Dominion Law Reports

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A NEW ANNOTATED SERIES OF REPORTS COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT AND THE RAILWAY COMMISSION, TOGETHER WITH CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

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Alberta Supreme Court, Hyndman, J. September 5, 1914.

1. Landlord and tenant (§ III D—110)—Distress for rent—Stipulation to keep up stock—Enforceability—Injunction.

A provision in a lease whereby the tenant, a retail merchant, binds himself to keep on the demised premises at all times goods enough to cover four months' rental under distress will not be specifically enforced by the court, and an injunction restraining the tenant from reducing his stock will be refused on the ground that the court would, contrary to practice, thereby be assuming to superintend the execution of the stipulation from day to day during the tenancy.

[*Phipps* v. *Jackson* (1887), 56 L.J. Ch. D. 550, applied.]

Statement

Application for an injunction restraining the defendant as tenant from reducing his stock of goods below a four months' rental, $1,200.

The application was dismissed.

C. A. Grant, K.C., for plaintiff.

S. W. Field, for defendant.

Hyndman, J.

Hyndman, J.:—This is an action for an injunction restraining defendant from removing the goods and chattels from his premises or from selling or otherwise disposing of the same except with respect to any surplus he may have at any time over and above sufficient to pay four months' rental equivalent to $1,200, under distress and for an order compelling the defendant to keep goods and chattels upon the premises leased so as to be sufficient to pay four months' rental provided for in the lease.

It appears that the plaintiff leased to the defendant and one A. D. Berry a portion of the ground floor of the building situated on lots 22 and 23, river lot 6 in the City of Edmonton, according to plan E and known as 621 First St., for a term of two years from April 1, 1914, at the annual rental of $3,600, payable in monthly instalments of $300 each in advance on the 1st day of

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every month. Subsequently the plaintiff agreed to release the said Berry and to accept the defendant alone as his lessee.

The defendant at the present time is in arrears of rent and it is alleged that he proposes to vacate the premises and remove the goods and chattels therefrom and that he has not kept on the premises a sufficient quantity of goods and chattels to satisfy a possible distress warrant for at least four months' rent. On August 22 last an interim injunction was granted by the Master in Chambers restraining the defendant until September 2 from removing the goods and chattels from the said premises. A motion is now made by the plaintiff for an order continuing the injunction until trial.

Counsel for defendant raised, amongst others, the following objections, (1) that the plaintiff was himself, in fact, a sub-lessee and that his demise to defendant exhausted the full term of his own lease, and, therefore, having no reversion in the property, was not entitled to distrain for arrears of rent, thus rendering the clause in the lease ineffective; and (2) that even if he had the right of distress, an injunction should not be granted in a case of this nature on the ground that it would be equivalent to an order for specific performance and would mean that the Court would have to exercise continuous superintendence over the business of the defendant to see that the injunction was complied with. It appears that the defendant is a retail merchant, whose stock-in-trade and the value thereof varies from time to time in the usual course of the business of a retailer.

I do not think that this is a proper case in which to grant an injunction for the reason that it practically amounts to an order compelling the defendant to cease doing business in case his stock fell to $1,200 and for financial or other reasons he was unable to increase it. It could never have been intended by either of the parties that such would be the effect of the clause in the lease under consideration. My opinion is that the only remedy (if any) under this particular clause would be the right to terminate the lease for breach of covenant, but not that the lessee should be prohibited from doing business as a retailer. The agreement was to keep upon the premises sufficient goods to answer a distress for four months' rent, and what is really being asked for

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is an order for specific performance compelling defendant to carry out the term of his agreement to keep his stock up to a certain standard. The case of *Phipps* v. *Jackson* (1887), 56 L.J. Ch. D. 550, seems to me to be exactly in point. There the tenant agreed "at all times during the tenancy to keep a sufficient stock of sheep, horses and cattle." The tenant threatened to dispose of all his stock and effects and widely advertised his intention so to do, and an injunction was asked for restraining him from allowing the farm to remain without a proper and sufficient stock of horses, cattle, etc. Stirling, J., refused to grant the injunction on the ground that it would virtually mean that he would have to superintend the execution of this particular stipulation during the remainder of the tenancy and that this was contrary to the practice of the Court, and that the Court will not undertake to superintend the performance of a series of continuous acts.

The facts here appear to me to be analogous to those in the case cited and the application falls within the rule referred to.

As I have come to the conclusion that the injunction should not be granted on the 2nd ground raised by counsel for defendant, I do not deem it necessary to consider the first objection. The application is, therefore, dismissed.

Application dismissed.

HOLMESTED v. ANNABLE.

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Saskatchewan Supreme Court, Newlands, J. June 17, 1914.

1. CORPORATIONS AND COMPANIES (§ IV G—126)—OFFICERS—DIRECTORS—FIDUCIARY RELATION—LIQUIDATOR—RECEIVER.

A liquidator under the Companies Winding-up Act, R.S.S. 1909, ch. 78, may legally sell his company's property to a director in the absence of a shewing that the fiduciary relationship between the company and its directors, which is *primâ facie* determined by sub-sec 5 of sec. 7 of the Act, was actually kept in force.

2. CORPORATIONS AND COMPANIES (§ IV G—126)—OFFICERS—FIDUCIARY RELATION—LIQUIDATORS—RECEIVERS.

Sub-sec. 5 of sec. 7 of the Companies Winding-up Act, R.S.S. 1909, ch. 78, under which all the powers of a company's directors cease (unless the company itself or its liquidator may otherwise determine) operates to cancel the fiduciary relationship previously existing between the company and its directors.

Statement

ACTION by a transferee of the interest of a director of a company in certain of its property which the director had pur-

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chased for his own use and benefit, the defence disputing the right of a director to make such a purchase on the ground of fiduciary relationship.

Judgment was given for the plaintiff.

Willoughby, Craig & McWilliams, for the plaintiff.

Newlands, J.

NEWLANDS, J.:—The defendant purchased the property of the Moose Jaw Nursery Co. from W. W. Davidson the liquidator of the company for the sum of $15,000. At the time of this purchase Malcolm J. McLeod, J. A. Killough and W. Doree entered into an agreement with Annable to become parties with him on certain promissory notes which were given to enable Annable to pay off certain debts of the company, the payment of which was part of the consideration of the company's property in consideration of which Annable agreed to give them an equal interest in this property with himself. McLeod assigned his interest to the plaintiff, who brought this action to recover McLeod's share of the proceeds from Annable. The defence was that Annable had made a settlement with McLeod and that there was no sufficient memorandum to satisfy the Statute of Frauds. After hearing the evidence, I held that no settlement had been made with McLeod and that the Statute of Frauds was not a defence because the agreement in question was not an agreement for the sale of land but an agreement to share the profits, and, therefore, did not come within the statute.

I, however, reserved the question as to whether the agreement was a legal one, Annable and the other parties mentioned having been directors of the Moose Jaw Nursery Co. Upon consideration I do not think the fact of their having been directors affects the agreement between them or the sale to Annable. The company was in liquidation and by sub-sec. 5 of sec. 7 of the Companies Winding-up Act, it is provided:—

> Upon the appointment of liquidators all the powers of the directors shall cease except insofar as the company in general meeting or the liquidators may sanction the continuance of such powers.

No evidence was given that the powers of the directors had been continued, and therefore, I think there would be no fiduci-

ary relationship between them and the company and nothing to prevent them from purchasing the assets of the company from the liquidator.

The plaintiff is therefore entitled to recover one quarter of the profits made by Annable upon the property purchased by him from the liquidator. Evidence of the amount of this profit was taken at the trial and I refer this evidence to the Local Registrar and direct him to take an account of the profits and to enter judgment for the plaintiff for his interest in the same.

I cannot in this action decide the question which was raised by the liquidator in giving his evidence that all the profits made by Annable over $15,000 was to be paid to him. The written agreement does not shew this. I will, however, grant a stay of thirty days to enable him to bring an action if he is so advised.

Judgment for plaintiff.

Annotation—Receivers (§ I B—10)—When appointed.

Annotation

Receivers—When appointed.

An annotation on "When receivers may be appointed" imports a foreword on the distinction between "receivers" and "liquidators" and "managers." The term "liquidator" in the Imperial Act is in a limited sense construed to include a "receiver" under some circumstances: *Re English Bank of the River Plate*, [1892] 1 Ch. 391. A "receiver" means, a person who receives rents or other income, paying ascertained outgoings; but he does not manage the property in the sense of buying and selling or anything of that kind; he merely takes the income and pays necessary outgoings, while a "manager" carries on the trade or business: *Re Manchester and Milford R. Co.*, 14 Ch.D. 645, at 652. A "receiver and manager" stands in the same position as a "receiver," but the former has a larger scope than the latter and is empowered to carry on the business of the company, whereas a "receiver" is merely authorized to take possession and protect the property which comes into his hands: *Manchester* v. *Milford R. Co.*, 14 Ch.D. 645; Parker & Clark on Company Law (1909), p. 282.

A "receiver" or a "receiver and manager" as an officer of the Court is appointed by the Court to take possession of certain property and to protect it for the benefit of the parties interested therein: Parker & Clark on Company Law (1909), p. 282. The appointment of a "receiver" is not a mere matter of discretion, but the party asking for such an appointment is, in a proper case, entitled *ex debito justitiae*: Parker & Clark on Company Law (1909), p. 283. Where a liquidator already in possession of property is, by the Court appointed receiver also, such appointment is a matter of discretion and the Court of Appeal will not, except under special circumstances, interfere with this discretion: *Giles* v. *Nuthall*, W.

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Annotation

Receivers—When appointed.

Annotation (*continued*)—Receivers (§ I B—10)—When appointed.

N. (1885), 51; Parker & Clark on Company Law (1909), p. 283. A "receiver," or a "receiver and manager," appointed by the Court is not an agent, but a *principal;* when appointed out of Court he is an *agent* and not a principal: Riviere on Receivers and Managers (1912), p. 155, and cases there cited. A memorandum sent to tenants by a landlord directing them to pay their rents to a third party will not, of itself, constitute such third party a "receiver" of such rents or confer upon him any powers of a "receiver" or a power to distrain: *Ward* v. *Shaw* (1833), 2 Moore & Sc. 756; Riviere on Receivers and Managers (1912), p. 191. The first statutory powers of appointing a receiver conferred specially on mortgagees were created by Lord Cranworth's Act, Imp. Statute 23 & 24 Vict. ch. 145. A discussion of the provisions relating to receivers in that Act and in the Conveyancing Act 1881 will be found at pp. 193 to 200 of Riviere on Receivers and Managers (1912).

Where a receiver is appointed out of Court under any power in that behalf contained in any document, the powers of such receiver will depend on the document creating the power of appointment read with the appointment itself: Riviere on Receivers and Managers (1912), p. 190.

Since the passage of the Imperial Judicature Act a receiver may be appointed, under sec. 25, sub-sec. 8 of the Act (ch. 66 of statutes 1873) in cases in which it shall appear to be "just and convenient" that such appointment be made, the power thus conferred enlarging that formerly possessed by a Court of Equity: *Anglo-Italian Bank* v. *Davies*, 9 Ch.D. 275.

This provision of the Judicature Act has been adopted in nearly all the provinces of Canada: See the Judicature Ordinance of the North West Territories, sec. 10, sub-sec. 8 (N.W.T. 1905, ch. 21); R.S.N.S. 1900, ch. 155, sec. 19, sub-sec. 9; Ont. Judicature Act of 1881, sec. 17, sub-sec. 8, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 9, 3 Geo. V. (Ont.), ch. 19, R.S.O. 1914, ch. 56; R.S.M. 1902, ch. 40, sec. 39, sub-sec. *o*; R.S.M. 1913, ch. 46; R.S.S. 1909, ch. 52, sec. 31, sub-sec. 8; Laws Declaratory Act, R.S.B.C. 1911, ch. 133, sec. 2, sub-sec. 29.

Although receivers are more readily appointed than before the passing of the Judicature Act, and certain inconvenient rules formerly observed have been relaxed, yet the principles on which the jurisdiction of Courts of Chancery rested are still applied: *Holmes* v. *Millage*, [1893] 1 Q.B. 551. The Ontario Judicature Act does not confer jurisdiction to appoint receivers in cases where previously no Court possessed power to do so: *O'Donnell* v. *Faulkner*, 1 O.L.R. 21. Such Act was intended to confer on all Courts that jurisdiction which, under the designation of equitable jurisdiction, was previously exercised by Courts of Chancery: *Re Asselin and Cleghorn*, 6 O.L.R. 170. And the power thus conferred is not an arbitrary or unregulative one: *Harris* v. *Beauchamp*, [1894] 1 Q.B. 801. Under the Judicature Act, the rule is that a receiver will be appointed whenever it is just and convenient; or where it is practicable and is required in the interest of justice: *Edwards* v. *Picard*, [1909] 2 K.B. 903. But a receiver will not be appointed unless the party requesting it makes out a

Annotation (*continued*)—Receivers (§ I B—10)—When appointed.

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Annotation

Receivers—When appointed.

primâ facie title to or interest in the property in dispute: *Loney & Son* v. *Collingham*, [1908] 1 K.B. 79; *Whitley* v. *Challis*, [1892] 1 Ch. 64; or unless the probabilities are that the appointment will be effectual and useful: *Edwards & Co.* v. *Picard*, [1909] 2 K.B. 903; *Wills* v. *Luff*, 38 Ch.D. 197; *Mercantile, etc., Trust Co.* v. *River Plate, etc., Co.*, [1892] 2 Ch. 303; *Re Knott End Railway Act*, [1901] 2 Ch. 8. And a receiver will not be appointed unless it is reasonably certain that benefit will follow therefrom: *Re Asselin and Cleghorn*, 6 O.L.R. 170. A receiver of the tolls of a company will be appointed at the suit of a city that has, under statutory authority, lent the company money in the form of city debentures, the city having redeemed the debentures and proceeded against the company to compel payment, or to foreclose its interest under its act of incorporation: *Brantford* v. *Grand River Nav. Co.*, 8 Gr. 246. The powers of the Courts in the several provinces of Canada in respect to the appointment of liquidators, receivers and managers are, in the main, now regulated by statute.

In mortgage cases.

Since the Judicature Act a receiver will be appointed of property which is subject to both a legal and equitable mortgage, although mixed, and the whole comprised in one security: *Pease* v. *Fletcher*, 1 Ch. D. 273. Without making a prior mortgagee, who has the legal title, a party to the proceedings, a receiver will be appointed at the instance of an equitable mortgagee where a mortgagor is in possession of encumbered property, irrespective of the sufficiency of the security: *Aikins* v. *Blain*, 13 Gr. 646. Likewise a receiver will be appointed where a mortgagee is prevented by the mortgagor from taking possession under his mortgage: *Truman* v. *Redgrave*, 18 Ch. D. 547; or where a first mortgagee, in whom an equity of redemption is vested, has cut and removed timber from the land to a value greater than the amount due on his mortgage, a receiver will be appointed at the instance of a second mortgagee: *Steinhoff* v. *Brown*, 11 Gr. 114. On the question as to when a receiver of railway property will be appointed at the instance of bond or debenture holders, attention is called to a few cases: *Lee* v. *Victoria R. Co.*, 29 Gr. 110; *Grey* v. *Manitoba & N.W.R. Co.*, 11 Man. L.R. 42; *Allan* v. *Manitoba & N.W.R. Co.*, 10 Man. L.R. 106.

Estates of decedents and trust estates.

A receiver of an estate may be appointed where an executor has been guilty of mismanagement, or a breach of duty: *Re Beaird* (Ont.), 9 D. L.R. 842; *Meacham* v. *Draper*, 2 Gr. 316; or when necessary for the protection of an infant's interest in an estate: *Re Beaird, supra;* or where there is no one in charge of an estate, the executor residing without the jurisdiction and ignoring the Surrogate Court Order for an accounting: *Re Beaird, supra;* or where it is charged that an executor is guilty of maladministration, is insolvent and has made an assignment for the benefit of his creditors, notwithstanding maladministration is denied, and it is claimed that his insolvency was not the reason for the assignment: *Harrold* v. *Wallis*, 9 Gr. 443.

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Annotation (*continued*)—Receivers (§ I B—10)—When appointed.

Annotation

Receivers—When appointed.

A receiver of a trust estate will be appointed if a trustee commits a breach of trust: *Grand Council Provincial Workmen's Association* v. *McPherson*, 8 D.L.R. 672; or where a trustee unreasonably refuses to bring an action for the benefit of a trust estate, which has nearly expired, and there is nothing to do but wind it up: *Garesche* v. *Garesche*, 4 B.C.R. 310. But a receiver will not be appointed on a general charge that an executor is committing waste on the property of an estate where no specific acts are shewn: *Sanders* v. *Christie*, 1 Gr. 137.

Receivers in equitable execution cases.

A receiver is frequently appointed at the instance of a judgment creditor in order to reach a debtor's equitable interest, not subject to the usual legal process.

A receiver of the salary of a school teacher not under contract with the government, may be appointed: *Fisher* v. *Cook*, 32 N.S.R. 226.

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COZOFF v. WELSH.

British Columbia Supreme Court, Morrison, J. May 20, 1914.

1. MASTER AND SERVANT (§ V—340)—B.C. WORKMEN'S COMPENSATION ACT —PROCEDURE—APPEAL—ERROR OF FACT.

The right of appeal to a Judge of the Supreme Court from an erroneous finding of fact by an arbitrator under the Workmen's Compensation Act (R.S.B.C. 1911, ch. 244) is not taken away by sec. 4 of the 2nd schedule of the Act.

[*Disourdi* v. *Sullivan Group Mining Co.*, 14 B.C.R. 241, followed.]

Statement

APPEAL from the award of His Honour Judge McInnes as arbitrator under B.C. Workmen's Compensation Act.

The appeal was allowed and award sent back to assess compensation.

Alexander & Sears, for plaintiff.
Ritchie, K.C., for defendant.

Morrison, J.

MORRISON, J.:—The claimant appellant alleges he strained himself whilst performing his work as employee of the defendant, with the result that a hernia developed rendering him unfit to continue his work. He was removed to the hospital and in due course a surgical operation performed. Upon his recovery, he invoked the provisions of the Workmen's Compensation Act and His Honour Judge McInnes was appointed arbitrator, who hav-

ing heard the evidence declined to award the plaintiff any compensation, holding that he was not satisfied that the hernia was not present at the time the claimant strained himself (if he did strain himself as alleged).

I have read the evidence very carefully and I cannot, with respect, comprehend what justified the learned arbitrator to form such an opinion. There is no evidence of a pre-existing hernia, or any condition which would support the contention that a hernia had existed and that it was aggravated by the strain, which, according to the only evidence given, had taken place. In the case of *Smith* v. *Dunlop & Co. Ltd.*, quoted in the Medical Annual, 1913, the plaintiff, in helping to replace a derailed hutch, strained himself with the result that a hernia developed, incapacitating him from work. It was admitted or proved in evidence that that hernia existed prior to the strain which aggravated it. Compensation was awarded and on appeal the judgment was affirmed. This case was decided in the Court of Sessions, Scotland, October 18, 1912. The objection was urged by Mr. Ritchie, K.C., for the respondent, that the appellant is confined by sec. 4 of the 2nd schedule to the Workmen's Compensation Act to a submission by the arbitrator of any point of law and that an appeal does not lie. But the case of *Disourdi* v. *Sullivan Group Mining Co.*, 14 B.C.R. 241, decides otherwise. There is also the case of *Lee* v. *Crow's Nest Pass Co.*, 11 B.C.R. 323, which, apparently, points the other way. But the very meagre report of that case makes the decision, in my opinion, useless as a guide. The award will be sent back for the arbitrator to assess the compensation to which I hope I am right in saying the plaintiff is entitled. The plaintiff will get the costs of this application.

Appeal allowed.

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TORNEY v. McNEIL.

Saskatchewan Supreme Court, Lamont, J. June 9, 1914.

1. BILLS AND NOTES (§ III D—79)—TRANSFERS WITHOUT ENDORSEMENT—EFFECT OF DELIVERY—ONUS OF PROOF.

Where the plaintiff suing on a promissory note is not the payee or endorsee, the onus is on him to prove that he is the holder if delivery to him is disputed by the defence.

Statement

ACTION on a promissory note upon which the plaintiff does not appear as payee or endorsee, involving the plaintiff's burden of proving delivery.

Judgment was given for the defendant.

J. A. M. Patrick, K.C., for plaintiff.

F. Wilson, for defendant.

Lamont, J.

LAMONT, J.:—This is an action upon a lost promissory note. The defendant, on or about August 24, 1911, executed a promissory note for $2,000 in favour of Morrell & Co. Ltd. The note was given for shares of the capital stock of the company. The name of Morrell & Co. Ltd. was afterwards changed to Morrell Manitou Mineral, Ltd., and the note in question was endorsed by Morrell & Co., Ltd., and became the property of Morrell Manitou Mineral, Ltd. This company, desiring an advance from the Bank of B.N.A., endorsed the said note in blank and pledged it with others as collateral security to the bank for the amount advanced. The note not being paid at maturity, was handed by the bank to S. H. Green, its Winnipeg solicitor, with instructions to sue in the name of a nominal plaintiff. Green sent the note to Messrs. Pickett & Schull, solicitors, of Moose Jaw, who brought action on it in the judicial district of Yorkton in the name of the plaintiff. Messrs. Pickett & Schull returned the note to Green, but whether before or after the action was commenced does not appear. On November 20, 1913, Green dictated to his stenographer a letter addressed to Messrs. Livingstone & Wilson, of Yorkton, asking them to act for him in the action, and stating that he enclosed the note. He handed the note to his stenographer, who says she enclosed it with the letter and mailed it. Mr. Livingstone received the letter in due

course of mail; but, as his firm had been retained by the defendant, he replied saying they could not act for the plaintiff, and also stating that the note had not been enclosed in the letter. At the trial he was called as a witness, and he stated that he opened the envelope himself and that there was no note enclosed therein. Careful search has been made for the note, but it cannot be found. The defendant resists the claim on two grounds: (1) because the note was obtained by fraudulent misrepresentation, and (2) because the note was not endorsed or delivered to the plaintiff and he was not the holder thereof.

On the evidence I find that Morrell and his agent McDonald represented to the defendant that from the beginning of the year 1911 until the day they interviewed the plaintiff, August 24, the company had done business to the extent of $80,000, and that the defendant made an application for stock in the company on the faith of that representation. The representation was not true. According to the evidence of the liquidator, the company from its inception until it went into liquidation on March 1, 1913, did a total business of $3,830.48. As Morrell was managing director of the company and actually conducted its business operations, he must have known the representation to be untrue when he made it. I therefore find that the note was obtained by fraud. Morrell took this note and other notes received from selling stock in the company amounting in all to $22,555, and pledged them to the bank as security for an advance of $10,000. This was in December, 1911, before the note in question became due. It is not shewn that the bank had any knowledge of the fraud by which the note was obtained, or that there was any defect as to the company's title thereto. The bank therefore became the holder in due course, and to the extent of the moneys still remaining unpaid for which the note was pledged as security is entitled to recover. The defendant, however, contends that, notwithstanding the fact that he may be liable to the company he is not liable to the plaintiff, because the plaintiff has failed to shew that he is a holder of the note, and that he is therefore not entitled to sue. The contract entered into by the defendant when he signed the note, if ex-

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panded into words, was that he would, at the maturity of the note, pay the amount thereof to Morrell and Co., or to any other person who might be the lawful holder thereof under an endorsement from Morrell & Co. *Alcock* v. *Smith*, [1892] 1 Ch. 238 at 264. A holder may sue in his own name. A "holder" means the payee or endorsee of a note who is in possession of it or the bearer thereof, and "bearer" means the person in possession of a note which is payable to bearer. Bills of Exchange Act, sec. 2. A note is payable to bearer when it is endorsed in blank and delivered to him. If, therefore, a note is endorsed to a person for collection only, or is endorsed in blank and delivered to him for collection, he may sue the same in his own name although he has no beneficial interest in the note. The plaintiff was neither the payee nor endorsee of the note. To entitle him to be considered as the holder thereof he must have been the bearer, that is, it must have been delivered to him and he must have had possession of it either actual or constructive. There is not a particle of evidence that the note was ever actually in the plaintiff's possession, or that he had ever seen it or heard of it, or in fact, that he was aware that the action had been brought in his name. He therefore, so far as the evidence before me shews, did not have actual possession of it. Can it be said that he had constructive possession? A person has constructive possession of a note when it is in the actual possession of his servant or agent on his behalf. Maclaren on Bills, Notes and Cheques, p. 24. The note was not in the hand of his servant or agent, unless Messrs. Pickett & Schull, who issued the writ, can be said to be his agent. They received the note as the agents of the Winnipeg solicitor of the bank. They could only become the agent of the plaintiff by making him aware of the existence of the note and obtaining his consent to become the holder thereof and his authority to sue. None of these have been shewn. The bringing of the action by the solicitors raises no presumption of delivery to the plaintiff. They may have followed the instructions of the bank and sued in the name of a nominal plaintiff. The returning of the note to the Winnipeg solicitor supports this view; and in the letter of November 20, to Messrs. Livingstone & Wilson, Mr. Green expressly stated that Messrs. Pickett & Schull

were acting as his agents in the matter. Where the plaintiff is not the payee or endorsee, and the defendant alleges that the note was not endorsed or delivered to him, the onus is on the plaintiff to prove that he is the holder thereof before he is entitled to sue in his own name. This onus the plaintiff has not discharged. There will therefore be judgment for the defendant with costs.

Judgment for defendant.

RAFFAN v. CANADIAN WESTERN NATURAL GAS CO.

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 27, 1914.

1. NEGLIGENCE (§ I B—5)—DANGEROUS AGENCIES—STATUTORY AUTHORITY TO LAY GAS PIPES, HOW LIMITED.

Statutory authority given a defendant company to locate and construct gas pipes in a municipality with a provision against thereby endangering the public health or safety is not pleadable by the defendant company in an action against it for damages for failure to control the dangerous substance where the company has violated such provision.

[*Midwood* v. *Manchester*, [1905] 2 K.B. 597, and *Charing Cross* v. *London Hydraulic*, 83 L.J.K.B. 1352, referred to; *Parmal* v. *Medicine Hat*, 1 A.L.R. 209, distinguished.]

2. NEGLIGENCE (§ I A—4*a*)—LAYING GAS PIPES—BREACH OF STATUTORY DUTY —RULE IN CONSTRUING SUCH STATUTES.

Statutory authority given a defendant company to locate and construct gas pipes in a municipality with a provision that the work must be done "so as not to endanger the public health or safety" is construed to mean that no such danger shall ensue without regard to time, upon the principle that such provisions are given a liberal construction.

[*Midwood* v. *Manchester*, [1905] 2 K.B. 597, referred to; *Parmal* v. *Medicine Hat*, 1 A.L.R. 209, distinguished.]

Statement

APPEAL by the plaintiff from the trial judgment dismissing his action in damages for personal injury suffered while testing for gas near pipes laid by the defendant company, the defence being statutory exemption from liability in the absence of negligence.

The appeal was allowed and a new trial, limited to exclude the issue of negligence, was directed.

Howard W. MacLean, for plaintiff, appellant.

J. Craig Brokovski, for the defendant, respondent.

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HARVEY, C.J.

HARVEY, C.J.:—The defendant company is one to which the provisions of the Ordinance respecting water, gas, electric and telephone companies, being ch. 103 of 1901, applies. Under sec. 2 of the Ordinance, no such company shall be entitled to the benefit of the Ordinance until it has obtained the consent of the municipality within which it operates. Subject to certain by-laws of, and agreements with the city of Calgary, the defendant has laid pipes and supplies natural gas throughout that city. The city authorities found gas in its conduits on the streets near where the company's pipes were laid which apparently came from the pipes. The plaintiff, an employee of the city, while testing for gas in one of these conduits caused an explosion from which he suffered injury, the damages from which he seeks to recover in this action. The case was tried with a jury and the learned trial Judge directed the jury that the defendant was not liable in the absence of negligence. He directed them also on the subject of the plaintiff's contributory negligence. No questions were asked the jury, but the verdict was: "we find the defendant company not guilty," and upon this verdict the action was dismissed. In view of the charge there can be no doubt that the verdict means that the jury found no negligence established against the defendant and it was so recorded. The plaintiff objected to the trial Judge's direction and contended that it was not necessary for his case to prove negligence, but that, on the other hand, it was sufficient for him to shew that the injury resulted from the escape of the defendant's gas, because being a dangerous substance, it was incumbent on the defendant to control it and if it failed it would be liable for the damage resulting, upon the principle established by the leading case of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, 19 L.T. 220. This is one of the main grounds of the appeal.

Objection is taken that this ground is not open to the appellant as the action is one for negligence. I think this objection cannot be sustained. Whether the ground is distinctly raised on pleadings or not, it was certainly raised on the trial and dealt with as part of the issue. The answer that the defendant makes is that the defendant was acting under statutory authority and is, therefore, liable only in case of negligence in accordance with

the decisions in numerous cases, one of which: *C.P.R. Co.* v. *Roy*, [1902] A.C. 220, 71 L.J.P.C. 51, is of the highest authority for this Court.

It happens, however, that the statutory authority to which I have referred (ch. 103 of 1901) contains the following provisions:—

> Sec. 11. The company shall locate and construct its gas or water works or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety.

It is therefore apparent that the statutory authority is limited and if the company has gone beyond the limit, it is without statutory authority and therefore would not come within the principle of the cases referred to. Upon this point, this case appears to me undistinguishable from *Midwood* v. *Manchester*, [1905] 2 K.B. 597, 74 L.J.Q.B. 884, and the very recent case of *Charing Cross* v. *London Hydraulic*, [1913] 3 K.B. 442, reported in the February, 1914, number of the Law Journal reports, 83 L.J.K.B. 116 and affirmed on appeal last April and reported in 30 L.J. 440. In both of these cases, the restriction on the defendants' statutory authority was

> nothing in the Act shall exempt the company from any indictment, suit, action or other proceedings at law or in equity in respect of any nuisance caused by them.

In the latter case, the pipes of the defendant, through no fault of its own, broke and the water escaped and caused injury to the plaintiff's electric cables, and in the former by reason of a leakage of electricity through no negligence of the defendant, and a consequent formation of gas and an explosion thereof, the plaintiff's goods were destroyed.

In both cases the Courts were of the opinion that a nuisance had been created and the defendants having no statutory authority to create a nuisance came within the principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, and were liable regardless of the absence of negligence. Appellant's counsel contends that the defendant, in the case at bar, by not controlling its gas within its pipes so that it escaped in the manner shewn by the evidence,

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created a nuisance, and is, therefore, liable without negligence. I am of opinion that in this case it is not a question of nuisance or no nuisance. It may be that what would endanger the public health or safety would be a nuisance in some cases at least, but what is material here is not whether it is a nuisance, but whether it endangers the public health or safety. Respondent's counsel contended that sec. 11 is only intended to protect the public and that it does not intend to make the company liable to an individual for a private injury, but only to the public in respect of public danger.

The true view, however, is, I think, that once the company endangers the public health or safety, it at once ceases to have statutory authority for its action and has therefore nothing to support a defence to an action, brought against it by anyone. I have felt a greater difficulty, however, in coming to a conclusion as to whether the limitation could apply to the present case. The section only provides that the company "shall locate and construct" its works so as not to endanger the public health or safety. It says nothing about maintenance and the question arises whether it intends to furnish any protection after the works are once located and constructed. I have, however, come to the conclusion on the principle that statutory provisions imposing a restriction for the benefit of the public upon a company being granted unusual powers should be liberally construed in the public interest, that the correct view to take of the section is that it means to provide that the works shall be so located and constructed that no danger to the public health or safety shall ensue, without regard to time. It follows that if danger to the public safety has ensued, the works were not located and constructed so as to prevent it, since they did not prevent it. This view also appears to me to be the one consistent with the two decisions I have referred to.

In the restrictive provisions then under consideration, it was directed that the company should be liable for "creating" a nuisance, not for "not preventing" or even for "permitting" a nuisance. In both cases it was a pure accident which the company could not have foreseen or reasonably have provided

against, yet the company was held liable because a nuisance had arisen.

Some of the remarks of Collins, M.R., in the *Midwood Co. Case*, [1905] 2 K.B. 597, referring to the reason for the limitation, seem to be as applicable to this case as to that. At pp. 605-6, he says:—

> underlying the whole is a condition imposed for the protection of the public upon an undertaking of the kind which is not yet in its final stage of development and may involve undiscovered risks which it would not be fair to throw upon the public. While on the one hand, the privilege is conferred upon the defendants of laying down their mains and supplying the city with electricity, on the other hand their powers are fenced round with a provision for the benefit of the public, throwing the risk of any nuisance that may be caused by the exercise of those powers upon the undertakers. Permission is given to the defendants to do the things provided for, but if in doing them, they occasion a nuisance they must bear the consequences.

The case of *Parmal* v. *City of Medicine Hat* (1908), 1 A.L.R. 209, decided by this Court, was cited as authority for the defendant's contention.

In that case there was no question of restriction upon the defendant's statutory authority such as is pointed out here upon which the whole foregoing argument is based, and it is apparent, therefore, that it is no authority upon this point. Whether the defendant has exceeded its statutory authority by reason of the terms of sec. 11 is a question of fact to be determined by the jury under proper directions from the Court and a new trial will be necessary to determine that.

The issue of negligence having been determined in favour of the defendant, that should not be an issue in the new trial. The question, however, of whether the accident was due to the fault of the plaintiff is, of course, still to be determined. I would, therefore allow the appeal with costs, and direct a new trial from which the issue of negligence should be excluded. The costs of the first trial should follow the event of the second.

STUART, and SIMMONS, JJ., concurred with HARVEY, C.J.

Appeal allowed.

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DONALDSON v. SCOTT FRUIT CO.

Manitoba King's Bench, Curran, J. June 9, 1914.

1. ESTOPPEL (§ III G—85)—BY ACQUIESCENCE—CORRESPONDENCE — SALE —COMMISSION TRANSACTION.

Where the pliantiff claims for the purchase price of consignments of apples, a letter and telegram by the alleged purchaser to the plaintiff inconsistent with a purchase and only consistent with a commission transaction operate as an estoppel against the plaintiff, it appearing that such letter and telegram were tacitly acquiesced in by the plaintiff.

Statement

ACTION for the purchase price of certain consignments of apples, the defence being that the consignments were merely on commission.

The action was dismissed.

H. E. Henderson, K.C., and *R. M. Matheson*, for plaintiff.

E. A. Cohen, for defendant.

Curran, J.

CURRAN, J.:—The plaintiff sues for the price of a quantity of apples shipped by him to the defendant company in the late summer and fall of 1912, in pursuance of an alleged contract of purchase made and entered into on his behalf as vendor by his brother Joseph Donaldson, with the defendant's manager at Brandon, one D. L. Paulin. The amount claimed is $6,061.50, and represents the balance claimed to be still due on the shipments made.

The plaintiff admits that Joseph Donaldson, who resides at Brandon, was his agent, and that he is bound by what he did in connection with the apple shipments. The plaintiff himself lives at South Zorra in the County of Oxford, Ontario. The defendant is a Manitoba corporation duly incorporated, with head office at the city of Winnipeg and branches at Brandon and other western points, and is the legal successor of the McPherson Fruit Co., which latter company was re-organized under the name of the defendant company and its business was continued by the defendant company without any change. D. L. Paulin was the manager of the Brandon branch of the McPherson Fruit Co. and continued to be the manager at this place of the defendant company, and is now such manager.

Some time in the year 1912, the plaintiff claims that his brother Joseph Donaldson, acting as his agent, agreed to sell to the defendant company, or its predecessor, the McPherson Fruit Co., through D. L. Paulin, its manager, some five or six cars of fall apples, at the price of $2.75 per barrel, f.o.b. point of shipment in Ontario, and a little later on a large quantity of winter apples at the same price, the total quantity of fall and winter apples to be between 25 and 30 cars. The defendant denies that there was any agreement by it to purchase, or that it did purchase, the apples in question; but merely made an arrangement to handle the plaintiff's apples on commission.

The bargain, whatever it was, was made by Joseph Donaldson and Paulin in the city of Brandon by word of mouth only. There is no writing of any kind to evidence it, and there is a direct conflict of testimony between Joseph Donaldson and Paulin as to what the bargain really was. Both these parties appear to be responsible business men, and I would experience great difficulty in deciding whose evidence to accept if there were no other circumstances to aid me.

Joseph Donaldson claims that he asked Paulin several times for a written agreement. On the first occasion of his asking, he says Paulin promised to have a contract written out, but kept putting him off from time to time until finally he was obliged to leave town, and when he returned to Brandon some of the apples had arrived and he didn't bother more about the matter. It is unfortunate that he did not do so.

Paulin admits that Joseph Donaldson asked him to put the arrangement into writing, but that this was some weeks after the commission arrangement he contends for was made; but he says he distinctly told Joseph Donaldson that it was not necessary to put their arrangement into writing, and, as a matter of fact, no writing of any kind to evidence the agreement in question was ever made.

Joseph Donaldson's statement of the bargain, according to my notes of the evidence, is as follows:—

During the year 1912, I sold the manager of the defendant company, or the McPherson Fruit Co., apples for the plaintiff. I don't know which company it was. I had sold Paulin apples the year before, and he

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wanted the first chance for the next year. I went and saw Paulin and sold him the fall apples, 5 or 6 cars, at $2.75 per barrel f.o.b. the shipping point. I then tried to sell him the winter apples. He said, No; but to see him later. I did so in a week or two, when Paulin told me he had seen the apple crop report and he would not give me over $2.75 a barrel, so I sold them to him at that price, and he had to take 25 or 30 cars all told.

Now, I think this is a pretty loose way of making a contract involving some $18,000 for the sale of perishable goods. No terms of payment were stipulated for; nothing was said as to times of delivery, or as to the grades, quality and varieties, or percentage of one kind or another, all of which very important matters were seemingly left undetermined, and the plaintiff apparently could exercise his own judgment and send along just what sort of fruit he chose, up to the limit of 30 cars, which the defendant must accept and pay for at the stipulated price. This seems to me so wholly an unbusinesslike proceeding on the part of the defendant company, whose business was to buy and sell fruit, that I would require the clearest evidence to give effect to it.

Paulin says if he had bought the apples he would have had the qualities and varieties stated, for, in making contracts for the purchase of apples in the wholesale trade, it is customary, he says, to specify the quantity of each grade and the varieties in all cases, and that the mixed varieties would not exceed 20 per cent., to which the vendor would be held, and I think this is a most reasonable proposition.

He also says that four cars of fall apples would be the maximum quantity he ever purchased in any one year.

His version of what took place is, in substance, as follows: He says,

Joseph Donaldson came to me some time in the fall of 1912 and told me "the boy" (meaning the plaintiff) had about 30 cars of winter apples, and wanted to know what we could do; to which I replied that I thought we could handle these apples to good advantage. Nothing was then mentioned about terms, and nothing was agreed to. That Joseph Donaldson came to me a second time and said he had received a letter from the plaintiff advising him that winter apples would cost around $2.50 per barrel and fall apples around $2.30 per barrel, and that his brother had only one car of fall apples. That Joseph Donaldson then asked me, what

do you think about $2.75 a barrel, as "the boy" will want 25c. a barrel profit, to which I replied I thought we could net that amount for winter apples.

Paulin goes on to say that his company was getting fall apples from other sources and that one car of fall apples from the plaintiff was all he could handle that year. But that, as a matter of fact, he didn't agree to handle fall apples for Donaldson at all. He says, "I was to try and handle to the best of my ability 30 cars of winter apples on a cost basis of $2.75 to the plaintiff, plus the freight." Anything over this figure would represent the defendant's profit. This contention seems to me more reasonable than that put forward by the plaintiff.

Now, the evidence shews that some 8 or 9 cars of fall apples were actually shipped. The plaintiff, on receiving word from his brother Joseph Donaldson, in September, 1912, began shipping fall apples. The first car was shipped on September 23, 1912, and the plaintiff continued shipping cars, without reference to the defendant, until November 1, following, when Paulin sent plaintiff the telegram of that date (part of ex. 1), requesting him not to ship any more apples. The bills of lading, with lists of varieties of apples in each case attached, consigned to the defendant at Brandon, were forwarded to Joseph Donaldson personally and not to the defendant. No invoices of the contents of each shipment were made out by the plaintiff and forwarded with the bill of lading or sent direct to the company, so that Paulin, or the defendant company at Brandon had no means of knowing what shipments were being made till the cars actually arrived in Brandon. If there had been a sale of the apples to the defendant it seems to me that these shipping bills with proper invoices of the apples shipped would have been sent direct to the defendant, and not to the plaintiff's agent.

The apples were coming in such quantities that the defendant could not unload the cars for want of storage facilities, upon which a plan was agreed to by Joseph Donaldson and Paulin that a store should be rented in Brandon for the sale of apples by retail. Here again there is a direct conflict of testi-

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mony between Joseph Donaldson and Paulin. The former claims that this arrangement was made at Paulin's request to help the defendants out of the difficulty, whereas the latter contends that it was made at Donaldson's request, and for the plaintiff's benefit.

The fact is, a store was rented on Ninth street in the city of Brandon, by Donaldson and not by Paulin, for two months, and the rent was paid by Donaldson. An employee of the defendant company, named Tate, was sent to attend the store and assist in retailing the apples. The defendant company paid his wages, but charged them subsequently to the plaintiff. Joseph Donaldson assisted in selling the apples in this store and elsewhere. A price list (ex. 16) was made out, by whom does not clearly appear, and given to Tate by one Smith, the defendant's warehouse manager at Brandon. Apples were sold on credit without reference to the defendant, as well as for cash, and Donaldson took orders in the country, which were filled, sometimes from the store and sometimes from the defendant's warehouse. Orders for apples were also taken at Joseph Donaldson's butcher shop in Brandon and filled from the store. An advertisement of the apple sale was printed and distributed; Donaldson says at Paulin's request, and by his instructions. The store was opened on November 8, and sales continued to be made in it until December 29, following. No difference of opinion between Joseph Donaldson and Paulin as to the respective positions of the parties occurred until November, when Donaldson says he first learned there was trouble.

Now, in this view of matters, no disputes or misunderstandings having arisen, let us see how the defendant company dealt with the transaction in its books, for, while this is not direct evidence for the defendant, it will, I think, afford a very clear index as to what was then in Paulin's mind as to the nature of this transaction. The defendant's books were produced at the trial and shew a ledger account opened for Joseph Donaldson personally in what is called a customer's ledger. (See exs. 26 and 27). The entries in this account relating to the apples in question, apparently begin on November 8, and continue until

the end of December. It will be noted that no price or amount is charged in this account to Joseph Donaldson for the apples got during this period. These apples were supplied to the store, sometimes direct from the car and at other times from the defendant's warehouse, out of the different cars of apples shipped by the plaintiff. The omission to charge Joseph Donaldson for the apples is, I think, significant. Paulin says that he did not sell these apples to Joseph Donaldson, nor, indeed, does Joseph Donaldson say he bought them. If the apples were the property of the defendant, it seems most extraordinary that it would make no charge to Joseph Donaldson for the large quantity disposed of in the store.

This might be explained as a handling by Joseph Donaldson for the defendant if returns had been made to the defendant of sales in the store and if other items of debit in this account (ex. 26) had not been charged to Joseph Donaldson such as the freight. Donaldson took all the money received at the store, and forwarded it to the plaintiff direct by cheques (ex. 9). He did not account to the defendant for this money, or even render the defendant any statements shewing what business was done at the store. The young man Tate did not do so, but accounted to Donaldson and paid over to him every day the amount of cash sales. Donaldson kept no separate bank account for this money and retained the money in his own possession for some months. The only record of the apples sold in the store is to be found in counter-check books (ex. 24). These were turned over to Donaldson when the store was closed, and not to the defendant. No statement of account of the business done at the store, or by Donaldson elsewhere, was ever rendered the defendant. Even if it is a fact that Paulin instructed Donaldson to remit direct to the plaintiff, the moneys received in the store, it would still have been incumbent on him, if his contention for a sale to the defendant is correct, to have accounted to the defendant for the apples sold at this store, so that the defendant could adjust accounts with the plaintiff for the remainder of the apples. Yet this was not done.

After January 1, the store having been closed and unsold

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stock removed to the defendant's warehouse, sales by retail continued to be made by Joseph Donaldson, and a uniform price of $3.90 per barrel was charged him by the defendants in their ledger account (ex. 27). Just why a price was so charged does not appear in evidence. This price is evidently made up of the cost to plaintiff $2.75 per barrel and the freight, $1.15 per barrel. A ledger account was also opened by the defendant for the plaintiff in ex. 5. This account shews the dates of receipts of apples, the car number, and the number of barrels in each car. It also shews the moneys remitted plaintiff at different times by the defendant. It is to be noted in this account also that no cost price of the apples is credited to the plaintiff as against the moneys paid to him. This is a singular thing and surely would not have occurred if the apples had been bought outright by the defendant. It seems to me that the method of book-keeping used by the defendant is wholly inconsistent with the plaintiff's contention for a sale The correspondence does not afford very much help, and unfortunately the plaintiff, in March or April, 1913, destroyed all letters he had received from Joseph Donaldson up to that date.

I will now refer to the correspondence which has been put in. The defendant's letter of October 17, to the plaintiff (ex. 18), was, I think, explicit enough to call the plaintiff's attention to the fact that the defendant was assuming a position other than that of purchaser. Referring to the fall apples, the letter states: "We are going to try and net you $2.25 per barrel for them; but we think it will be a losing deal for us, as it is almost impossible to move them at all." If the plaintiff's contention is correct that there was an actual sale of these apples at $2.75 per barrel, this letter is inconsistent with such a state of things, and should have apprised the plaintiff and put him upon inquiry as to what sort of a bargain his brother had really made with the defendant as to the fall apples.

Plaintiff replies to this letter on October 21, (part of ex. 1), yet makes no reference to the portion of ex. 18 above quoted. The defendant's telegram to plaintiff of November 1 (part of ex. 1), stating that it was impossible to handle any more apples

and instructing the plaintiff not to ship any more, seems to me also wholly inconsistent with the fact of a purchase, but more like what might be expected when the apples were being handled on commission if the markets were bad.

If the apples had been bought, it made no difference to the plaintiff what the market was, as the defendants would be obliged to take delivery and pay the agreed price in any event, yet this telegram called forth no protest from plaintiff that the apples were sold and that he was entitled to make deliveries at all events.

Again, the letter of November 1, 1912, defendant to plaintiff (part of ex. 23), indicates, to my mind, that the defendant considered the position of matters was not what the plaintiff is now contending for. The part I refer to is as follows:—

> We note that up to the present time you have loaded very few spies, and the apple market here in the west to-day is something very unreasonable as you cannot even give them away, and we have your brother here at this place working tooth and nail to try and unload these apples, so do not lose any good chance in the east to sell any that you may see fit. We are afraid we are going to be loaded up so badly that we will never be able to get from under it, and our little apple deal with you is a great deal on friendship through your brother here, and we are trying to do all we can both for he and yourself and we want you to use every good judgment in shipping these cars of apples, and do not turn any orders down in the east.

The telegram of November 6, ex. 29, which, I am satisfied from the evidence of Paulin and Kline, was sent with the knowledge and sanction of Joseph Donaldson, further strengthens the defendant's contention. The plaintiff's reply to defendant of November 9, 1912, part of ex. 1, does not seem to me the answer a man would make under the circumstances of having the defendant bound by a sale at a fixed price. He says in part:—

> I am very sorry for the position you are in; but I have also been placed in a very awkward position, having several cars of apples on my hands without a market, as I had no idea how things were with you until I got your telegram.

Again, the telegram of November 11, ex. 20, sent in the name of Joseph Donaldson, and which I also am satisfied was sent with his knowledge and sanction, seems to indicate the position in

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which the defendant was placed with regard to selling the apples on hand. The defendant had been loaded up with green fruit and mixed varieties out of all proportion to the available quantity of the better varieties of red fruit, and without which this green fruit was a drug on the market and could not be disposed of. I cannot understand Joseph Donaldson allowing such a telegram to be sent if the defendant was committed to a sale.

The plaintiff acknowledges receipt of this telegram by a letter to Joseph Donaldson of November 10, ex. 12. He advises that he has shipped a car of spies and baldwins to the defendant, and says:—

> The company has put me in a very bad shape, but I will try and help them out as much as I can. I am afraid I will have to draw on them in a few days if I don't receive any returns for I have been looking for a little money for some time. I suppose it will be all right to do that.

This is not, to my mind, the language of a man who had made a definite contract of sale with the defendant company and to whom the purchase price of the goods sold was due.

On November 24, ex. 14, plaintiff writes to Joseph Donaldson:—

> I think I will ship another car to you after this one, to-morrow. I will make it a very good one so as you can get rid of it at *some price*."

Further on he says:—

> If I only had pluck enough to go to the farmers and tell them that they would have to take about 50c. per barrel less for their apples, like other folk out West does, I might make out all right, but I won't do that if I lose all I have made, which I am most likely to do.

Now, if the plaintiff had sold all these apples to defendant at $2.75 per barrel, he would not stand to lose anything, for he says in a postscript to his letter of November 10 to his brother, ex. 12:—

> The company wanted to know what I had to pay the farmers for the apples. I would tell them about $2.50 per barrel, for I think they stand me about that for winter apples.

The fall apples cost less than $2.50 per barrel, so I am unable to see how the plaintiff could lose, if he had a contract to purchase with the defendant at $2.75 per barrel f.o.b. point of

shipment in Ontario. There was a profit of 25c. a barrel at the least.

No direct issue between the parties was reached until the plaintiff's banker in Ontario wrote the defendant the letter dated March 29, 1913 (part of ex. 1), stating that the defendant was still considerably indebted to the plaintiff for these apples and demanding prompt payment. The defendant at once replied to this letter on April 2, repudiating any indebtedness to the plaintiff, and on March 31, wrote the plaintiff the letter ex. 22; with statements of account attached shewing fully how matters stood from their standpoint, and an overpayment to plaintiff of some $1,700. Instead of plaintiff taking the subject-matter of this letter up with the defendant direct, he contented himself with forwarding this letter and the statements to his brother to find out what it meant.

Now, Joseph Donaldson received this letter, and says he went to Paulin about it on April 29, and asked him if he didn't buy the apples at $2.75 per barrel all through, to which he claims Paulin would not say either yes or no. He says that Paulin then paid him $500 by cheque (ex. 21), and promised him $500 at the end of each month until the apples were paid for. He admits that he did not have the statement, ex 22, with him then, or at any of the interviews with Paulin about it. What Paulin says about the $500 payment is that it was an advance on the apples on hand then unsold, and was made at Joseph Donaldson's urgent request, to help the plaintiff, who he said was about to be sold out by the sheriff. Paulin further says that Joseph Donaldson then wanted $1,000 but that he refused to advance so much money. This payment does not seem to have been warranted at all and it is hard to explain in view of the defendant's contention. When ex. 21 was sent out the defendants had on hand only 150 barrels of apples, mostly greenings and mixed varieties, which Paulin describes as "junk." These were sold subsequently to March 31 for what the defendant could get for them, and apparently only realized $295.65. It does seem strange that Paulin would, in the face of an overpayment to plaintiff of $1,700, as shewn by ex. 22, have put his

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principals further to the bad by paying out $500 more on April 30 without the adequate protection of a sufficient quantity of salable apples in hand to recoup the advances.

Furthermore, Paulin wrote to plaintiff on November 4, 1912 ex. 17 which, if binding on the defendant, contains statements that are hard to reconcile with the commission agreement. He says:—

> I do not want to discourage you but I am tied up with the firm so bad that I must take another course to help sell the apples, as the general manager in Winnipeg is so hot after me that he is going to fire me, and if I am fired, the help from here would be off. I want to help you on account of your brother as he and I are personal friends, and I would advise your writing him and telling him how you stand with the deal down there with the farmers so he will know what to do. I stand to lose over $1,000 at the very least, and from the way it looks I will have to pay the firm this amount personally, so you can see what friendship will do for a fellow. At the time of writing I am in no position to stand any loss personally, and Mr. Donaldson and myself will have to have your every assistance if we intend to try and clean up these green apples.

I confess I do not know what to make of these statements or to understand them. This is the only letter in the whole correspondence produced that is signed by Paulin personally, and the letter on its face seems to express the personal views and opinions of the writer, and of no one else. Why Paulin wrote this letter in his own name has not been explained. The expression in it: "I must take another course to help sell the apples," Paulin says meant that he would go out on the road himself and sell. This plan coming to the knowledge of the company, it refused to allow him to carry it out. I cannot understand his statement that he stood to lose $1,000 and expects to have to pay this amount to the firm personally. If the defendant was selling on commission only it could not be actually out of pocket, except for freight charges and money advanced. As a matter of fact the defendant had paid out considerable sums for freight. On March 31, according to ex. 22, the advance of this account for Joseph Donaldson, amounted to $1,344.38, with $178.35 more for cartage and wages, making in all $1,522.73. Paulin may have had these payments in mind when he wrote this letter and was confronted by a possible loss owing

to the state of the market and the impossibility of getting rid of the apples in hand, chiefly fall apples and mixed varieties, at a price which would realize the plaintiff's price plus the freight. It is to be noted that the writer is calling particular attention to his own personal position in the matter so that I do not regard this letter, or the over-payment referred to, as of sufficient moment to overthrow the defendant's contention and as tending to establish beyond question the plaintiff's assertion that there was a sale.

I will now consider the evidence of Hawson and Hill, witnesses for the plaintiff, called to corroborate the plaintiff's assertion of a sale. Hawson is an employee of Joseph Donaldson in the butcher shop, and had interested himself in selling apples at the time the store on Ninth street was open. He says he had a price list and made some sales to farmers, shop-keepers and others. He says that some time in September, 1912, Paulin came into the butcher shop and told him he had bought all old Joe's apples (meaning winter apples) and to come out and have a drink on the strength of it. He says he asked Paulin how many cars he was getting from Donaldson, to which Paulin replied, "About 30 cars." He then says he asked Paulin what he was going to do with them, to which Paulin replied he would get rid of them.

Hawson also swore that he knew Paulin had bought the fall apples a week or ten days before this conversation; but he was unable to say how he knew this, or to give any satisfactory explanation as to how he came to make such a positive statement of fact. He admitted that at the time he volunteered this information to Joseph Donaldson he knew about the lawsuit and had been told by Donaldson that the company claimed it had not bought the apples. He says the witness Hill was also present in the shop and heard what Paulin said.

Hill also was called by the plaintiff, and testified that Paulin came into the shop and, after some talk with Hawson, he heard Paulin say to Hawson: "Come on out and have a drink, I have bought all old Joe's apples." Witness could not remember anything else that was said. Frankly, I did not at the

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time these men were giving their evidence, believe either one of them, and upon consideration, I see no reason to change my opinion of their veracity. Paulin denied point-blank ever making such a statement or holding any such conversation with Hawson about the apples. I can see no reason why he should discuss his employers' business with these men. I am always inclined to view with suspicion the testimony of witnesses, who are called as these men were called, to prove an isolated statement or admission alleged to have been made by a person under circumstances which render it improbable that such a statement or admission was likely to be made, or, if made, likely to be remembered, the witness having no interest in the subject-matter, and there being no reason why such a matter should remain in recollection.

Hill also is in the employ of Joseph Donaldson, and I think both of these witnesses have come forward at a critical juncture for the plaintiff to help him win his case. They both use exactly the same phraseology, "I have bought all of old Joe's apples," and tell of the invitation to come out and have a drink. It looks to me very much like manufactured evidence, and I so regard it. But even if Paulin had made the statement attributed to him it would not, in my view of the whole of the evidence, be enough to turn the scale in the plaintiff's favour.

Now, with regard to the opening of the store for the sale of the apples by retail, Joseph Donaldson admits that in 1911 he had temporarily opened stores to sell apples shipped to him by his brother, and I cannot see what difference in method could have been pursued in the year 1912, except that the apples were consigned to the defendant company and not to Joseph Donaldson. I think the store in 1912 was opened by Joseph Donaldson in his own or the plaintiff's interest and not at the request of the defendant. It is apparent that the reckless shipping of such large quantities of fall apples of mixed varieties by the plaintiff, regardless of market conditions in Brandon, and without consulting the defendant, caused a serious congestion, Smith, one of the plaintiff's witnesses, stating that there were 6 or 7 cars lying on the track at Brandon at one time which could not

be unloaded, the cold weather was approaching and it was evident something had to be done to get rid of as many of the apples as possible. So, I think it most reasonable to suppose that Joseph Donaldson would adopt the same methods that he had adopted in previous years; namely, to rent a store for a short period and, by extensive advertising, get a quick sale for the stock.

Donaldson rented the store and took the entire management of the business, received all the proceeds, allowed sales to be made on credit without any reference to the defendant, and generally conducted matters as a man would in his own business. If this store had been opened, as Donaldson says, for the defendant's benefit, I would have expected the daily receipts would have been turned over to the defendant, or the money kept in a separate account, and that proper books of account would have been kept, so that statements could have been rendered of the business done when the store was closed. Nothing of the kind was done, and Donaldson kept the money until he went east in January, 1913, to visit the plaintiff, and then only paid over to the plaintiff part of the money received, namely, $1,000.

The plaintiff says that he had been sending apples to his brother Joseph for the past four or five years to sell for the best price he could obtain, that no fixed prices were mentioned and that he knew his brother had opened stores in Brandon for the purpose of selling these apples. I do not think the defendant had anything to do with the store beyond supplying the man Tate to help sell, and sending over new stock from time to time as required to replenish stock or fill orders taken. It seems to me incredible that this business was the defendant's business, Donaldson's name only being used as a cloak. The conduct of Joseph Donaldson in the matter leads me to the conclusion that he was only doing as he had done in former years in opening this store.

In considering the conduct of the parties, I find the evidence of Kline, the defendant's book-keeper, of much assistance. This man impressed me as a clear-headed and candid witness. He says Joseph Donaldson handed him the bills of lading from

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time to time, that on the occasion of presenting the first of these he asked Donaldson for an invoice, to which Donaldson replied that there were no invoices, but to try and get his brother $2.25 a barrel on fall apples. The book known as the cost book, ex. 25, was kept by this witness, and in it was entered all the apple shipments from the plaintiff. Witness says this was necessary for insurance purposes. The first was received October 5, lot No. 447, car No. 91532, 190 barrels. In the column headed "Invoice" is entered the amount $427.50. Kline says he figured this as the invoice price at $2.25 a barrel from what Joseph Donaldson told him, as he had no other data. The freight for this car appears in the next column, $203.86. This witness says all the fall apples worked out at $2.25 per barrel and the winter apples at $2.75 per barrel; that Joseph Donaldson told him he wanted $2.75 a barrel for the winter apples, and he accordingly figured the cost at this sum; for example, lot No. 521, Nov. 2, 206 barrels, entered in invoice column at $566.50. The defendant's synoptic cash book was also produced and pages 284, 285 and 300, put in as ex. 6. The witness Kline referred to entries appearing on these sheets relating to the plaintiff's apples which demonstrate the same thing. When these entries were made there was no thought of any trouble over the apples, and it appears to me that the internal evidence afforded by these books largely corroborates the defendant's contention that the apples were being handled on commission and were not bought by the defendant. I have no doubt that the prices to be realized for fall apples was $2.25 per barrel and for winter apples $2.75 per barrel, but owing to the great number of fall apples sent and the condition of the market, it became impossible to realize this figure for them. Joseph Donaldson denies the statement made by Kline that he asked Donaldson for invoices and that Donaldson told him to try and get $2.25 a barrel for the fall apples. But I do not accept his denials as worth very much. He appears to have been willing to deny many things concerning which I am satisfied he had very little clear recollection. If he did not tell Kline to figure the cost of the fall apples at $2.25 a barrel it does not appear from what other source Kline

could have got the information. That he did get it somewhere for the purpose of his books is certain, and I believe him when he says he got it from Joseph Donaldson.

Upon the whole, I have reached the conclusion that the plaintiff has failed to establish his case for a sale of the apples to the defendant as alleged. I accept the evidence of Paulin, corroborated, as I think it is, by many collateral evidences, in preference to that of Joseph Donaldson. I think the evidence preponderates in the defendant's favour that the apples were consigned to the defendant to be sold on commission at $2.25 a barrel for fall apples and $2.75 a barrel for winter apples.

As I said before, it is very unfortunate that the plaintiff destroyed all letters received from his brother prior to April, 1913. It is evident there was some correspondence between them. Why did the plaintiff destroy it? His reason is not a satisfactory one, and does not appeal to me. The transaction was still open; he knew from the defendant's letter of November 17, ex. 18, that the defendant was having difficulty with the fall apples, and advised him that they were going to try and get him $2.25, and this should have put him on his guard if he was then contending for a sale, and if the letters from his brother which he had received, and which it is only reasonable to infer would have detailed the arrangement made with the defendant, bore out this contention, it is hard to understand his folly in destroying them. It would not be too much to apply the maxim and infer that these letters did not bear out the present contention, but the reverse, and so were destroyed.

I may say, in conclusion, that I have not the least doubt in my mind of the finding of facts I should make in this case and which I have made. The plaintiff's contention looks to me very much like an attempt to fasten on the defendant a substantial loss on this apple transaction, which was brought about primarily by the unbusinesslike methods of both plaintiff and his brother. From the best consideration that I have been able to give the case, I think the plaintiff's action ought to be dismissed and I accordingly dismiss it with costs.

Action dismissed.

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Saskatchewan Supreme Court, Lamont, J. May 21, 1914.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION—EFFECT AS TO OBLIGATION TO PAY PURCHASE MONEY.

Where a vendor by his own act rescinds a contract for the sale of land, the purchaser's obligation to pay the purchase price thereby ceases.

[*Marckel* v. *Taplin*, 13 D.L.R. 118, and *Johnson* v. *Scott*, 1 O.L.R. 488 referred to.]

Statement

ACTION by a vendor for rescission of an agreement for the sale of land and for partial payment of the purchase price and other relief, the defence being that by electing to rescind, the plaintiff was limited to that relief alone.

Judgment was given for the plaintiff rescinding; otherwise the action was dismissed.

F. Wilson, for plaintiff.

C. P. Tisdall, for defendants.

Lamont, J.

LAMONT, J.:—By an agreement in writing dated May 1, 1911, the plaintiff agreed to sell and the defendants agreed to purchase, the south-west quarter of section 36, township 30, range 12, west of the 2nd mer., for the sum of $4,000, payable $1 cash and the balance by annual payments of one half of all the crop grown upon the land in each year until the principal and interest were paid. It was also agreed that the defendants should give to the plaintiff their promissory note for $1,000, to be applied on the purchase-money when paid. The agreement contained a provision that the defendant would break and crop a certain acreage each year. It also contained a clause by which, upon failure by the defendants to perform any of the covenants therein contained, the plaintiff was at liberty to cancel the contract by giving a notice specified in the agreement. The defendants did not break as large an acreage as was provided for in the agreement, and they failed to perform certain other covenants. On May 16, 1913, the plaintiff gave the requisite notice cancelling the contract, and shortly afterwards he brought this action, in which he claims:—

(1) A declaration that the contract had been terminated; (2) payment of the $1,000 note; (3) an accounting by the defendant of the crops grown in the years 1911 and 1912; (4) damages for the failure of the defendants to break the acreage specified in the agreement.

In their statement of defence the defendants admit the cancellation of the contract by the plaintiff and set up that this cancellation is a complete answer to the plaintiff's claim.

I am of opinion that the contention of the defendants is right. In *Marckel* v. *Taplin*, 13 D.L.R. 118, my brother Newlands held that, where a promissory note was given for the cash payment under an agreement for the purchase of land, and the agreement was subsequently cancelled, the note could not be collected by a person who took it after maturity for valuable consideration. *A fortiori* it could not be enforced in the hands of the vendor. As pointed out by Maclennan, J.A., in *Johnson* v. *Scott*, 1 O.L.R. 488,

where a contract for the purchase of land has been rescinded, the obligation to pay the purchase-money has been terminated.

This action, therefore, in so far as the plaintiff seeks to recover on the note and for an accounting of the plaintiff's share of the crop, cannot be maintained. Is the claim for damages for breach of the covenants to break a certain amount each year in the same position? I think it is. The damages recoverable upon a breach of contract are such as may be reasonably supposed to be in the contemplation of both parties when they made the contract as the probable result of the breach of it. The damage claimed by the plaintiff is the difference between the value of the farm as it is and what it would have been worth had the breaking been done. The object of inserting in the agreement a covenant that a certain amount of land should be put under cultivation each year was to ensure to the vendor a larger payment of purchase-money each year than he would otherwise get, and provision was made that if the purchasers failed to perform this covenant the vendor should be at liberty to determine the contract. The plaintiff, having elected to enforce the remedy for breach of the covenant expressly given him in the contract, is limited to that. Having, by his own act, put

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an end to the obligation to pay the purchase-money, he is not entitled to damages because a larger portion of the purchase-money might have been paid to him before cancellation had the breaking been done.

The plaintiff contends he is entitled to a declaratory judgment that the agreement is at an end, and that it no longer affects his title to the land. I have some doubt whether or not I should give such judgment. Rule 222 provides that:—

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

This rule gives to the Court jurisdiction to make declaratory judgment, but this jurisdiction must be exercised with great caution: *North-Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 2 Ch. 498. In *Williams* v. *North's Navigation Collieries*, [1904] 2 K.B. 44, the Master of the Rolls intimated that the declaration claimed must be ancillary to putting in suit some legal right. Here the declaration sought by the plaintiff is that the contract with the defendant is at an end. It is not contended that such a declaration is ancillary to putting in suit any legal right. I can, however, see that where land has been purchased under agreement of sale which agreement provides for its determination under certain conditions, a declaratory judgment that the agreement has been duly determined may be a convenient way of placing beyond dispute the question whether or not it still attaches to the vendor's title. I therefore have reached the conclusion (but not without some doubt) that I should exercise my discretion in the plaintiff's favour and allow him a declaratory judgment. As the defendants did not dispute the plaintiff's right in this respect, the plaintiff must obtain such judgment at his own expense. There will therefore be judgment for the plaintiff declaring that the agreement is at an end. In all other respects the action will be dismissed. As the defendants have succeeded in their defence, the plaintiff will pay their costs.

Judgment for plaintiff rescinding; otherwise action dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. May 26, 1914.

1. CONTRACTS (§ I E—70)—COLLATERAL CONTRACTS—DEBTS OF OTHERS—STATUTE OF FRAUDS—TRUE TEST.

Upon a promise to answer for the debt of another being original not collateral under sec. 4 of the Statute of Frauds, the true test is that whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another and although the performance of it may incidentally have the effect of extinguishing that liability.

Statement

APPEAL by the plaintiff from the judgment of Dawson, County Court Judge, nonsuiting an action to compel the defendant to pay the debt of another, the defence being the Statute of Frauds.

The appeal was allowed, HOWELL, C.J.M., and CAMERON, J.A., dissenting.

C. H. Locke, for plaintiff, appellant.

C. G. Keith, for respondent.

Howell, C.J.M. (dissenting)

HOWELL, C.J.M. (dissenting).—The plaintiff is seeking to compel the defendant to pay a debt which was due by one Brandes to the former. The action was framed to create a liability under a written order signed by Brandes directing the defendant to pay the plaintiff the sum of $229.30. The written order was not produced and the contents of it was given only in very general terms. Even assuming that there was a debt or liability owing or existing between the defendant and Brandes the vague evidence as to the contents of the writing prevents any serious consideration of the claim as an equitable assignment of the alleged debt due Brandes.

The plaintiff, however, on appeal strongly urged that he had proved a special bargain or contract whereby in consideration of his doing certain work on the contract which Brandes was to have done the defendant promised that he would pay to the plaintiff not only for this work, but also the amount of the written order. This claim was apparently not set up or urged before the trial Judge, and it was not considered by him or in any way disposed of.

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Howell, C.J.M. (dissenting)

The only part of the statement of claim which in any way might cover this point is the following:—

> The plaintiff presented the said order to the defendant aforesaid and said defendant accepted the said order and there and then promised the said plaintiff that he would pay to the said plaintiff the sum of $229.30 as ordered.

It will be seen that there was no consideration alleged for the promise to pay and as above stated the trial Judge did not consider or dispose of this alleged contract and no such issue was tendered, tried or disposed of. It is quite impossible from the evidence to extract any such contract; it is impossible to find even on the plaintiff's own testimony what work he was to perform as a consideration for this promise, and impossible to find for whom he did the alleged work and who paid him for it.

The appeal should be dismissed.

Richards, J.A.

RICHARDS, J.A.:—One Brandes contracted with the defendant, for the consideration of $1,225, to furnish, execute and put on the walls, all plaster ornaments required (as per specifications) in a moving picture building. Brandes entered on the work and employed the plaintiff to make certain of the ornaments. When the moneys due by Brandes to the plaintiff, for the latter's work in making these ornaments, amounted to $229.30, Brandes gave plaintiff a paper, signed by him, Brandes, asking defendant to pay that sum to the plaintiff. Brandes had not then completed his contract, but had received $525, part of the contract price, and had done so much of the work that it was subsequently completed at a cost of $276.

The evidence satisfies me that that paper was presented to defendant and that the plaintiff then asked the defendant for the $229.30 and told him that he would not work any further unless paid that sum. The defendant then told him that, if he would go on and finish the work he was doing, he, the defendant, would pay him the $229.30. Though it is not stated that he also promised to pay the plaintiff for such further work, I think it was implied that he would do so, and he, in fact, did pay him for it, as will appear later. Brandes abandoned the contract and the defendant's architect employed the plaintiff to

finish the part of the work on which he, the plaintiff, was engaged. He finished it, and was paid $56 for so doing. When paid the $56 the plaintiff gave a receipt for it to the architect, "in full for the work done at the plaster running . . . to date." It ends with "and have no other claim against the building" (specifying it).

The defendant refused to pay the $229.30 and the plaintiff sued him in the County Court of Winnipeg, where he was nonsuited. He then appealed to this Court. As Brandes had not completed the work when the order was presented, there was no fund then actually payable to him. So that there was no fund upon which an equitable assignment could operate.

There is, however, another aspect of the matter, which the learned trial Judge has not dealt with. I think that there was established a contract that, in consideration of the plaintiff continuing to work on the building till such work as he was engaged in should be completed, the defendant, in addition to paying him for such further work, would pay him the $229.30. The plaintiff performed that agreement on his part. I look on the plaintiff's agreement with the architect as merely a carrying out of that which he had made with the defendant. The defendant says that he employed the architect to finish Brandes' contract for $700 (which was the balance still in defendant's hands of the $1,225). But he does not swear that he, in fact, paid that sum to the architect, and I do not find that there was, in reality, such a contract made. The architect, I think, merely acted as defendant's agent in employing the plaintiff.

Even if there was such a contract between the defendant and the architect, the plaintiff performed his part of his agreement with the defendant by finishing that part of the work upon which he had been engaged. When he did that he gave the consideration on his part, on the performance of which the defendant had promised to pay him the $229.30. The receipt for the $56, though expressed to be "in full for the plaster running," evidently only meant that it was to be in full for the plaster running done under the contract with the architect. There is no pretence in the evidence that, when the plaintiff agreed to com-

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plete the plaster running, it was understood that he should forego his claim for the $229.30. As to the part of that receipt stating that the plaintiff had "no other claim against the building," it is sufficient to say that, in this action, he is not asserting any claim against the building.

It may be asked why the defendant should have contracted to pay the $229.30. He knew that the $700, still in hand of the contract price, was enough to pay for its completion and to pay this $229.30 also. The work on which the plaintiff had been engaged, and which the defendant wanted completed, is of such a kind that it might be impossible to procure in Winnipeg anyone, other than the plaintiff, who could finish it. The defendant also may have feared proceedings by the plaintiff under the Builders' and Workmen's Act, or the Mechanics' Lien Act.

The defendant, however, set up sec. 4 of the Statute of Frauds, claiming that the promise sued on was one to answer for the debt of another, and that there was no evidence in writing of such a promise. This question, as has been observed many times, is a difficult one to deal with, and the cases on it are not easily reconcilable. Brandes was not released from his indebtedness to the plaintiff by the bargain made between the plaintiff and the defendant. The circumstances were not such, in my opinion, as to create a novation, as the debt from the defendant to Brandes was not yet exigible owing to the latter not having finished the contract.

It might be claimed that, in promising to pay this, the defendant was merely agreeing to pay his own debt, he being perhaps responsible under the Builders' and Workmen's Act. But no question of that kind arose between them and, therefore, I hesitate to hold that the contract was, for that reason, outside of the statute. There was also no surrender by the creditor of anything for the benefit of the promisor. The only way in which, it seems to me, this agreement can be held to be outside of the statute is because the object of the contract was on defendant's part not the payment of this debt, but the completion of the work by the plaintiff. There was a direct contract between him and the defendant for a benefit to the defendant, which did not re-

quire a writing within the statute, though part of the consideration to be paid by the defendant to the plaintiff was the payment of this $229.30, which incidentally was the debt of Brandes.

One of the latest cases discussing this question which I have been able to find is *Harburg Indiarubber Comb Co*, v. *Martin*, [1902] 1 K.B. 778. There Cozens-Hardy, L.J., at 793, says:—

> If the Court can find that there is a main contract, the object of which is not to answer for the debt of another, that contract is not within sec. 4, even though incidentally it may result in a liability to answer for the debt of another.

In vol. 15, of Lord Halsbury's Laws of England, at p. 462, it says:—

> The true test whether the Statute of Frauds applies is to see whether the person who makes the promise is, but for the liability that attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it, independently of the promise.

Again, at 463:—

> Where the payment of a debt or the fulfilment of a duty by another is a mere indirect incident, or ulterior consequence, of the terms in which the contract is framed, the transaction is outside the statute.

In *Davis* v. *Patrick*, 141 U.S.S.C. at 488, the judgment of the Court quotes with approval from a former judgment of the same Court as follows:—

> Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

In *White* v. *Rintoul*, 108 N.Y. at 227, the Court of Appeals for New York, says:—

> Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor.

I have quoted from these four authorities because of their eminence, though there are many others in which one finds the same doctrine laid down. It seems to me that the rule, as stated

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above in these different Courts, applies to this case. The defendant wanted the work finished. His sole object was to get it finished. He was able to do so without loss to himself if he promised, in consideration of its being finished, to not only pay for the finishing work, but to pay the $229.30 claimed by the plaintiff, and he could only get the plaintiff to finish it by so promising. In my opinion he did not enter into this contract for the purpose of being responsible for Brandes' debt, but solely for his own purposes, and the fact that, by so doing, he became liable to pay that which would discharge Brandes' debt, is a mere incident of the contract.

With much respect, I would allow the appeal with costs, set aside the judgment in the County Court and enter judgment there for the plaintiff for $229.30 with costs, including a counsel fee of $12.00.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff was in the employ of one Brandes, who was a contractor employed in the construction of a building for the defendant. Brandes owed the plaintiff $229.30 for wages earned in connection with the work and on the plaintiff demanding payment, Brandes gave him an order in writing on the defendant for the payment of that sum. This order was delivered to the defendant in the presence of another witness, but the defendant denies that he received it and consequently did not produce it. Parol evidence was given as to the contents of the written order. The plaintiff, one Naskar and Mr. Magnusson, the solicitor who drew up the order, all agree in stating that Brandes signed an order on the defendant to pay the plaintiff the above sum of money. It is not clearly shewn that the fund was designated out of which the money was to be paid. The order was, however, taken by the plaintiff to the defendant and handed to him in the presence of one Baurer, who heard the conversation that then took place between the parties.

The evidence of this conversation appears to me to establish that the plaintiff told the defendant that unless the defendant agreed to pay the order, the plaintiff would stop working; and that the defendant told him to go ahead and finish the job and the defendant would pay the plaintiff all that was coming to

him on the work. The plaintiff's evidence is corroborated by Baurer and I have no doubt that the plaintiff went on with the work and completed it on the faith of the defendant's promise. The defendant admitted to the plaintiff that there was $600 or $700 coming to Brandes at this time on account of the contract.

About three weeks after the order was given Brandes absconded. The plaintiff went on with the work and finished his portion of it, which consisted of manufacturing certain ornamental figures. The defendant, or his architect, paid the plaintiff for the work done after Brandes left, but he refused to pay the money mentioned in the order.

The learned County Court Judge entered a nonsuit, holding that an equitable assignment had not been proved. The objection that no fund was mentioned in the order, out of which the money was to be paid, does not seem to me to be an answer to the case made by the plaintiff. There was only one fund out of which the defendant could possibly be expected to pay the money and it was in respect of this fund that the order was given. It is also clear that the defendant knew that the order was intended to deal with a portion of this fund and to be payable out of that fund only. The decision of the Divisional Court in *Lane* v. *The Dungannon Agricultural, etc., Asso.*, 22 O.R. 264, is an authority completely in point and establishes that in such circumstances an equitable assignment has been created.

In *Brice* v. *Bannister*, 3 Q.B.D. 569, 47 L.J.Q.B. 722, the order given was as follows:—

> I do hereby order, authorize, and request you to pay to Mr. William Brice, solicitor, Bridgewater, the sum of £100 out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge.

Objection was taken that this was a mere order to pay and conferred no right to the money sought to be charged, but the Court of Appeal, affirming Coleridge, C.J., held that it was a good equitable assignment. Cotton, L.J., in giving judgment, said:—

> The letter of the 27th October (set out above) is a good equitable assignment by Gough to the plaintiff of money to the extent of £100, which might become due under his contract with the defendant.

A more serious objection is that it is not sufficiently shewn that there was, either when the order was given or at any time

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afterwards, money due to Brandes on the contract, out of which the order could be paid, Brandes having absconded before completion of the work.

But it appears to me that, apart from the question of equitable assignment, the transaction between the parties may be supported upon this basis, that an entirely new and original contract was created between the plaintiff and the defendant, when the plaintiff presented the order to the defendant and the latter agreed to pay it if the plaintiff would go on and complete his part of the work. Such a contract is not a guarantee for the indebtedness of Brandes and is not within the operation of the Statute of Frauds.

Original, as distinguished from collateral, conditional or accessory promises are outside the statute, because they bind the promisor to do something independently of, and without regard to, another's liability. 15 Hals., p. 460.

Where, therefore, one H. was employed to do work on certain houses and the defendant was surveyor over him and was to receive the moneys to be paid for the work, and in consideration that the plaintiff would supply materials for the work the defendant promised to pay the plaintiff for them out of such moneys received by him as should be due to H. for the work on receiving an order from H. for that purpose; the goods having been supplied, the money having been received by the defendant and the order having been given by H. it was held that defendant was liable and that the Statute of Frauds did not apply, because the defendant's promise was an original and not a collateral one: *Andrews* v. *Smith*, 2 C. M. & R. 627.

In *Bampton* v. *Paulin*, 4 Bing. 264, an auctioneer employed to sell goods on premises for which rent was in arrear, was applied to by the landlord for the rent, the landlord saying it was better to apply so than to distrain; the auctioneer answered: "You shall be paid; my clerk shall bring you the money." It was held that an action lay on this promise without a note in writing. See also *Dixon* v. *Hatfield*, 2 Bing. 439; *Houlditch* v. *Milne*, 3 Esp. 86; *Williams* v. *Leper*, 3 Burr. 1806; *Davis* v. *Patrick*, 141 U.S. 479.

Dealing with this question, Lopes, J., said in *Sutton* v. *Grey*:

> The true test, as derived from the cases is, as the Master of the Rolls has already said, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he had an interest in it independently of the promise. In the former case, the agreement is within the statute; in the latter, it is not: *Sutton* v. *Grey*, [1894] 1 Q.B. 285, 290.

See also *Simpson* v. *Dolan*, 16 O.L.R. 459. The defendant had an interest in securing the plaintiff's continuance of the work and he had in hand the money to pay for that work. He had also the authority from Brandes to pay the plaintiff and deduct the amount from the money coming to him, Brandes. By his promise to pay the order, the plaintiff secured the continuance and completion of the work by the plaintiff. Defendant, therefore, had a direct personal interest in the transaction between himself and the plaintiff.

The defendant put in no evidence at the trial, but rested his case on the nonsuit. The trial Judge was of opinion that "no evidence of acceptance was given," but he makes no finding on the evidence given of a distinct contract having been made between the plaintiff and defendant when the order from Brandes was presented. The particulars of claim sufficiently allege such a contract, and the evidence is, in my opinion, sufficient to support it. The defendant was bound, under the Builders' and Workmen's Act, R.S.M. 1913, ch. 20, to require Brandes to produce a pay list shewing the names of the workmen and the wages due to them, and these wages the defendant was liable to pay. The plaintiff has not sued under this Act, but the fact that such liability existed may be taken into account in considering the reasonableness of the defendant's promise to the plaintiff to pay the wages already due to him, and to shew the interest of the defendant in the transaction with the plaintiff.

I do not think it necessary to put the plaintiff to the expense of a new trial. The defendant denied that he received the order from Brandes and denied that the plaintiff ever came to him with such an order. This involves, no doubt, a denial that he ever promised to pay. But I think the evidence of the plaintiff and Baurer should be believed, as against a denial by the defendant, and that a verdict should be entered for the plaintiff for

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the amount of the order with interest and costs in the County Court. The plaintiff is also entitled to the costs of this appeal.

CAMERON, J.A. (dissenting):—The plaintiff was working on ornamental plaster work for one Brandes who had a contract with the defendant Kaplan, the owner of a moving picture building in course of construction. When $229.30 was due the plaintiff, he asked Brandes for the money. Brandes told him he would give him (the plaintiff) an order on Kaplan for it. A solicitor was employed to draw up a document in the presence of the plaintiff, Brandes and one Naskar. Brandes disappeared about three weeks after giving the document, p. 5. The plaintiff then took the document to Kaplan, who told him to go ahead and finish up the job and he would pay him. (Plaintiff's ev., p. 3.) The plaintiff further says that he, Naskar and Kaplan discussed the amount due Brandes and that Kaplan said it was $600 or $700. When the plaintiff came to Kaplan he told him he would work no more unless he received the money, and the defendant told him, "Go ahead and work, I pay every cent." The plaintiff went on with and finished the ornamental work, under a contract with Abramovitch, defendant's architect, and was paid for it. Plaintiff says he several times asked for his money, but without effect. The plaintiff's work simply consisted in making certain ornaments in moulds. He had nothing to do with putting them on the building. On cross-examination the plaintiff says that when the order was handed to Kaplan, one Baurer and one Brandes (not the debtor) were present.

The solicitor was called and gave evidence as to the contents of the document which was not forthcoming at the trial. His evidence on the subject is as follows:—

Q. The plaintiff claims that he has an order for $229.30 drawn on Kaplan, by the order of Brandes, payable to the plaintiff herein, Conrad. Did Conrad ever come into your office to have an order drawn for $229.30? A. He did so. Q. On one of the first days of February, A.D. 1913. To whom was that order drawn? A. That order was drawn in favour of B. Kaplan for the sum of $229.30. Q. Was it signed? A. Yes. Mr. Brandes the maker of the order signed it himself; the order was in favour of A. Conrad for the balance of the building, near the corner of Logan and Quelch, and the address of A. Conrad then was 331 Manitoba Ave., and I have the name of Sam Brandes here, who signed the order, and I have in his own handwriting the name of Naskar, for whom I later on, on the same building, filed a lien.

Obviously the document, or order as it is called, could not be both in favour of B. Kaplan and of A. Conrad. The solicitor meant, I suppose, to say "on B. Kaplan." The witness does not say that the document contained words requesting or directing Kaplan to pay the plaintiff the sum in question and give the words according to his recollection. The witness is really stating in his description what he inferred to be the legal effect of the document rather than its terms and words, either with accuracy or with as great accuracy as his memory recalled.

In reality the evidence of the contents of the document is of such a vague character that it is impossible to come to any conclusion as to what they actually were. I consider the comment of the trial Judge on this point is well made. As for Naskar's evidence on the subject, it adds nothing to that of the solicitor. Though he spoke in direct examination as to the contents of the document it appeared in cross-examination that he had not read it, for the good and sufficient reason that he could not speak English. Naskar says he was with the plaintiff when the document was presented to Kaplan. He says Kaplan said:—

> All right, Brandes has enough money coming to him to finish the work, and if you keep on and finish the work you get paid right away,

which is very different from the plaintiff's version.

Kaplan's examination for discovery was put in by the plaintiff's counsel. In it Kaplan denies positively ever having received any such order as is here relied upon, p. 23. He refuses to admit any liability to Brandes, p. 39, and says all payments made by him on the building were on the authority of the architect, on whom he relied, pp. 35, 38. On the evidence, it seems to me clear that the plaintiff has not established the cause of action alleged in his pleadings, that Brandes gave the defendant an order in writing to pay the plaintiff $229.30, which the plaintiff presented to the defendant, who accepted the same and then and there promised he would pay the said sum as ordered.

In the first place the wording of the document, or order as it is called, in question is not established. Nor is the acceptance of the order proved. On the contrary, it is expressly negatived by Kaplan's evidence, put in by the plaintiff himself. Moreover,

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there is no satisfactory evidence shewing the defendant's indebtedness to Brandes. His (the defendant's) evidence is the other way, and negatives the evidence of the plaintiff, and there being nothing shewn to be due Brandes, there could not be any remedy in this action against Kaplan. These are really all matters of fact which were before the trial Judge for consideration and I do not feel inclined to interfere with his decision.

Haggart, J.A.

HAGGART, J.A.:—Is the order in question an equitable assignment to the extent of $229.30 of moneys claimed to be in the hands of Kaplan?

The following is a summary of the law as laid down by one of the text-writers, Leake on Contracts, 6th ed., p. 857:—

An equitable assignment of a chose in action, supported by a valid consideration, may be made in any form of words, with or without deed or writing, expressing the intention to assign. . . . There must be a definite debt or fund as the subject of assignment; an order upon a person to pay a third party, not referring to any fund for payment, assigns nothing; nor is it binding upon the person on whom it is made, unless he accepts and undertakes to pay it; as in the case of a bill of exchange drawn upon him; or a cheque. A bill of exchange in the usual form, though for the exact amount of a fund of the drawer held by the drawee at his disposal, does not effect an equitable assignment or appropriation of the fund.

Hall v. *Prittie*, 17 A.R. (Ont.) 306, is a case in which the leading authorities are collected or referred to. One E., who had a contract with the defendant for certain carpenter work, gave to the plaintiff an order on the defendant in the following form:

Please pay to H. the sum of $138.40 for flooring supplied to your buildings on Dovercourt Road, and charge the same to me.

It was held that this was not an equitable assignment but a bill of exchange and that, in the absence of written acceptance by her, the defendant was not liable. Burton, J.A., in his reasons, on page 307, says:—

There is nothing whatever upon the face of this instrument to indicate that it was intended as an assignment of any portion of the debt secured and payable under the contract, the words "for flooring, etc.," merely point to the consideration existing between Eyrie and the plaintiffs equivalent to the words frequently found in similar documents, "for value received," and the other words, "and charge to my account," though superfluous, are the words usually found in a draft or bill of exchange, and do not by any means indicate that the payment of the money to the bearer

of the draft was to be made from any particular fund, but a direction to the drawee to charge the money to him. But even if the words of this document had gone to the extent of saying, "and charge the same to account of moneys payable under my contract with you," I should still hold that it could not be treated as an equitable assignment of any portion of that debt. The rule itself is perfectly clear that if these or similar words are used merely to designate the fund out of which the drawer may reimburse himself, or as a mere reference in the draft to the fund to call his attention to his means of reimbursement, then it is nothing more nor less than a direction, and the document is a bill of exchange. If on the contrary they are used to limit the payment or make the order itself payable only out of a particular fund, then the order is not a bill of exchange.

And Osler, J.A., in the same case, at p. 310, says:—

And it is equally well settled that to constitute a valid equitable assignment there must be a specific appropriation of the whole or some part of an existing fund, or of a fund which is to arise out of some existing contract or agreement, citing *Lamb* v. *Sutherland*, 37 U.C.R. 143; *Shand* v. *DuBuisson*, L.R. 18 Eq. 283; *Brown* v. *Johnston*, 12 A.R. (Ont.) 190.

The plaintiff's counsel urged the reasons given by Street, J., who delivered the judgment of the Court in *Lane* v. *Dungannon*, 22 O.R. 264. In this case the contractor for the erection of a building for the defendants, during its progress gave to various persons orders upon the defendants for sums due them by him. It was held there that these orders were not in themselves good equitable assignments of the portion of the fund in the hands of the defendants. After the trial the Court directed that further evidence should be taken *viva voce* before Falconbridge, J., at the Goderich autumn sittings and be brought before the Court, which would then dispose of the motion. Evidence was taken, the result of which is stated in the judgment. Street, J., says, on p. 271:—

If, therefore, the decision of this question had rested upon the evidence before the learned Chief Justice of the Common Pleas, I think we should have been obliged to allow the appeal. At the request, however, of the counsel for the respondents, we have allowed evidence to be given before Mr. Justice Falconbridge, at the last Goderich Assizes on behalf of any of the parties who desired to shew that the state of facts in evidence upon which the appeal was brought did not fully shew the position of the parties.

The evidence taken before my brother Falconbridge at Goderich leaves no doubt whatever as to the intention of Henderson in giving, and of the several claimants in taking, the orders here in question. There was only one fund out of which the directors could possibly be expected to pay

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the orders; the nature of that fund and its origin were well known to all the parties; and when Henderson promised the persons with whom he dealt orders upon the directors, it is clear that he meant to give, and that the claimants expected to get, orders which were to be paid out of the contract price of the building which he was putting up for them. Not only this, but it is equally plain that the directors understood the orders as intended to deal with portions of the contract price and to be payable only out of that particular fund. Under these circumstances, I think we are at liberty to open our eyes to what the real intention of all the parties to the transaction was, and to give effect to it by declaring that Henderson did make an equitable assignment to each of the claimants of a portion equal to the amount of the written order given him of a portion of the fund in question, and that the fund should be distributed upon that footing.

In the last mentioned case, *Hall* v. *Prittie*, 17 A.R. (Ont.) 306, was considered, so that if we follow the reasoning of the Divisional Court, which was constituted by Armour, C.J., and Street, J., it appears that it is not absolutely necessary that the fund should be designated on the face of the order or direction.

I think, after a careful perusal of the evidence, that here there was only one fund out of which this order could be paid and the nature of that fund and its origin were known to all the parties. On page 11 of the evidence, the plaintiff says:—

> I told him (Kaplan) that Mr. Brandes told me I couldn't get any money and he gave me that order that you would pay me, and Mr. Kaplan told me to go ahead and finish up the job and he would pay me anything that was coming to me.

And again on page 12:—

> I told him (Kaplan) if you do not agree to pay that money I wouldn't work any more. He said, "Go ahead and work, I pay every cent."

And on page 13:—

> A. I went to Kaplan and asked him if he wanted to pay me or not. Q. What did he say? A. Yes, go ahead and finish the job; I pay you the money.

Evidently there is no doubt as to what was in the minds of the parties at the time that order was given, and it is also clear that there was only one fund. So that, if I follow the reasoning of Mr. Justice Street I should hold that the document in question was a good assignment of the money. It is also contended on behalf of the plaintiff that the giving of this order by Brandes, the taking of it to the defendant who retained possession, and his

promise to pay everything that would be owing to the plaintiff, constituted a new contract and thus be an answer to the defendant's objection that the order was only a promise to answer for the debt of another, was not signed by the defendant and came within sec. 4 of the Statute of Frauds.

I think we can treat this as a new contract. There are here, under changed conditions, all the elements of a new contract; there were valuable considerations; there was practically the waiving of a wage-earner's lien; there was an assurance that the work would be completed, and there was complete performance upon the part of the plaintiff. I think the evidence on behalf of the plaintiff supports the foregoing and, if it were necessary to amend the pleadings, I would allow any amendment that might be needed.

In allowing the appeal I would not be substituting my finding of fact for the trial Judge's finding, as I simply draw conclusions from established facts different from those of the trial Judge, and I am not reversing any express finding of fact when I say I would believe the story of the plaintiff as to the delivery of the order (being notice) to the defendant and the existence of an indebtedness from the defendant to Brandes at the time of $600 or $700 corroborated by independent witnesses in preference to the denial of the defendant.

I would allow the appeal. *Appeal allowed.*

ESSEN v. COOK.

British Columbia Supreme Court, Macdonald, J. May 26, 1914.

1. COSTS (§ II—50)—OF UNNECESSARY PROCEEDINGS—FORECLOSURE—UNTENABLE DEFENCE.

Costs in a foreclosure action caused by untenable defences are against the defendant.

APPLICATION for costs in a foreclosure action. Judgment accordingly.

Campbell & Singer, for plaintiff.

A. S. Johnston, for defendants.

MACDONALD, J.:—This is an action brought by the plaintiff for declaration of default under an agreement for sale. The defendants other than defendant Cook, delivered defences deny-

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ing all allegations tending to support the plaintiff's claim. Prior to the action coming on for trial, admissions were made which practically disposed of the issues and left only the question of costs, reserved for consideration. Judgment for foreclosure was granted and the plaintiff now seeks to obtain judgment imposing costs upon the defendants thus defending.

The general rule is that in an order for foreclosure there is no judgment against the defendants personally for costs should redemption not take place, but an exception arises where the validity of the security has been unsuccessfully disputed. See Morgan & Wurtzburg on Costs, p. 222. There is a case not referred to in this text book—*Guardian Assurance Co.* v. *Lord Avonmore* (1873-4), Ir. R. 7 Eq. 496, where the only question left for the Vice-Chancellor to decide was the same as now comes before me for consideration. I think it well to quote the judgment almost at length, as follows:—

> The only question I have to decide is as to the costs. The general rule in foreclosure suits is, that the costs should come out of the estate with the demand. But there is an exception to that rule where the mortgagor raises a defence which is untenable, in which case the costs so occasioned may be ordered to be paid by him personally—and that, whether there be fraud or not on his part. In the present case there is no doubt that Lord Avonmore did raise a defence which was untenable, and which caused a great deal of litigation in the case. I am not of opinion that the suit was rendered necessary by Lord Avonmore, as it was necessary to be instituted to enable the charges on the property to be raised. I do not, therefore, think the entire costs should be given against him, but I am certainly of opinion that the additional costs of the litigation caused by this defence should not be merely added to the plaintiffs' demand, for payment of which there is likely to be an insufficient fund. I think the proper form of the decree should be that suggested by Mr. Gibson, and which was made in the case of *Sharples* v. *Adams*, 8 L.T. 138. The addition to the usual decree should be that, in case of the fund proving insufficient for payment of plaintiffs' demand and costs, Lord Avonmore personally should pay so much of the costs as were occasioned by his unsuccessful defence.

I follow this judgment and am supported in this conclusion by the judgment of the Vice-Chancellor in *Tildesley* v. *Lodge* (1857), 3 Jur. (N.S.) 1000, where the learned Judge directs costs should be paid by the defendant through his failure in the litigation and that he "ought to pay so much of the costs of the suit as have been occasioned by disputing the plaintiff's right to sue upon his equitable mortgage."

In this action all costs should be taxed in the ordinary man-

ner and added to the amount required to be paid for redemption within the stipulated period. Then the judgment should provide for a separate taxation of the additional costs occasioned by the defendants defending the action, and such costs will be paid by such defendants in the event of the redemption not taking place.

Judgment as to costs against certain defendants. Macdonald, J.

REX v. BELMONT.

Quebec King's Bench (Crown Side), Gervais, J. July 6, 1914.

1. JUSTICE OF THE PEACE (§ III—12)—JURISDICTION ALSO AS SUMMARY TRIAL MAGISTRATE—SUMMARY CONVICTION OR SUMMARY TRIAL PROCEDURE.

Where trials for keeping a disorderly house and for frequenting a common bawdy house are held before a magistrate having jurisdiction to proceed to a summary conviction under the vagrancy clauses (Cr. Code, sec. 228) or to a summary trial without consent under Code sec. 774 (amendment of 1909), it will be taken in the absence of any express statement in the record of proceedings to indicate which procedure was being followed, that the magistrate acted under the power of summary conviction from which an appeal would lie rather than that he acted under the powers of Code sec. 774 upon summary trial from which there would be no appeal.

Statement

APPEALS by Paulette Belmont and others, heard together by consent, from eight several convictions against the eight appellants, defendants, one of whom was convicted of keeping a bawdy house and the others for being frequenters of the same.

The appeals were allowed and the convictions quashed.

J. C. Walsh, K.C., for the Crown.

A. Germain, K.C., for the accused.

Gervais, J.

GERVAIS, J.:—The appellants, numbering eight, seek to set aside the convictions to a term in jail which were given against them by the recorder of the city of Montreal for having kept a common bawdy house in Montreal during the month of March, 1914.

By consent, the eight present appeals have been joined.

The evidence of the Crown through three constables shews that the house kept by the accused had a bad name, that it was looked upon by them as a common bawdy house wherein and wherefrom men and women were seen during the day and night coming; but the witnesses of the Crown cannot swear that any

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act of prostitution had taken place therein, as they have never been there, and that they cannot bring witnesses to bear out the ill repute of the place.

On behalf of the defence a fireman of the city of Montreal was heard, and he swore that he had been for some months a boarder in the house, and that he had not seen anything improper there.

One of the accused took the stand and swore that she was there as a mere boarder and that she was earning her livelihood as an employee in a St. Lawrence street ice cream parlour.

Two questions have to be decided:—

1st. Are these convictions appealable?

2nd. Is the proof of the offences alleged sufficient?

By examining carefully both complaints and convictions, one cannot see if they have been taken or rendered under the law relating to bawdy houses, viz.: Articles 225-228-229 of C.C., or under articles 238, C.C., punishing vagrancy.

Have these cases been tried under the Summary Convictions part or the Summary Trial part of the Code?

Amongst all the accused, only one is charged with having kept a disorderly house, that is, a common bawdy house. The others are before the Court for having frequented such a place.

Let us quote at once the new article 239 as amended by 3-4 Geo. V., ch. 13, which limits punishment for such frequenting to a fine not exceeding $100, or in default to two months' imprisonment, for those who are found without reason in a disorderly house.

The records do not shew any declaration of intention on behalf of the recorder to sit in the present cases in virtue of article 773, C.C., which merely declares that "the magistrate may, subject to the subsequent provisions of this part, hear and determine the charge in a summary way."

Article 774, C.C. [amendment of 1909], declares that

> The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked if he consents to be so tried.

2. The provisions of this part do not affect any absolute summary jurisdiction given to justices by any other part of this Act.

It is not indifferent for an accused to be tried for keeping a disorderly house or for frequenting it, under Part XV., or Part XVI., since 1913, that is to say, the passing of the Act, 3-4 Geo. V., ch. 13, amending article 797, C.C., by refusing appeal when the conviction for such offence has been given under the Summary Trials part, not presided over by two justices of the peace sitting together, but by a magistrate such as the said recorder; and *a contrario* not abolishing appeal allowed under article 749 in any case decided, under Part XV., relating to Summary Convictions.

Should the prosecution be taken under article 228, C.C., it may give rise to a summary trial, if presided over by a magistrate there is no appeal from his conviction under the amendment of 1913.

On the other hand should the prosecution be taken under article 238 relating to vagrancy under paragraph "*j*" and "*k*," the trial may be made before two justices of the peace or a magistrate having their jurisdiction.

If the trial takes place, under article 228, the punishment may be one year's imprisonment; if held under article 238, the punishment may only be for six months in jail or a fine not exceeding $50.

The consequence of the utter differences between the two enactments is very easily seen to be of the utmost importance for an accused.

The accused has no choice, between a Summary Convictions Trial or a Summary Trial. The option, if I may be allowed to call it so, belongs to the Crown or to the magistrate, but the magistrate, who may use his right to exercise an absolute jurisdiction under articles 773 and 774, C.C., if he wishes, must so declare, in so many words.

We do not find anything of the kind of record; neither in the complaint, nor in the conviction; nor in the *procés-verbal* of proceedings, wherein very naturally such assertion of jurisdiction by the magistrate should be found.

As the recorder has not seen fit to express the aforesaid abso-

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lute jurisdiction before mentioned which would have precluded the accused from appealing from the said convictions we cannot but recognize to the accused their general right of appeal which is granted to them under article 749 of Part XV. relating to Summary Convictions.

On the merits, I find that the proof of prostitution is not sufficient.

It was easy for the police to prove facts of that nature which might have taken place in the house in question and which would have gone to shew that either article 228 or 238 or 239 applied.

Also, I must mention that under the new article 239, as amended by 3 & 4 Geo. V., ch. 13, the convictions would be excessive as regards the accused, who had been brought before the Court for having frequented the said house. Article 1035, C.C., cannot be made applicable to them, it is needless to say.

Upon the whole, I declare that the present cases are appealable; I maintain the appeals and quash the convictions.

Convictions quashed.

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REX v. DAIGLE.

Quebec King's Bench (Appeal Side), Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. May 2, 1914.

1. FALSE PRETENCES (§ I—6)—ELEMENTS OF OFFENCE—FRAUDULENT CONTRACT—PRETENDED STOCK SUBSCRIPTION.

A charge that the accused through false pretences induced the complainant to subscribe for shares and thereby obtained a promissory note and cash in payment therefor is within Code sec. 405 as charging that the security was obtained through the pretence of a contract fraudulent in fact.

2. CRIMINAL LAW (§ II A—31)—PRELIMINARY ENQUIRY—REPLACEMENT OF MAGISTRATE.

The justice of the peace who issues a warrant of arrest to bring the accused in custody for a preliminary enquiry has the right to order him to appear before himself or any other justice or magistrate having jurisdiction in the district, and the enquiry may, therefore, be taken in such case before another magistrate who replaces the first.

3. CRIMINAL LAW (§ II B—48)—RIGHTS OF ACCUSED—WAIVER—CONSENT TO ADMIT DEPOSITIONS IN TRIALS OF OTHERS SIMILARLY CONCERNED.

The accused may make a minor confession while not fully confessing his guilt and in view of this and of Cr. Code 978 it is not error to admit either at the preliminary enquiry or at the trial depositions in similar concurrent prosecutions of others for fraudulent stock sub-

scriptions in the same company, where the same counsel acting for all of the accused signed a consent by which the evidence at the preliminary inquiry against any one of them might be used as against any other both at the several preliminary enquiries and upon the trials.

[See also *R.* v. *Brooks*, 11 Can. Cr. Cas. 188, 11 O.L.R. 525.]

4. INDICTMENT, INFORMATION AND COMPLAINT (§ IV—70)—QUASHING—INFORMATION TREATED AS FORMAL CHARGE OR INDICTMENT—SPEEDY TRIAL.

Where the information on which the preliminary enquiry proceeded is used in place of a formal indictment or "charge" on a speedy trial, and the accused moves to quash it as such, he thereby treats it as a *de facto* indictment and cannot object to the lack of a formal document, at least where no prejudice is shewn.

5. BAIL AND RECOGNIZANCE (§ I—25)—CRIMINAL LAW—DIRECTION FOR BAIL IN LIEU OF COMMITTAL FOR TRIAL—RECORD.

Where an order is made on a preliminary enquiry that the accused give bail under Code sec. 696 to appear for trial, but no committal for trial is made as the magistrate does not consider the case sufficiently strong to order committal, the recognizance of bail acknowledged before the magistrate or two justices and duly signed, is the only necessary record to go before the trial Court with the depositions and information; and a speedy trial without jury on defendant's subsequent election of same is not annulled by the lack of a formal order signed by the magistrate to further evidence the direction to give such bail.

6. CRIMINAL LAW (§ II B—49)—ELECTING TRIAL WITHOUT JURY—ACCUSED NOT COMMITTED FOR TRIAL BUT BAILED TO ANSWER TO JURY COURT.

On the order being made under Code sec. 696 that the accused shall give bail to answer any indictment at the jury court upon the charge, in lieu of a committal for trial thereon, the accused may, without waiting for an indictment, elect speedy trial without a jury upon the charge.

Statement

CROWN case reserved upon a conviction for obtaining money and a promissory note by false pretences.

The conviction was affirmed.

N. K. Laflamme, K.C., for the accused.
Aimé M. Dechêne, for the Crown.

The opinion of the Court was delivered by

Gervais, J.

GERVAIS, J.:—Having heard the Crown prosecutor for the District of Kamouraska, as well as the attorney for the accused upon his application for the opinion of this Court on divers questions of law which were reserved for such opinion by the Court below, sitting at Fraserville, during the trial of the accused on the charge of obtaining by false pretences, in the fall of 1912, a sum of money and a promissory note, through a contract of subscrip-

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tion for shares in a phantom joint stock company; having examined the record and upon the whole having deliberated;

Seeing that, on the 22nd day of October, 1913, after his motion to quash the indictment had been dismissed by the Court of the Sessions of the Peace for the District of Kamouraska, the accused applied to the same, on the 23rd of October, 1913, to reserve to this Court, for its opinion, several questions of law in virtue of Article 1014, C.Cr.;

Seeing that the Court of Special Sessions, after having dismissed, on the 22nd day of October, 1913, the first motion of the accused, postponed his trial; and then closed it, on the 23rd day of October, 1913, declaring him guilty of the charge brought against him, and condemning him to six months in the jail of the District of Kamouraska, and finally, on the 25th of November, 1913, the Court below reserved for the decision of this Court divers questions of law which will be explained later on.

Seeing that it is necessary to understand the case that it be alleged, at once, that, even before that date, Justice of the Peace Dugal had issued his warrant of arrest, on the 29th of November, 1912, against the accused; that after the arrest of the latter the said Justice of the Peace had admitted him to bail "upon the condition for him to appear before the said Justice of the Peace or any such other Justice of the Peace for the District of Kamouraska"; that Mr. C. Panet-Angers, Police Magistrate for the district aforesaid, had already, during the month of January, 1913, held the preliminary investigation which was closed on the 14th March, 1913, by an order for recognizance of bail to surrender, but without any commitment, to the Court of King's Bench for the District of Kamouraska; as the whole is shewn by the *procès-verbal* of hearing properly signed or initialled by the said Magistrate or the Clerk of the Crown (Mr. Pelletier); as well as by the Bail Bond, dated 14th March, 1913, signed by the accused and the said Magistrate, in accordance with Article 696, C. Cr.; that Mr. Corriveau, District Magistrate, had granted the option of the accused for a trial without jury; that the said trial had been postponed, on several occasions, to be closed, on the 23rd October, 1913, by Mr. Magistrate Langelier, Judge of the Special Sessions of the Peace for the said district, who, after trial, as we have already said, found the accused guilty and convicted him, as above said;

Seeing that the charge against the accused was substantially identical with three others brought, to wit; against Pierre M. Gauthier, Oscar Duchesne, and Joseph Gamache, for having obtained, in the same way, similar valuable securities, to wit a sum of money and a note in settlement, from divers parties, in the fall of 1912; that, against each of them, a similar series of judicial proceedings had been had in each case, resulting as in the present one, in a conviction of six months in the said jail;

Seeing that the said accused got themselves all admitted to bail, in the course of their trials, that they are still at liberty;

Seeing that, on the 22nd October, 1913, the attorney for the accused, acting for each one of them, signed a consent, under which the evidence, in the case of Daigle and of the others, at the preliminary investigation, would be made use of at his trial without jury, of the said case, as well as at the preliminary investigation and also on the merits in the three cases of Gauthier, Duchesne and Gamache, and *vice versa*;

Seeing that it is under these circumstances that the accused made his motion, dated 23rd October, 1913, to the Court of Special Sessions of the Peace for the District of Kamouraska to be allowed to ask this Court to give its opinion on the following questions:

1. Does the indictment contain the necessary elements to constitute the offence of obtaining money and valuable securities by false pretences with intent to defraud?

2. Has the accused been properly indicted, as the so-called indictment is null for the following reasons:—

(*a*) Has not the Magistrate violated the law by allowing as depositions for the benefit of the Crown, those of witnesses who have never been heard in this case but in some other case, that is, in the other cases already mentioned.

(*b*) Are not those depositions useless, as there is nothing to shew therein that they have been taken in the presence of the accused.

(*c*) Is not the order of recognizance of bail to the Court of King's Bench null, as it is not signed by the Magistrate and does not disclose the charge upon which the accused is held?

3. Were not those objections properly raised, on the 22nd October, 1913, by way of a motion to quash.

4. Does not the accused suffer a prejudice by the dismissal of said motion?

5. Was not the amendment to the indictment, viz: to alter dates, illegal, as the Magistrate being powerless to grant it, being not one appointed specially for the District of Kamouraska, wherein the offence had been committed?

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Seeing that the Court of Special Sessions for the District of Kamouraska, while wishing to grant the demand of the accused has formulated them by its Order, dated 25th November, 1913, as follows:—

1. Does a promissory note constitute a valuable security in accordance with sec. 7, sub-sec. 40 of C.Cr.?

2. Did the Justice of the Peace who issued the warrant of arrest and left it to another Magistrate to execute all the proceedings at the preliminary investigation act illegally?

3. Were the depositions illegally taken in the absence of the accused, but under his consent?

4. Were the accused to be committed or could the Magistrate in virtue of Article 696 of C.Cr. just send them, without any commitment, to the Court of King's Bench upon their giving recognizance of bail under the said article?

Seeing that all these questions of law as they have been formulated lack clearness;

Considering, nevertheless, that they are the only questions of which this Court can take cognizance; that the accused cannot be prejudiced thereby; that the clearness and precision of these questions can be obtained by perusing the motion to have the opinion of this Court, dated 23rd October, 1913, as well as by taking communication of the defendant's factum, dated 14th April, 1914, and the said questions could be reduced to the following:—

1. Does the indictment allege an infraction of false pretences?

2. Does the replacement of Justice of the Peace Dugal, who issued the warrant of arrest, by Mr. District Magistrate Panet-Angers, who held the preliminary investigation, by Mr. Magistrate Corriveau, who received the option for trial without jury; by Mr. Justice Langelier, Judge of the Sessions of the Peace, who held the trial, and gave the conviction, make the latter incompetent to make such trial and to give such conviction?

3. Did the attorney for accused act illegally by consenting to the use of the depositions taken in other cases?

4. Could the accused accept the complaint in place of an indictment?

5. Was the Magistrate at the preliminary investigation under pain of nullity bound to sign himself the order of recognizance of bail to surrender to the Court of King's Bench, or could he let the same be signed by the Clerk of the Crown, when the accused

afterwards appeared before the Court of Special Sessions to make his option for a trial without jury, in accordance with the bail bond dated 14th March, 1913?

6. Can the accused renounce to a jury trial after the order of recognizance of bail to surrender to the Court of King's Bench, but before or without any commitment or appearance before that Court, upon a regular indictment?

Passing judgment upon the first question:—

Seeing that the Crown has charged the accused with having, through false pretences, induced the complainant, one Belle, to subscribe for shares in the capital stock of The American Shoe and Counter Company, and to have, thereby, received on account some money, and to have thereby also obtained a promissory note in settlement of payment of the balance for the said shares from the same complainant; seeing that if we interpret, in good faith, the words used, in the complaint, in accordance with French or English etymology, we have to come to the conclusion that the complaint does disclose against the accused the facts that he has gotten two things which can be stolen, to wit: two valuable securities, to wit; a sum of money and a note, through the pretence of a fraudulent contract; that is to say, the promise on behalf of Belle to pay, without cause or consideration, the amount of certain shares in the said joint stock company;

Seeing that the general averment of false pretences, right at the beginning of the phrases, which enunciates the infraction, makes it clear that the accused has used false pretences to obtain both the said subscription and thereby the said money and note;

Considering that "to obtain payment of a security through fraud" implies a realization just as perfect, if not more so, than the obtaining of the same;

Considering that the complaint alleges all the essential elements imposed by the Criminal Code to constitute the infraction of false pretences;

Seeing Article 405, C.Cr.:—

The majority of the Judges of this Court answer affirmatively to the first question, Mr. Justice Cross is dissenting.

Passing judgment upon the second question relating to the replacing of Magistrates:—

Seeing that the accused has appeared, according to the con-

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dition of his bail bond before Mr. Magistrate Panet-Angers, having the jurisdiction of two Justices of the Peace for the District of Kamouraska in accordance with Article 823, C.Cr.;

Considering that a Justice of the Peace who issues a warrant of arrest against an accused has always the right to order him to appear before himself or any other Justice of the Peace for the said district; that the continuation of proceedings is allowed before another Justice of the Peace, or Magistrate;

Seeing Article 680 and 831, C.Cr.;

The Court unanimously answer in the negative to the second question.

Passing judgment upon the third question with regard to the illegality of the consent of the accused to the admission of depositions given in other cases, but in accordance with the law;

Considering that an accused may always confess his guilt in full, and *a fortiori* make a minor confession; Seeing Article 978, C.Cr.;

The Court unanimously answer negatively to the third question.

Adjudicating upon the fourth question with regard to the absence of a regular indictment:—

Seeing that the accused has renounced to a jury trial before the commencement of the same, or time fixed for the preparation of such procedure;

Seeing that the accused in pursuance of his own demand to quash the indictment admits *de facto* as an indictment, under Article 872, C.Cr., the complaint, the nullity of which this Court is asked to pronounce upon, not as an act of indictment, but as an act of complaint, as not implying the essential elements of an infraction of the law for false pretences;

Seeing that the accused has proven no prejudice, under this head;

Seeing Articles 825, 828, 1019, C.Cr., the Court unanimously answers in the affirmative to this question;

Passing judgment on the fifth question:—

With regard to the lack of signature at the close of the preliminary investigation on the part of the Magistrate ordering the recognizance of bail by the accused to surrender to the Assize Court;

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Seeing that there has been, in this case, no order of commitment, in accordance with Article 690, C.Cr., but simply an order of recognizance of bail by accused to surrender to the Court of King's Bench, under Article 696, C.Cr., which implies merely, in such a case, the obligation of giving a bond;

Seeing that the rendering of the said order results from the signature, on the 14th of March, 1913, by the accused and the said Magistrate Panet-Angers holding the said preliminary investigation and ordering the said bail bond, on behalf of the accused and his bondsmen, that he would appear during the following term of the Court of King's Bench to be tried for his said offence;

Seeing that the accused has appeared, afterwards, in August, 1913, in compliance with the said order to renounce to his jury trial, notwithstanding any so-called informality;

Considering that there is a distinction to be drawn between the said two orders; that the said Magistrate Panet-Angers had not to sign any order of commitment but simply a bond which he did, on the 14th day of March, 1913;

Seeing Articles 690, 696, 824, 1019, C.Cr.;

The Court unanimously answer negatively to this question.

Passing judgment upon the sixth question with regard to the renunciation by the accused to a jury trial, before any commitment or drafting of an indictment, or appearance before the Assize Court:—

Seeing that the option for a jury trial has taken place in proper time before the opening of the Assize Court, with the permission of a competent Judge, and the formalities required by law, together with the full consent of the accused, in the presence of his lawyer, who has then and there given his written consent to use, in each of the four trials, as complete evidence, the depositions of the witnesses used in any one of the other trials;

Considering that the accused has not suffered any prejudice therefrom;

Considering that the recent amendment to the Criminal Code has abolished, when the accused so demands it, the formalities of the commitment to the Assize Court, as well as the notice to the Sheriff for an option of a trial without jury, and finally that of the

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return of the accused before a competent Judge to hold a speedy trial;

Seeing Articles 825, 826, 827, 828, C.Cr.:

The Court unanimously answers in the affirmative to this question.

And the majority of the Judges of this Court doth order in consequence, that the *acte* of its present answers, after being duly registered and docketed in its records, be sent with the record of the present case, to the said Court of Special Sessions of the Peace for the District of Kamouraska; leaving it to the latter to deal ultimately with the execution of the said sentences.

Conviction affirmed.

N.B.—A similar judgment was rendered in each of the three cases of Pierre M. Gauthier, Oscar Duchesne and Joseph Gamache.

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Re ONTARIO POWER CO. and STAMFORD.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. MUNICIPAL CORPORATIONS (§ II H 2—275)—POWERS—AS TO TAXES—FIXED ASSESSMENT—PUBLIC SCHOOLS, HOW AFFECTED BY.

Sec. 77 of ch. 39 of the Public Schools Act, (Ont.) 1901, as amended by sec. 39 of ch. 89 of Act of 1909, carried into R.S.O. 1914, ch. 266, as sec. 39, covers an exemption by means of a fixed assessment, so that where under the by-law of a township a company's ratable property is to be assessed at a fixed commuted gross sum for a fixed period of years and relieved from any "assessment or taxation" in excess thereof, the company is not thereby exempted from assessment for school rates.

[See also *Re Electrical Development Co. and Stamford*, 18 D.L.R. 70.]

2. TAXES (§ I F—85)—EXEMPTION FROM—COMMUTING AT FIXED GROSS SUM, HOW CONSTRUED—SCHOOLS.

The effect of a fixed assessment by a municipality commuting at a fixed gross sum covering a stated period of years "taxation of any nature or kind whatever" against a company's ratable property used for the corporate purposes of the company is to that extent to exempt from taxation the property to which it applies.

[See also *Re Electrical Development Co. and Stamford*, 18 D.L.R. 70.]

Statement

APPEAL by the Ontario Power Company of Niagara Falls from an order of the Ontario Railway and Municipal Board,

dated the 26th September, 1913, confirming the assessment for school purposes by the Corporation of the Township of Stamford of the appellant company's property in the township.

The appeal was dismissed.

Glyn Osler, for the appellant company, argued that the company was entitled to the exemption conferred by a by-law of the respondent corporation, passed on the 10th October, 1904, and confirmed by the Ontario statute of 1905, 5 Edw. VII. ch. 78, by which the valuation of the company's property for assessment purposes was fixed at $100,000, for the years 1904 to 1924, inclusive. From 1904 to 1912 it was never suggested by any one that the by-law could have any other meaning than that the assessment so fixed should apply to school as well as to other purposes. The provision of the Act of 1892, "An Act to amend and explain certain portions of the School Laws," 55 Viet. ch. 60, sec. 4, forbidding the application of any exemption to school rates, is controlled by the express enactment in the statute of 1905 declaring the by-law "to be legal, valid and binding, notwithstanding anything in any Act contained to the contrary;" and the Board erred in holding that the last-mentioned statute did not prevent the operation of the statute of 1892 (now found in the Public Schools Act, 9 Edw. VII. ch. 89, as sec. 39). He contended also that the by-law did not really exempt. He referred to *Canadian Pacific R.W. Co.* v. *City of Winnipeg* (1900), 30 S.C.R. 558; *Stratford Public School Board* v. *City of Stratford* (1910), 2 O.W.N. 499.

A. C. Kingstone, for the township corporation, the respondent, argued, from a review of the history of the provincial legislation with regard to municipal taxation and exemptions therefrom, that the Legislature should not be considered to have had the intention to withdraw the express statutory prohibition against exempting from school taxes which has been in force ever since 1892, if not before, as suggested by GARROW, J.A., in *Pringle* v. *City of Stratford* (1909), 20 O.L.R. 246, 258, 259. He also referred to *Toronto Public Board* v. *City of Toronto* (1902), 4 O.L.R. 468; Broom's Legal Maxims, ed. of 1911, pp. 438, 461-463; *Freme* v. *Clement* (1881), 44 L.T.R. 399; *Minet* v.

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Leman (1855), 20 Beav. 269; *Pryce* v. *Monmouthshire Canal and Railway Companies* (1879), 4 App. Cas. 197. An exemption by means of a fixed assessment comes within the meaning of a partial exemption under the statute of 1892.

By arrangement between counsel in this and the following case, *Wallace Nesbitt*, K.C., was heard in reply. He referred to the Separate Schools Act, 3 & 4 Geo. V. ch. 71, sec. 66, and to *Stratford Public School Board* v. *City of Stratford*, *supra*.

Meredith, C.J.O.

January 12, 1914. MEREDITH, C.J.O.:—This is an appeal by the Ontario Power Company of Niagara Falls from an order of the Ontario Railway and Municipal Board, dated the 26th September, 1913, confirming the assessment for school purposes of the appellant's property. The exemption which the appellant claims is conferred by a by-law of the council of the respondent, passed on the 10th October, 1904, and it provides that the annual assessment "of all the real estate, property, franchise and effects of the Ontario Power Company, situate from time to time within the Municipality of the Township of Stamford, and used for the corporate purposes of the company, be and the same is hereby fixed at the sum of $100,000 apportioned as follows:—namely, $30,000 upon the gate-houses, penstocks, inlets, inlet bridges and other principal works of the company, situate in the Queen Victoria Niagara Falls Park, and $70,000 upon the other property of the said company situate in the said park or elsewhere in the said municipality, for each and every year of the years 1904 to 1924 both years inclusive, and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of $100,000 apportioned as aforesaid."

On the application of the appellant, an Act was passed on the 25th May, 1905, ch. 78 of the statutes of that year. The Act contains but one section, which reads as follows: "By-law No. 11 of the Municipal Corporation of the Township of Stamford"

(*i.e.*, the by-law in question) "set forth as Schedule 'A' to this Act, is legalised, confirmed and declared to be legal, valid and binding, notwithstanding anything in any Act contained to the contrary."

Oddly enough, the by-law provides that "this by-law and the provisions thereof shall come into full force and effect immediately after the municipality shall be authorised by sufficient legislative or other authority to pass the same;" and, therefore, reading it literally, the event upon which it was to come into full force and effect has not happened, for the special Act does not confer authority to pass the by-law, but confirms it, and, strictly speaking, all that has been confirmed is a provision for exemption to take effect when authority is obtained to pass the by-law.

The case is not distinguishable from the *Electrical Development Company's* case, *post*, notwithstanding the use in the by-law of the words "any assessment or taxation of any nature or kind whatsoever." The addition of the words "of any nature or kind whatsoever" does not add anything to the force of the preceding words, and are but the flourish of the draftsman's pen, nor are the concluding words of the special Act, "notwithstanding anything in any Act contained to the contrary," sufficient, according to the principle of the decision in *Pringle* v. *City of Stratford*, 20 O.L.R. 246, to bring the school rates within the exemption. It is forbidden by sec. 77 of ch. 39 of the statutes of 1901, the Public Schools Act, to hold or construe the by-law as exempting the appellant's property "from school rates of any kind whatsoever;" and, therefore, all the special Act effected, if it effected anything, was to validate a by-law into which the exception of school rates had been practically written by the Legislature.

It was argued by Mr. Osler that the by-law does not exempt from taxation, and is, therefore, not within this prohibition, or the exception contained in the Municipal Act; but that contention is not, in my opinion, well-founded.

The provisions of sec. 77 of ch. 39 of the statutes of 1901 are wide enough to embrace a by-law providing for a fixed assessment. The section provides that "no by-law passed by any municipality after the 14th day of April, 1892, for exempting

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any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever." The words "in whole or in part" appear to me to have been introduced for the very purpose of including an exemption by means of a fixed assessment. They were evidently not intended to apply to an exemption of part of the property, for that is provided for—by the use in the earlier part of the section of the words "any portion of the ratable property." The effect of a fixed assessment is to exempt from taxation the property to which it applies to the extent by which its assessable value exceeds the amount of the fixed assessment; but, if there were any doubt as to the application of the section to fixed assessments, the fact that the by-law in question expressly provides that the company shall not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each year by the application of the yearly rate levied by the municipal council in that year to the fixed assessment, brings the by-law clearly within the scope of the section.

In my opinion, the appeal should be dismissed with costs.

Maclaren, J.A. Magee, J.A.

MACLAREN and MAGEE, JJ.A., concurred.

Hodgins, J.A.

HODGINS, J.A.:—I agree with my Lord the Chief Justice that these cases* are governed by the principle enunciated in *Pringle* v. *City of Stratford*, 20 O.L.R. 246, and that the by-law in question cannot be read or construed as exempting from school taxes. They were passed after the Legislature had expressly enacted that no municipal by-law exempting any portion of the ratable property of a municipality, in whole or in part, should be held or construed to exempt such property from school rates of any kind whatever. In face of that direction from the Legislature, I do not see how this Court can do otherwise than follow it in the construction of these by-laws. See *Smith* v. *City of London* (1909), 20 O.L.R. 133; *Beardmore* v. *City of*

*The reasons of HODGINS, J.A., are applicable to both this case and the *Electrical Development Company's* case, *post*.

Toronto (1910), 21 O.L.R. 505. The case of *Stratford Public School Board* v *City of Stratford*, 2 O.W.N. 499, may be distinguished from the case of *Pringle* v. *City of Stratford*, upon the ground that in the former case the council commuted the taxes and accepted them "for and in respect of all assessable property." There was no property exempted, but the rate imposed on it was fixed and validated by statute.

But I do not see why fixing the assessment at a lower figure than the actual value is not an exemption to that extent. While the assessor is bound to enter the property on his roll at its actual value (Assessment Act 1904, 4 Edw. VII. ch. 23, sec. 22, sub-sec. 3, col. 15), he is also required to enter (col. 16) the total amount of taxable real property, and (col. 18) the total value of property exempt from taxation. He is also to set down the amounts assessable against each person opposite his name in the proper columns for that purpose. This item, viz., the amount assessable, *is not* included in the return (schedule E) required to be made by a ratepayer, although the information from which it is to be ascertained by the assessor is to be stated in cols. 13, 14, 15, 17, and 18. His declaration is (schedule G) that he has set down in the assessment roll "all the real property *liable to taxation*," and that he has justly and truly "assessed each of the parcels of real property so set down" (*i.e.*, the real property liable to taxation) "at its actual value."

I can see no anomaly in the assessor entering the value of the real estate in any of these cases at its actual value, say, $600,000, and in col. 18 entering the total value of property exempt from taxation at, say, $500,000, leaving the amount assessable against the companies, *i.e.*, the total value of taxable real estate in col. 16, at $100,000.

The taxes are to be levied on the whole of the "assessment" for real property, income, etc., and upon all the ratable property (secs. 3 and 4). The Assessment Act of 1904 seems to me to recognise the exemption of separate pieces of a block of property and also of portions of its value. See sec. 5, sub-secs. 1 and 12; sec. 10; sec. 14, sub-secs. 2 and 5; sec. 35; sec. 39, sub-sec. 2; sec. 41. A property worth $600,000, but only assessed at $100,000, is exempt to the extent of $500,000 of its value, and the

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amount of exemption must be represented by land or buildings or the ratepayer's five-sixths interest in the same.

Under sec. 226 of the Assessment Act of 1904, that Act is not to affect the terms of any agreement heretofore made with a municipality or any by-law heretofore or hereafter passed by a municipal council under any other Act fixing the assessment of any property, or for commuting, or otherwise relating to municipal taxation. This would indicate that the provisions as to actual value and otherwise in the Assessment Act are not to override the provision of the special Act. But that section does not affect the provision found in the other Act to which I have referred, and which defines the construction to be placed by the Courts upon agreements or by-laws passed by municipal councils.

Appeal dismissed.

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Re ELECTRICAL DEVELOPMENT CO. and STAMFORD.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. SCHOOLS (§ IV—70)—RIGHT TO TAX EXEMPTED COMPANIES—"TAXATION OF ANY NATURE OR KIND WHATEVER," HOW CONSTRUED.

Under Ontario assessment legislation, an assessment by a municipality to impose upon a company's ratable property certain taxation for school purposes will not be set aside merely upon a shewing by the company that all its ratable property, within the municipality, used for the corporate purposes of the company, is under a municipal by-law commuted at a fixed gross sum covering a fixed period of years in lieu of "taxation of any nature or kind whatever."

[See also *Re Ontario Power Co. and Stamford*, 18 D.L.R. 64.]

Statement

APPEAL by the company from an order of the Ontario Railway and Municipal Board, dated the 26th September, 1913, confirming the assessment for school purposes made by the township corporation upon the appellant company's property in the township.

The appeal was dismissed.

Argument

D. L. McCarthy, K.C., for the appellant company, relied upon the arguments and cases cited on behalf of the appellants in the two previous cases. He referred to the agreement made

in 1903 between the Commissioners of the Queen Victoria Niagara Falls Park and Messrs. Mackenzie, Pellatt, and Nicholls, which was validated by the Act of 5 Edw. VII. ch. 12, in sec. 3 of which is contained the enactment applicable to this case. The by-law under which the appellant company claims the right to exemption was passed on the 10th October, 1904. It is the duty of the proper officials to make up the roll in accordance with this by-law; and, if corrections are required under sec. 97 of the Assessment Act of 1904, the proper remedy is by way of appeal to the Court of Revision.

A. C. Kingstone, for the township corporation. See the note of the argument in *Re Ontario Power Co. and Stamford*, 18 D.L.R. 64.

By arrangement between counsel in this and the preceding case, *Wallace Nesbitt*, K.C., was heard in reply.

Meredith, C.J.O.

January 12, 1914. MEREDITH, C.J.O.:—This is an appeal by the Electrical Development Company from an order of the Ontario Railway and Municipal Board, dated the 26th September, 1913, confirming the assessment for school purposes of the appellant's property.

Although the facts of the case are somewhat different from those of the case of the *Canadian Niagara Power Company*, the result of the appeal must be the same, for the reasons that led to a conclusion adverse to the appeal in that case apply equally to this.

The enactment applicable to this case is contained in sec. 3 of ch. 12 of the statutes of 1905, which provides as follows: "It shall be lawful for the corporation of any municipality in any part of which the works of the company" (*i.e.*, the appellant) "or any part thereof pass or are situate by by-laws specially passed for that purpose to fix the assessment of the property of the said company, or to agree to a certain sum per annum or otherwise in gross, or by way of commutation or composition for payment, or in lieu of all or any municipal rates or assessments to be imposed by such municipal corporation, and for such term of years as to such municipal corporation may seem

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expedient, not exceeding twenty-one years, and any such by-law shall not be repealed unless in conformity with a condition contained therein and this section shall be deemed to have been in force and shall take effect from and after the first day of September, 1904."

The by-law under which the exemption is claimed was passed on the 10th October, 1904, and provides that "the annual assessment of all the real estate, property, franchises, and effects of the Electrical Development Company of Ontario Limited, situate from time to time within the municipality of the township of Stamford, and used for the corporate purposes of the company, be and the same is hereby fixed at the sum of $225,000, apportioned as follows, namely, $140,000 upon the lands, tunnels, wheel-pits, power-houses and gate-houses, penstocks, inlets and inlet bridges, and other principal works of the company situate in the Queen Victoria Niagara Falls Park, and $85,000 upon the other property of the said company situate elsewhere in the said municipality, for each and every year of the years 1904 to 1924, both years inclusive, and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of $225,000 apportioned as aforesaid."

The general law was substantially the same as that in force when the by-law granting exemption to the Canadian Niagara Power Company was passed, except that the provisions of the Municipal Act relating to exemptions in force when the later by-law was passed were consolidated in 1903 and appear in that Act (the Consolidated Municipal Act, 3 Edw. VII. ch. 19) as secs. 366*a*, 591 (12), and 591*a* (*g*).

The appeal should be dismissed with costs.

Maclaren, J.A. Magee, J.A.

MACLAREN and MAGEE, JJ.A., concurred.

Hodgins, J.A.

HODGINS, J.A., also concurred, for the reasons given by him in *Re Ontario Power Co. of Niagara Falls and Township of Stamford*, 18 D.L.R. 64.

Appeal dismissed.

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Ontario Supreme Court, Middleton, J. January 15, 1914.

1. MUNICIPAL CORPORATIONS (§ II G—207)—AUTHORITY TO CONSTRUCT BRIDGE—PERMISSIVE ONLY—COMMON LAW RIGHTS—NUISANCE—INJUNCTION—DAMAGES.

Legislative authority, merely permissive in its terms, does not abrogate common law rights, hence where under the Ontario Municipal Act authority is given a municipality to build a bridge over a river, the work must be done with due regard to the rights of others, and the resultant stopping or partial stopping of flowing water gives to persons injured thereby a *primâ facie* right of action for damages and an injunction against the nuisance.

[*Metropolitan Asylum District Managers* v. *Hill*, 6 A.C. 193, 198, 203; *Canadian Pacific R. Co.* v. *Parke*, [1899] A.C. 535; *West* v. *Bristol Tramways*, [1908] 2 K.B. 14, referred to.]

2. EVIDENCE (§ VII A—590)—EX POST FACTO EXPERT TESTIMONY—TEST—DIFFERENCE IN VIEWPOINT OF EXPERTS.

Upon a question of negligence by a municipality, in omitting to take the advice of competent engineers in constructing a bridge, the *ex post facto* expert opinion of such engineers, although endorsing the methods adopted without their advice, is entitled to less weight owing to the difference in viewpoint of such experts.

Statement

THESE actions were brought to recover damages for the flooding of the lands and works of the respective plaintiffs. The actions were tried together at Guelph and Toronto by MIDDLETON, J., without a jury.

Judgment was given for the plaintiffs with damages and injunction.

Sir George Gibbons, K.C., and *G. S. Gibbons*, for the plaintiffs.

I. F. Hellmuth, K.C., *J. J. Drew*, K.C., and *P. Kerwin*, for the defendants.

Middleton, J.

January 15, 1914. MIDDLETON, J.:—The actions arise out of the flooding of the works of both plaintiffs in the spring of 1912 and of the worsted company in the spring of 1913, the flooding being caused by the erection of a bridge by the defendants across the river Speed at Neeve street, which proved inadequate to permit the passage of the waters during spring freshets.

Before dealing with the legal question involved, it is desirable to set forth in some detail the facts giving rise to the actions.

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For many years a bridge has crossed the river at Neeve street, at this particular place. The bridge constructed in 1882, called throughout the evidence "the old bridge," was a steel structure, resting on piers at either bank of the river and on a pier five feet in width in the centre of the street. Each span was fifty feet clear and seven feet nine inches above low water level.

The bridge which has caused the present difficulty was constructed in 1911. It has also two spans, but the end piers have been brought in towards the river-bed to some extent; each span is narrowed by ten feet; and the centre pier is wider. Instead of the clear waterway being open to the floor of the bridge, each span is now a low arch, springing from a point four inches above low water level, and the crown of each arch is only four feet nine inches above low water level. There is no doubt that the flooding was occasioned by the inadequacy of this waterway.

The questions to be investigated are: first, the right, if any, of the defendants to interfere with the flow of water in the river; and, secondly, if it is found that the liability of the defendants depends upon negligence, whether there was in fact negligence.

The plaintiffs not only base their contention upon their rights as riparian proprietors owning lands abutting on the river, but rely, to some extent at any rate, upon their rights with reference to a small stream emptying into the river.

The title to the lands is also perhaps material. The whole territory was originally owned by the Canada Company. This company laid out the city of Guelph, and registered a plan of the original city. This plan runs only to the bank of the river. Neeve street is not shewn, and the land of the plaintiffs, which is across the river, is not covered by this plan.

The township of Guelph was also surveyed by the Canada Company, and the plan covers the land to the opposite bank of the river. The lands in question form part of lot 3 in division F. This plan was registered in December, 1846.

Sir John A. Macdonald became the owner of this lot, and on

the 3rd July, 1856, he made plan No. 113, subsequently registered in 1859. This shews the carpet company's lots as Nos. 83 and 84, fronting upon the river, and the spinning company's lot as No. 72. The small creek also appears upon this plan.

When the Canada Company parted with its title to lot 3 in 1832, by a conveyance to one Crawford, the lot was described by metes and bounds, running to the high water mark of the river. This was conveyed by Crawford to one Ross, and by Ross to Sir John A. Macdonald in 1854. After Macdonald's plan, he conveyed the lots in question, describing them as lots 83 and 84 upon the plan.

Queen street is a street immediately west of the river, paralleling, and at a short distance from, its bank. A plan was registered on the 10th December, 1864, of part of Sir John A. Macdonald's survey, covering land west of Queen street. The importance of this plan is that it shews what is apparently a series of trenches or ditches connecting with what appears to be the so-called creek emptying into the river. The evidence discloses the fact that all this land was a low-lying tamarack swamp, only rendered available for cultivation or building by means of drainage. The creek or stream may have been originally the natural outlet for the water from this swampy district, or it may have been artificial. I think the proper inference is, that the outlet from these swamp drains was continued in the line of the natural outlet, and that this ditch or stream, as it is now found, represents the original stream or watercourse, straightened and deepened artificially. This view is confirmed by plan 184, registered on the 22nd March, 1869, where the stream in question is shewn crossing Queen street and emptying into the river. The configuration of the lands suggests that this was the natural course of the drainage from the old swamp.

The branch of the river Speed in question drains an area of 110 square miles. This drainage basin has been cultivated for many years, and there has not been any appreciable change in the area, by reason of deforestation or drainage of swamps, or the construction of drainage schemes, during the last forty years. The country was opened up for settlement and most of the

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clearing done many years before this period; and, while there has during the last few years been some change, it has been so slight in extent as not to make any radical difference in the way in which the water would get away, either during the spring thaws or as the result of any heavy rainfall.

During the time of low water, the stream is small and quite insignificant; but in the springtime it becomes swollen, and the flow is for some time very heavy.

Some distance above the bridge in question, Colonel Davidson and his sister have lived for many years, in a residence the grounds of which reach to the river bank. The bank is there supported by a retaining wall some four feet in height, and beyond this a lawn slopes up to the steps of the main entrance to the house. A driveway passes in from the road around a circular bed, in which a sun-dial is placed. In the spring, the high water very frequently rises over this retaining wall and up upon the sloping lawn. This affords an excellent gauge for roughly estimating the comparative heights of the flow.

It is shewn by the Davidsons that the water frequently reached the lower edge of this circular bed. On three occasions, the flood has gone beyond that. In 1869, the flood was so great as to reach the steps of the house. This occurred again in 1912; and in 1913 the flood was almost as high.

The flood of 1869 was shewn to have been occasioned by the giving way of a dam upstream, thus allowing the escape of a considerable volume of penned-back water, which augmented the already heavy flood. This high water lasted only for a short time, and passed away.

In 1912, the conditions were entirely unprecedented and abnormal. Streams all over the country were swollen to an extent exceeding anything within the memory of living persons. This was the result of a sudden, heavy, and protracted warm rain coming upon an unusually large amount of snow which lay above frozen ground. This condition resulted not only in the running off of an enormous amount of water, but the frozen ground prevented percolation and facilitated the speed of the flow, so that the streams were swollen to this extreme degree. That was the case not only in the district in question but

throughout all western Ontario; more bridges and dams being carried away than ever before, and great damage being done throughout the Province.

The flood of 1913, while not as great as that of 1912, exceeded all other floods except that of 1869. The cause of the flood of 1913 was not so satisfactorily explained.

The plaintiffs claim an injunction in the action, taking the ground, as to this, that when the flood of 1912 stood alone it perhaps might be regarded as an unprecedented occurrence and not likely to happen again, yet, when the bridge in the succeeding year also proved to be inadequate, it became apparent that, quite apart from any question relating to its original construction, the bridge ought not to be allowed to continue. I am relieved from having to consider this aspect of the case with any anxiety, as I am told that such works have now been executed as so to increase the waterway that a flood even as great as that of 1912 will not occasion injury to the adjoining owners.

While there is great divergence of view between the engineers for the opposing parties, upon questions relating to the propriety of the bridge, I am fortunate in that there is no difference between them concerning the facts of the case. Since this action was brought, and in preparation for the trial, very careful surveys were made by both parties. After the plaintiffs' engineers, Mr. Bell and Mr. McCrae, had given their evidence, the data contained in that evidence was accepted by the defendants' engineers as substantially corresponding with their own results; and where there was any divergence they were ready to accept Mr. McCrae's figures, as his measurements had evidently been made with the greatest care and thoroughness. These figures shewed that when the water reached what has been called the Davidson high water mark, or the normal high water mark for floods, as indicated by the flow upon Davidson's lawn, the flow amounted to 2,350 c.f.s. (cubic feet per second) at the bridge.

In the flood of 1912 the flow reached 4,400 c.f.s., and in 1913, 3,700 c.f.s. The bridge, it is said, would permit the passage of 2,937 c.f.s. (though exhibit 28 shews it full with a flow

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of 2,750 c.f.s.), so that the effect of the inadequate waterway at the bridge was to bank the water up over the bank of the stream above the bridge. It crossed Neeve street and Cross street and flooded the premises in question.

The bridge was not constructed under a by-law. On the 20th March, 1911, the public works committee reported in favour of the construction of a concrete bridge over the river at Neeve street, and at a meeting of the council on the same day this report was adopted. On the 4th December, 1911, a by-law was passed to raise the money necessary to defray the cost. It is not clear whether this was before or after the work was done.

What precautions, if any, were taken by the defendants before the construction of the bridge, does not appear. It does not appear what, if any, information they had concerning probable floods. The engineer, if there was an engineer responsible for the construction of the bridge, was not called.

Able and competent engineers were called for the defendants, and these men took the responsibility of saying, assuming knowledge of all that is now known concerning the flow of the river, the watershed, etc., that the bridge was from that view-point sufficient, and that they would have advised its construction.

Put shortly, their theory is this. Engineering is a practical science. When confronted with a problem as to the space that should be allowed for possible freshets, the first thing that is sought is knowledge of the actual conditions of the river at flood-time over a series of years; in this case the conduct of the river appears to have been fairly uniform; normal high water approximated a certain mark upon Davidson's lawn and had never gone beyond that for forty years. Forty-two years ago it did reach a rise exceeding this, but that was on account of the breaking of a dam, and afforded no real exception. In many seasons the river did not even reach the normal high water mark, and except in 1869 had never gone beyond it. A factor of safety of 1.25 was, therefore, ample. It could not be expected that the flood would exceed forty years' record by more than 25 per cent. Assuming the figure given for normal high water, 2,350, and applying this factor, the result would be 2,937,

a figure slightly in excess of the bridge capacity; but the trifling difference would be more than overcome by the slightest rise on the upper side of the bridge, which would cause increased discharge.

The plaintiffs' engineers state that this theory is entirely erroneous, because the problem has been approached in altogether a wrong way. They say that the controlling factor in the consideration of the problem is the drainage area. When this is known, the greatest possible run-off should be ascertained; then provision should be made to take care of it. The drainage here is 110 sq. miles. The possible run-off is 40 cu. ft. per second per mile, or 4,400 ft.—exactly the figure reached in the flood of 1912. This run-off of 40 ft. is not a run-off to be normally expected, but is the result of the abnormal combination of what must be regarded as normal conditions. It is by no means unusual to have a heavy snow-fall continuing well into the spring. It sometimes occurs that this snow-fall is resting on frozen ground. In our somewhat erratic climate a warm rain continuing for several days is a thing to be expected. When the three conditions—frozen ground, heavy snow, and a warm rain—concur, a heavy flood is inevitable, particularly if the rain lasts. No one can say when such a combination may take place. It may not take place for fifty or a hundred years; or it may take place for several years in succession. A municipality, when constructing a permanent bridge, ought to make provision for that which is almost certain to happen, it may be sooner or it may be later.

To this the defendants rejoin: "The liability of the city, if any, must be based upon negligence. If we had received and had acted upon the opinions of the eminent engineers now given in evidence on our behalf, it would be impossible to say that there was negligence. Negligence would not be proved merely by shewing that there is a difference of opinion among engineers, or that there was error in the advice of these competent engineers; and it is contended that if this is so we can no more be liable if what we did, even in the absence of any engineering advice, is now shewn to be the very thing that a competent engineer would have advised."

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I leave the discussion of this question for the present.

The right to the uninterrupted flow of the water past the plaintiffs' property is not disputed, but the defence rests upon the law laid down in *Hammersmith, etc., R.W. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, and *Vaughan* v. *Taff Vale R.W. Co.* (1860), 5 H. & N. 679, and the statutory authority of the Municipal Act. The principle is thus put in *Canadian Pacific R.W. Co.* v. *Roy*, [1902] A.C. 220, 231: "The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty." The obvious exception as to negligence is indicated in the words of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, 455-6: "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."

If the very thing authorised necessarily interferes with the common law rights of others, then there can be no right of action, and one expects to find in the statute some provision for compensation; but the absence of such a provision does not create a right of action; it only suggests the more careful scrutiny of the Act to ascertain whether the real intention of the Legislature was to permit the interference with private rights without compensation.

In accordance with this principle, it has been laid down that where the Legislature has conferred authority by an Act which is permissive in its terms there is no authority to ignore the common law rights of others.

Thus, in *Metropolitan Asylum District Managers* v. *Hill* (1881), 6 App. Cas. 193, we find Lord Blackburn stating (p. 208): "It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private

rights of individuals, to shew that by express words, or by necessary implication, such an intention appears," And (p. 203): "Where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorised by the Legislature, would entitle any one to an action, the right of action is taken away. . . . The Legislature has very often interfered with the right of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others. What was the intention of the Legislature in any particular Act is a question of the construction of the Act." Lord Watson states the principle in similar terms, and adds (p. 213). "Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended the discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose." Earlier in the case (p. 213) he had made the statement, with reference to the obligations of those attempting to justify a nuisance under a statute: "Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights." The second proposition is equivalent to the "negligence" defined by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*.

In *Canadian Pacific R.W. Co.* v. *Parke*, [1899] A.C. 535, Lord Watson again states the law in much the same terms (pp. 544-5): "Whether, according to the sound construction of a statute, the Legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the

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Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others."

West v. *Bristol Tramways Co.*, [1908] 2 K.B. 14, is a good illustration of the obligation resting upon those who have statutory authority to perform a work which can be done without creating a nuisance, so to perform the work as to avoid injury to others.

In Halsbury's Laws of England, vol. 21, para. 785, the rule is thus clearly stated: "The particular act may be held not to be authorised by statute when there is a merely discretionary power or permission given to a public authority enabling the act to be done or not to be done at the will of the authority, or where the power enables it to be done by an alternative method which would not have caused injury." See also para. 879.

In the Municipal Act, authority is given to erect a bridge, but a bridge could have easily been erected so as not to dam the stream, even in times of freshet, and cause it to overflow its banks and flood the riparian proprietors.

In this view of the case, there is, it seems to me, liability quite apart from any finding of what I may call actual negligence, because the very thing done here was not authorised by the Legislature, but the construction and mode of construction were left entirely to the municipality; secondly, because the legislation was permissive only; and, thirdly, because the construction of a bridge only was authorised, and not the obstruction of the flow of the river.

I might here end my judgment, but it is better for a trial Judge to indicate his view upon all issues presented and so lighten the labours of any appellate Court.

I think that there was in this case negligence in the construction of this particular bridge. There was no reason why an ample waterway could not have been provided. Nothing in the physical situation invited or required that the waterway should be cut down to the smallest dimension consistent with safety. No investigation is shewn to have been made previous to the construction of the bridge; and, for the reason given by

Mr. Lea and Mr. McCrae, whose evidence appeals most strongly to me, I think that in this case a much larger space should have been left.

Mr. Mitchell and the other engineers called for the defence now give their opinion *ex post facto*, and justify the design of the bridge.

If negligence, in its ordinary sense, is necessary for the plaintiffs' success, and if the defendants had obtained and acted upon these opinions in the first instance, I could not have found against them, because they would have acted properly and without negligence if they relied upon the advice of competent engineers. But that is not this case. In the first place, I do not think that these engineers would have advised this particular structure if consulted before the work was done. Now the object before them is to ascertain how small a waterway can be justified. If consulted before the work was done, when the reduction of the waterway was not a thing to be sought after, as it was no advantage in any way, the attitude would have been quite different, the motto "safety first" would have had its influence, and an ample space would have resulted. They would not have sought to ascertain the smallest justifiable factor of safety, but would have made ample allowance.

I say this without in any way disparaging either the honesty or ability of these engineers, but to indicate the unconscious effect of the different view-point.

Neither law nor reason justifies the position taken by the defendants, that, where works are constructed without expert advice, which should have been had before the construction, the defendants can be placed in the same position as if they had obtained advice, by producing experts at the trial who say, "If we had been consulted we would have given advice which would justify the course adopted."

Apart from the infirmity of *ex post facto* theories, already pointed out, the defendants are by this reasoning able to justify by calling one or two engineers whom they select out of the large number available. They may have now laid the situation before a score of engineers, and almost all of them may have

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condemned, and only two or three may uphold, the plan adopted. They, and they only, are called.

Where the work is in fact undertaken without expert advice, and expert advice should have been obtained, this is negligence; but it is not enough to entitle the plaintiffs to succeed, for the defendants may have ignorantly constructed a work on quite proper lines, and the sufficiency of what has been done becomes a fact to be ascertained upon the whole expert evidence, weighing and considering the reasons given by the experts on both sides.

Jackson v. *Hyde* (1869), 28 U.C.R. 294, was an action against a surgeon for negligence. He exercised his own best judgment and skill, and at the trial produced the evidence of other surgeons of the highest standing, who said that, in the circumstances shewn, they would have adopted the same course. It was held that he could not be found guilty of negligence, even though other men of equal eminence would have adopted another course. Then, it was said in the course of the judgment, had he called a consultation of three men before the operation, and had they advised the course adopted, could it be said that the defendant had acted ignorantly, etc.? "In what manner does this after justificatory and approving evidence of what had been done differ from the prior advice and recommendation to do the same act and in the same manner?"

The question in issue there was the negligence of the man professing skill, and the case would have been quite in point here if the work had been done by an engineer who had advised it. Then it would not have been open to me to find negligence on his part, in view of the evidence of the engineers at the trial; but, as I have pointed out, when the work is done without advice or skill, the question is, it seems to me, a different one.

Schwoob v. *Michigan Central R.R. Co.* (1905), 9 O.L.R. 86, is in no way in conflict with this.

Some endeavour was made at the trial to shew that the flooding of the premises in question was not in fact caused by the bridge, but was caused by the small concrete diverting dam

erected by the defendants below the bridge. It was also contended that the defendants are not responsible because the flooding would have taken place quite apart from the bridge.

On the evidence, I am against the defendants on both these contentions.

With reference to the damages, I accept the plaintiffs' evidence, and I discredit Miller, when he seeks to attack his former employers. I think, as to the claim, that there is in some of the details some inflation, and that the amounts should be reduced slightly below the figures given. Absolute accuracy cannot be expected in estimating the exact amount of loss, particularly when the amount is estimated on a percentage of values; and, while the plaintiffs' evidence is fair, I think the amounts should suffer a general reduction, which will cover some of the minor matters in which error may exist.

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I would award the worsted company for the 1912 floods $15,000, and for the 1913 floods $6,000; and the carpet company for the 1912 floods $5,500.

Costs should follow the event; the bridge, as it stood in 1912 and early in 1913, should be declared a nuisance; and an injunction should be granted: see *Alex. Pirie & Sons Limited* v. *Earl of Kintore*, [1906] A.C. 478.

Judgment for plaintiffs.

REX v. "THE STADIUM."

Quebec King's Bench (Crown Side), Gervais, J. June 22, 1914.

1. SUNDAY (§ II—5)—SPORTS AND AMUSEMENTS—SKATING RINK—FRANCHISE TO CLUB UNDER QUEBEC STATUTE.

As section 16 of the Lord's Day Act, R.S.C. 1906, ch. 153, preserves in any province the provisions of any Act or law already in force there, an athletic institution which has acquired the rights and franchises granted by statute of the province of Quebec to an athletic club prior to the federal "Lord's Day Act" including by implication the right to keep its skating rink open on Sunday, has the right to maintain and operate a public skating rink on Sunday if permitted to do so under municipal by-laws and ordinances.

Statement

APPEAL on behalf of "The Stadium" from a conviction which was handed down against it on the 31st day of March, 1913, by

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the Police Magistrates' Court for the district of Montreal, imposing a fine of $50 for having kept open a skating rink on the Sunday dated 12th January, 1913, in Montreal.

The parties by consent have submitted the present appeal, at the argument, upon the evidence which had been adduced in the Court below, as well as upon the documents filed in the case.

The conviction was quashed.

Rinfret, K.C., for the appellant.

McGoun, K.C., for the Crown, appearing by special leave.

Gervais, J.

GERVAIS, J.:—The appellant is charged with having violated according to the complaint dated the 12th February, 1913, the Dominion Lord's Day Act by keeping running a skating rink on the Sunday.

The appellant admits the fact of the opening of the said skating rink, but he avers as a plea in bar that it had bought, in 1905, by virtue of Act 5 Edw. VII., ch. 89, sec. 5, the rights, privileges and franchises, especially the right to keep open a public skating rink, which had been granted to the Amateur Athletic Association "Le Montagnard," constituted as a corporation by Letters Patent issued by the Lieutenant-Governor in Council of the Province of Quebec on the 3rd December, 1898, and on the 6th of April, 1904.

As a second ground of defence, the appellant alleges that he has kept open the said skating rink even on Sundays, in accordance with the by-laws of the said corporation of La Montagnard and that of "The Stadium," the whole in accordance with the usages of the Province of Quebec in virtue of its own law relating to Sabbath Day Observance.

In the third place, the appellant refers to section 6 of the said Act, 5 Edw. VII. ch. 89, as the same merely prohibits on a Sunday the exercise of certain powers herein mentioned and relating only to the sale on that day of refreshments or intoxicating liquors, or the keeping of a roof garden.

Finally, the appellant contends that by the interpretation *a contrario* of said section 6, side by side with section 5, it is authorized to keep its said skating rink open on a Sunday.

These four allegations on behalf of the appellant are proven.

What is the consequence to be drawn from it?

It is clear that the said Act, 5 Edw. VII., ch. 89, has confirmed expressly the rights, privileges and franchises which had been granted by Letters Patent, some twelve years ago, to its predecessors "Le Montagnard."

If we examine side by side section 5 of the said Act, which contains no prohibition to keep the said skating rink open on Sunday, and section 6 which enacts prohibition to exercise certain powers under the same section on Sunday, we have to come to the conclusion that *a contrario* the special Act has regulated as far as the appellant is concerned, the maintenance on Sunday of the said skating rink. It must be conceded that in any penal statute case, or a criminal law case, the strictest interpretation must be given to any enactment, in favour of the defendant.

Finally, we must take into consideration the fact that the Federal Act on Sabbath Day Observance in its 16th section specially enacts that nothing can be construed in the Federal Act as to annul and set aside any Provincial Act already passed for the regulation of Sabbath Observance.

For all these reasons we think that there is error in the conviction brought about against the appellant on the 30th day of March, 1913, by the Police Magistrates' Court for the District of Montreal.

Seeing article 16 of chapter 153 of the Revised Statutes of Canada, 1906, as well as the provincial Act of Quebec, 5 Edw. VII. ch. 89, this Court proceeding to render the judgment which should have been given in the Court below, doth maintain the present appeal; doth quash the said conviction; and doth acquit the appellant from the said charge, that of having on the 12th day of January, 1913, violated the Federal Sabbath Observance Act.

Conviction quashed.

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HOPKINS v. JANNISON.

Ontario Supreme Court, Middleton, J. January 9, 1914.

1. SALE (§ II C—35)—WARRANTY OF FITNESS—PURCHASER'S OWN JUDGMENT AND SKILL—EFFECT.

The implied warranty that a machine sold by a manufacturer or dealer shall be fit for the particular purpose for which it is to be used, does not import that the machine will accomplish the purchaser's purpose, where the purchaser has relied on his own judgment and skill rather than the vendor's advice.

[*Shepherd* v. *Pybus* (1842), 3 M. & G. 868, followed; *Wallis* v. *Russell* [1902] 2 I.R. 585, referred to. See also on implied warranties, *Alabastine Co. Paris Ltd.* v. *Canada Producer and Gas Co. Ltd.*, 17 D.L.R. 813, and *Jones* v. *Just* (1868), L.R. 3 Q.B. 197.]

Statement

ACTION to recover a balance of the price of a machine sold by the plaintiffs to the defendants; and counterclaim to recover moneys paid on account of the price and damages by reason of the alleged failure of the machine to comply with the contract. The action was tried before MIDDLETON, J., without a jury, at Sault Ste. Marie.

Judgment was given for the plaintiffs.

R. McKay, K.C., for the plaintiffs.

A. C. Boyce, K.C., for the defendants.

Middleton, J.

January 9, 1914. MIDDLETON, J.:—Although this action was tried some time since, and very fully argued at the trial, the defendants desired to supplement the oral argument by a written argument, and I received the plaintiffs' answer to this only on the 27th November.

Originally there was much conflict upon the facts between the parties, but the evidence at the trial cleared that up, so that now there are not many questions of fact remaining.

The Jannisons, father and son, are contractors carrying on business at Sault Ste. Marie. Under a contract dated the 13th June, 1911, they undertook the construction of certain sewers in that city. In addition to this, they carried on a general contracting business, covering many other things—the making of excavations for sewers and foundations.

Prior to the events which gave rise to this action, they had done all their excavation by hand labour. They had had a

certain amount of trouble with the large number of men employed, arising from strikes and demands for increased pay, and were consequently ready to listen attentively to any proposition which would tend to solve the labour problem.

The Marion Steam Shovel Company are manufacturers of steel shovels and kindred machinery, upon a very large scale, at Marion, Ohio. The plaintiffs, F. H. Hopkins & Co., are dealers in machinery at Montreal. They are, among other things, what is called, in mercantile parlance, "agents" for the Marion company. The true relationship between these two companies is defined by two letters dated the 3rd June and the 20th June, 1910. The plaintiffs agreed to act as representatives of the Marion company in the Dominion of Canada. All sales in Canada were to be made through them. They, however, purchased the machinery from the Marion company, and made their own terms with the purchasers, giving or withholding credit as they saw fit. The so-called agency was in truth nothing more than an exclusive right to handle the goods in question.

Construction works of great magnitude were in progress at the American Sault. Mr. William Macdonald was in charge of the operation of a steam shovel for some contractors upon these works. Mr. Jannison was apparently much impressed with the way in which these steam shovels handled large quantities of earth, and was also impressed by the skill and ability with which Macdonald handled the machine under his control. He sought out Macdonald, and proposed entering into partnership with him, and that the partnership should purchase a steam shovel with which the work at the Canadian Sault should be carried on under Macdonald's supervision.

Macdonald was a man of great practical ability and much experience in the handling of machinery of this class. He claims, and no doubt quite rightly, that no one could be better qualified to form and give an opinion on steam shovels and their operation, and that no one could operate a steam shovel better.

The result of the conferences between Macdonald and Jannison was an inquiry addressed by Macdonald to the Marion

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company at Ohio, to which they replied on the 27th October, 1911, forwarding their catalogue and a letter, in which they said:—

"We trust these will give you the desired information, and, in case you are in the market for anything in this case, we would ask that you kindly give us full information regarding your requirements, so that we can then figure on a machine which would without doubt be the most suitable for your work.

"If you have sewer excavations to do, we would like to know the maximum and minimum depth, width at top and bottom, nature of the material, etc., so that we may figure on suitable length of boom and dipper handle to meet all the conditions.

"We have supplied several of these machines for similar work, and believe that we can take care of your needs very nicely."

Macdonald, on receiving this letter and enclosed literature, handed it over to Jannison for consideration. On the 17th November, Jannison wrote the Marion company as follows:—

"Kindly forward us by return of post your catalogue of your steam shovels, also prices, from 5/8 cubic yards to 1¼ full swing revolving. Our line of business is at present chiefly sewers ranging from 10 to 18 feet in depth, laying pipe from 8" to 18", and small cellars.

"In some places here it is rock to a depth of 6 feet, some quicksand and some good digging."

On the 21st the Marion company replied as follows:—

"We have your favour of the 17th inst., and in compliance with request we are pleased to enclose herewith circulars of our model 28, 5/8 yards, model 30, ¾ yard, and model 35, 1¼ yard, revolving steam shovels, which we believe will give you the desired information.

'We can equip any of these shovels with special dipper and dipper handle for the purpose of digging sewers, but for a sewer up to eighteen feet in depth we would recommend the larger size of revolving machine, and in cases where there is rock, if this is hard, it would be necessary to blast it.

"Inasmuch as we have representatives in Canada, Messrs. F. H. Hopkins & Co., Montreal, we will refer your inquiry to

them and ask that they take this matter up direct with you and supply you with any additional information required.

"We trust that you can see your way clear to favour them with your order for requirements, in which case it will receive our very best attention, and thanking you in advance we beg to remain."

With this letter were enclosed prints of models 28, 30, and 35. On the same day, the 21st, the Marion company wrote Hopkins, quoting Jannison's letter, sending a copy of their reply, and adding: "Kindly take this matter up direct with them and ascertain definitely what the requirements are, and then quote on suitable machinery; and, if you are not in a position to do this, kindly supply us with all the information, and we will assist you, if possible."

On receipt of this, on the 23rd November, Hopkins wrote to Jannison, advising him of the receipt of this communication, and adding: "As our Mr. Osborn is due at the Sault at noon to-day, we wired him to call upon you." Osborn accordingly saw Jannison.

Osborn is a salesman, and not a practical engineer. He was taken to the work which was being carried on by Jannison, and heard what Jannison's requirements were. Osborn was plainly a man without any engineering or practical knowledge. He promised to take the matter up with his principals and ascertain whether a machine could be constructed to meet Jannison's needs, and ascertain the price. Accordingly, he wrote on behalf of Hopkins to the Marion company, on the 30th November, as follows:—

"In reference to your favour of the 21st inst. regarding inquiry received from David Jannison and Son of Sault Ste. Marie, may say that the writer was at the Sault a few days ago and went into this matter very thoroughly with Mr. Jannison, and we now wish to give you particulars, and would ask you to let us have your suggestion and very best price on equipment to suit his requirements.

"They require a steam shovel to be used for trench work, of the smallest size, which will give them a capacity of about 300 yds. per day. The maximum depth will be 13 ft., and the

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trench is to be three to four feet wide. They require this shovel on wide gauge trucks, and would prefer to have same mounted on wide gauge traction wheels, if possible.

"We would also ask you to let us have the extra price for the standard boom and dipper handle additional, also extra price for the necessary equipment for operating clam shell bucket, as illustrated your circular covering model 30 shovel. What we require is a proposition on the very smallest shovel which can be equipped in this way for trench work; in fact, if a model 28 would handle the work, they would much rather have this size shovel, as, when the trench work is finished, they wish to use this shovel for small foundation work. Therefore, the very lightest outfit will answer their requirements the best.

"If you will kindly look into the matter and let us have full particulars at your earliest convenience, we will be very much obliged."

To this, reply was made on the 9th December, as follows:—

"We have your favour of the 30th ult. in reference to the inquiry of Messrs. Jannison & Son, Sault Ste. Marie. This proposition has been referred to our engineering department, and we are enclosing herewith two blue prints (outline drawings) shewing our model 28 equipped with eighteen foot boom, twenty foot dipper handle and special trench dipper, in position on cross-section of a trench three to four feet wide and thirteen feet deep. We are of the opinion that the model 28, thus equipped, will do the work satisfactorily, and, with the proper management and handling, we believe would meet the required capacity of three hundred cubic yards per day of ten hours. We have shewn the machine with the standard gauge traction wheel mounting, and we are of the opinion that the most satisfactory method of operation would be to mount the machine on timbers spanning the trench, as shewn on sketches at the left of the enclosed blue print. We will quote you prices as follows:—

"Price of the model 28 revolving steam shovel, complete, equipped with eighteen foot boom, twenty foot dipper handle and special trench dipper, f.o.b. Marion, Ohio . . . $3,750.

"Price of the standard shovel equipment, including fifteen foot boom, less such parts as can be taken from the special or eighteen foot boom, standard 9 ft. 6 inch dipper handle, less socket and adjusting casting, which can be taken from the twenty foot dipper handle; and standard 5/8 yard manganese front dipper, f.o.b. Marion, Ohio . . . $420.

"Price of the extra attachments necessary to operate a ½ yard clam shell bucket with a model 28 steam shovel, including twenty foot boom and extra drum with fittings and boom raising and lowering device, but less the clam shell bucket; f.o.b. Marion, Ohio, . . . $425.

"We can ship the machine with the special equipment in three to four weeks after receipt of order, with full instructions.

"We are also enclosing herewith one blue print drawing No. 4584 and one set of specifications covering the standard model 28 steam shovel."

On the 15th December, Hopkins wrote Jannison making what is called a formal proposal based upon this, from the Marion company. The letter is as follows:—

"In further reference to the writer's visit and his conversation with your Mr. Jannison regarding special steam shovel arranged for trench work, we may say that we have had this matter up with the engineering department at the factory and we are now enclosing herewith our formal proposal, blue prints and specification, covering trench machine, arranged to take care of your work.

"We are submitting a proposal on our new model 28 shovel, equipped with an 18′ boom and 20′ dipper handle, also special trench dipper, and, if you will refer to blue print, we shew this machine in position on cross-section of a trench 3′ or 4′ wide and 13′ deep.

"We are of the opinion that the model 28 thus equipped will do the work satisfactorily, and, with proper handling and management, we think should meet your requirements of a capacity of 300 cu. yds. per day of ten hours. We have shewn the machine with the standard gauge traction wheel mounting, and we are of the opinion that the machine, to operate in the most satisfactory manner, should be mounted on timbers span-

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ning the trench, as shewn on the sketches at the left of blue print.

"In our proposal we are giving you the extra cost for equipping this shovel with the ordinary boom and dipper handle, if used for foundation work, and also the extra for the necessary attachments in order that the shovel can be used to operate a ½ yd. clam shell bucket, and we are also including a price on a standard ½ yd. clam shell bucket.

"Regarding shipment of a machine of this description, we may say that we could have same shipped in from three to four weeks of receipt of order.

"We are enclosing herewith blue print No. 4583 and one set of specifications covering the standard model 28 shovel.

"We wish you would look over this proposition thoroughly, and if you will kindly drop us a line advising us when it will be convenient to have our representative call and go fully into this matter with you, we will be very pleased to discuss the matter fully.

"Trusting to hear from you shortly, we are," etc.

This letter was accompanied by a form of contract proposed, blue prints shewing the details of the construction, and complete specifications. All this, it is to be noted, relates to a machine based upon what is known as a model 28, which is the lightest machine, at all corresponding to this type, manufactured.

On the 19th December, Jannison wrote in reply as follows:—

"In reply to your letter would say that we think this machine a little light for our work, and would prefer a model 35. We are making a few suggestions, etc. Could you change the radius of the boom for long and short sticks?

"Have the long dipper handle about 30 ft.

"Have the long sticks made heavier than short sticks if possible.

"Have 5/8 yds. dipper made without bail and with a flanged lip sheet.

"Change the distance over traction wheels sixteen feet with 20" tires, also have holes taped in tires for spuds for climbing.

"Have oil pump instead of lubricator, duplex pump instead of Star Honey pump.

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"Have the dipper teeth to use reversible points, and one extra set of shanks and one extra set of points, one extra U bolt for dipper sticks.

"What is the price of standard dipper 1¼ yds. with short handle?

"We would be pleased if you would give us this information as soon as possible, and send your agent two or three days after that. Kindly advise us as to when he will arrive here, and we shall arrange to meet him, also advise us the earliest you could ship this machine if ordered."

This letter was the result of a conference between himself and Macdonald, and was based largely upon Macdonald's ideas of what was necessary.

Osborn again saw Jannison; and, on the 26th December, on behalf of Hopkins, he wrote to the Marion company the following:—

"In reference to your favour of the 9th, submitting particulars covering model 28 special trench machine required by Messrs. David Jannison & Son at Sault Ste. Marie, Ont.

"We may say that our representative has had this matter up fully with these people, and they have decided that a model 28 shovel will be too light to answer their requirements, and they now wish us to submit them a proposition on a model 35 shovel with a number of changes which they wish made.

"We would now ask you to kindly prepare us a price on the following:—

"One (1) model 35 Marion revolving steam shovel, with dipper handle about 30′ long and with special boom of suitable length equipped with approximately 5/8 cu. yd. dipper for trench work, whole mounted on traction wheels, sixteen feet gauge.

"The above dipper to be made especially for trench work and to be without lugs or bail on the outside, and to have flanged mouthpiece, that is, the mouth of the dipper spread a trifle wider than the dipper itself.

"They wish the traction wheels of this machine to be mounted at 16′ gauge and wheels to be tapped for spuds.

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"Machine to be equipped with oil pump instead of lubricator, also to have duplex pump instead of Star pump.

"Dipper to be equipped with Panama teeth, and one extra set to be supplied, also one extra "U" bolt.

"If you will kindly look into the above and let us have a price covering the whole of the above-mentioned outfit in a lump sum, we will then take the matter up again.

"We would also like a price on 1¼ yd. standard dipper with the regular dipper handle and boom, less such parts as could be taken from the special handle and boom.

"If you will kindly look into the whole of this matter at once and let us have the information at your earliest convenience, and also how soon you could ship this complete shipment, we will take the matter up further."

To this the Marion company made reply on the 9th January:—

"We have your favour of the 26th in reference to a model 28 special trenching machine required by Messrs. David Jannison and Son at Sault Ste. Marie, Ont. In reply beg to advise that we would not recommend model 35 mounted on 16' gauge traction wheels, for the reason that it would not be practical to fit axles of sufficient size to support the shovel. We would, however, recommend mounting the machine on bolsters shewn on prints enclosed herewith. You will note the wheels have double flanges, with bearings carried by bolsters built of I beams, which have ample strength to support the shovel while working over a trench and travelling upon an 18t. gauge track. The bolsters which carry the driving wheels are rigidly connected to truck frame, and the shovel should be operated with this bolster to the front or facing the dipper, which insures a steady digging position. The bolster which carries the rear of slewing wheels is pivotedly connected to truck frame, which allows the shovel to run around slight curves and over uneven track sections. The slewing bolster can be connected by chains provided with turn-buckles to front bolster and adjusted to suit working conditions.

"We can furnish the model 35 shovel mounted on trucks as above described and equipped with 27 ft. boom, 30 ft. dipper

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handle, 5/8 yd. trenching dipper with Panama teeth, one extra set of Panama teeth, U bolt for yoke block, oil pump and duplex pump, for $6,500, f.o.b. Marion, Ohio.

"Price of 1¼ yd. dipper, 13 ft. 6 in. dipper handle, less socket and adjusting casting, 24 ft. boom, less crowding engines, shipper shaft, gears, boxes, caps, guard wheel and shields, $700.

"Above prices are all quoted f.o.b. Marion, Ohio.

"We can ship the above machinery in from two to three weeks from receipt of order. In case the customer insists on 16 ft. gauge traction wheels truck mounting for the shovel, we will quote a price of $7,150. This price covers complete trenching machinery only, and does not include extra boom, dipper handle and dipper. The blue prints which we are enclosing will give you a general outline of the machines as described.

"We trust this will give you the desired information; if not, we will be pleased to give you additional information if you will advise definitely just what is required."

In the interview between Osborn and Jannison it is again made quite plain that Osborn did not himself understand the machine, either from the engineering or practical standpoint, and that he was merely acting as a salesman, and the intention was that he should communicate the purchaser's desire to the manufacturers, so that it could be ascertained how far the manufacturers could comply with what was required. In pursuance of this, on receipt of the letter of the 9th, Osborn wrote in the name of Hopkins on the 12th January, as follows:—

"In reference to the writer's recent visit, and our conversation regarding 'Marion Special' trenching shovel, may say that we have gone fully into the matter, and we now wish to enclose you herewith blue print shewing model 35, Marion shovel, mounted on special traction truck, at a gauge of 16 ft.

"We are enclosing you herewith our formal proposition covering a machine of this description, and equipped with the extra fittings, as mentioned to the writer, and as stated in your letter of December 19th.

"We are also quoting you extra price for supplying the standard 1¼ yd. dipper and other parts for equipping this shovel as standard.

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"We can ship this shovel in from two to three weeks after receipt of order, and if you will kindly look into this proposition, and be good enough to wire us at our expense, advising us just when it will be convenient for you to take the matter up with our representative, we will have him call upon you and discuss the matter in detail."

With this letter were enclosed blue prints shewing details of construction and the form of the proposed contract.

On receipt of this, Jannison wired Osborn to come to the Sault, and Osborn accordingly went there on the 17th January. He had an interview, and there was a good deal of discussion over the contract before it was finally settled.

In this interview and in previous interviews, the question of the guarantee given by the company had been discussed, and, in response to all demands for guarantee, reference was always made to what Osborn called the "broad gauge guarantee" found on p. 11 of the catalogue. This guarantee is as follows:—

"We guarantee the materials and workmanship of the within described machinery to be first-class. If, on trial, any part should prove defective, we agree to furnish, free of charge, a duplicate to take its place—accidents, careless handling, wear and tear excepted.

"These machines will handle more material at a less expense and with fewer repairs than any machines of their respective sizes now manufactured.

"We will allow any responsible party to place any of the within described machinery on his work, subject to a liberal trial.

"If the machinery proves otherwise than as represented by us, it can be returned at our expense, and any money paid by purchaser for freight will be cheerfully refunded."

This is not a guarantee by Hopkins, but is the manufacturers' guarantee, which is supposed to run with their machines and to be available to the ultimate purchaser. The importance of it is that it is limited in its terms to a warranty against defect in the construction and manufacture and that the machine is as represented by the manufacturers.

The particular machine in question is not described in the

catalogue. It is a modification of model 35, which is described; the differences being modifications made at Jannison's instance.

The result of the interview was the signing of the contract in question, by which Jannison agreed to purchase the machine at $9,720, one-third on shipment, one-third on arrival, balance thirty days from arrival; the property to remain in Hopkins till the full price was paid.

Some correspondence which took place after the making of the contract and before its shipment does not appear to me to be very material. Ultimately the machine was shipped, and arrived at the Canadian Sault. It was charged by the Marion company to F. H. Hopkins & Co., and was settled for by them. Subsequently, upon disputes arising, F. H. Hopkins & Co., preferring to be in the position of defendants if the result should give rise to any difficulty between them and the Marion company, deducted an equivalent before paying a subsequent account; but the fact was that this machine was paid for by the Hopkins concern, and they are rightly the plaintiffs in this litigation.

Jannison, on his part, made the first two payments, and became entitled to possession of the machine. When the machine arrived, it is quite probable that Jannison was a little staggered at its elephantine proportions, probably having failed to realise its real bulk. It was taken from the train and erected in the Canadian Pacific Railway yards.

To understand what follows, it is necessary to apprehend what was in the mind of Jannison in purchasing the machine. It was a gigantic steam shovel, weighing nearly forty tons. A general idea of the machine can be well obtained from the illustration on p. 77 of the catalogue; but it must be borne in mind that what Jannison had specified was a machine with a much longer boom, so that the shovel would be capable of reaching some 16′ below the level of the road on which the machine would stand. The idea was that this shovel would excavate a trench in which a sewer was to be laid, to its full depth, casting the earth either beside or behind it; that it would follow up its own excavation of the trench, straddling the trench on its wide-set traction wheels. This machine would be self-propelling,

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and would be able to travel from place to place at a reasonable speed; I think it was said two miles per hour.

When the machine was set up in the railway yards, it was found that there it could travel without difficulty at the required speed, or even faster. The first real difficulty was encountered when an attempt was made to get it out of the yards. The gateway was too narrow; but this was soon remedied, for, upon the dipper being attached by a chain to the gate-post, the machine speedily lifted it and passed towards the highway. It was then found that the telephone and electric wires were in the way. To remove these was a matter of much difficulty and expense, and to get past them the boom had to be cut and a turnbuckle adjusted for its subsequent restoration.

When the solid ground of the railway yards was left, it was found that the light roads or mud roads of the Sault streets were utterly incapable of bearing the immense pressure of this weight, and the machine began to sink. Timbers were placed under its wheels, and spikes inserted in the wheels to enable the machine to climb upon them; but it cut the timbers to matchwood.

After much time and worry, the wasting of much money and material, the machine was finally brought to the place where it was to work. It was then found that the whole scheme was impracticable, because, while the machine undoubtedly could dig, its enormous weight upon the soft and somewhat yielding gravelly soil of the Sault caused the banks to cave in; and, instead of a neat, clean-cut trench, three feet wide and sixteen feet deep, the result was a ragged hole extending over most of the width of the highway. Sewer excavations, even when made by hand, required to be timbered.

Various devices were adopted. Timbers were placed, upon which the machine was supported while it worked; but, while better results were secured, the machine for the work for which Jannison wanted it turned out to be an absolute and complete failure.

At the trial it was practically admitted, and I have no hesitation in finding, that there was no difficulty in the machine as a machine. It answered in every respect everything that had

been said about it. Its material and construction are in no way defective. Its capacity is fully up to and probably exceeds what was represented. The whole trouble is that it was entirely unsuited for the task set before it. This arises, in the first place, from what I have already indicated, the caving-in of the soil owing to the weight; and, in the second place, from the fact that what was desired was to cut with a shovel a trench of practically the same width as the shovel, and sixteen feet deep. To raise this shovel, carrying its enormous load, and operated by the immense power of the engine, required the greatest possible skill on the part of the operator. Macdonald, with his skill and experience, was fairly successful in this; but dissension took place between Macdonald and Jannison, and the engine was placed in charge of Jannison junior, who was quite devoid of the skill and experience necessary to insure successful operation. Shortly thereafter the machine was abandoned by Jannison, and housed in, and left on the streets of the Sault, where it still was at the date of the trial.

When the machine arrived, Jannison expressed his delight at it and its ability to get over the ground in the railway yard. He had not then any doubt as to its fitness for the task. Subsequently he rather sought to defame the machine, as a machine, but at the trial finally confined his complaints to the matters that I have indicated.

Much correspondence took place after this date, but I do not think it aids in the solution of the controversy.

The defendants put their contention in two ways. They say that the plaintiffs knew the purpose for which the machine was to be used, and that they expressly represented that it was fit for that purpose, and they are liable upon this representation, quite apart from any implied warranty. This contention fails on the facts. In the second place, they say that there is an implied warranty in this case as to the fitness of the machine for the work contemplated.

The plaintiffs, on the other hand, contend that, whatever the situation might have been if the defendants had purchased a model 28, they did not rely in any way upon the plaintiffs' knowledge and skill, but deliberately elected to give a specific

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order based upon their own idea as to what was required and Macdonald's knowledge and skill. The plaintiffs further contend that this is not the case of a sale by a manufacturer, and that a manufacturer's warranty cannot be implied.

Before discussing these questions I think it desirable to point out that the implied warranty, where goods are sold by a manufacturer or dealer, rests on precisely the same footing as all other implied contracts. This is sometimes lost sight of not only in argument but in decided cases; and, where that is so, the decision is generally out of harmony with the body of the law.

In *The Moorcock* (1889), 14 P.D. 64, Bowen, L.J., made a statement (p. 68) which has often been quoted, always with approval: "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

The same learned Judge, in *Lamb* v. *Evans*, [1893] 1 Ch. 218, said (p. 229): "What is an implied contract or an im-

plied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile."

In *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, at p. 491, Lord Esher quotes from *The Moorcock*, and thus expresses his own opinion: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

Lord Esher had already stated the principle in a somewhat similar way in *Ex p. Ford* (1885), 16 Q.B.D. 305, thus (p. 307): "It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

All this is subject to the caution given by Cockburn, C.J., in *Churchward* v. *The Queen* (1865), L.R. 1 Q.B. 173, where he says (p. 195): "But in all these instances, where a contract is silent, the Court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. This I take to be a sound and safe rule of construction with regard to implied covenants and agreements which are not expressed in the contract."

So much for the general principle. In the celebrated judgment in *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, Mellor, J., classi-

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fies the cases relating to implied warranty upon the sale of goods, under five heads. The first two heads have no relation to this controversy. The remaining heads are as follows:—

"Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer: *Chanter* v. *Hopkins*, 4 M. & W. 399; *Oliphant* v. *Bailey*, 5 Q.B. 288.

"Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown* v. *Edgington*, 2 Man. & G. 279; *Jones* v. *Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

"Fifthly, where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: *Laing* v. *Fidgeon* (1815), 4 Camp. 169, 6 Taunt. 108."

What is relied upon by the defendants is the statement under the fourth head, imposing liability upon a manufacturer or dealer "where the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer." It is then only that there is a warranty that the article is warranted to be "reasonably fit for the purpose to which it is to be applied." Here the controversy does not fall in any way under the fifth head, because there is no doubt that the machine supplied was a "merchantable article," in the sense in which that expression was used. There is no defect in its material, workmanship, or design. The only question is its fitness for the purpose to which it was to be applied.

I have come to the conclusion that in each case in which the

fourth rule can be applied it must be ascertained upon the facts of the particular case that the buyer trusted to the judgment or skill of the dealer. I am not concerned with the question of onus. It may be that there is the warranty unless the vendor is able to shew that the buyer did not trust to his judgment or skill. In this case I think it is clear upon the evidence that in the purchase of this particular machine the purchaser relied upon his own judgment and skill, and the knowledge and skill of Macdonald, his colleague and prospective partner, and that to read into this contract the term suggested would be not to give expression to the real intention of the parties but to make it entirely the opposite of what was their true intention.

For reasons to be explained, I make no distinction between the Marion company and Hopkins. I assume for the present that they stand in precisely the same position. When inquiry was made from Osborn as to the guarantee that went with the machine, he pointed to the broad gauge guarantee found in the catalogue. Nothing further was sought. At an earlier stage of the negotiations, the advice and opinion of the vendors was sought and given. It was not accepted. The purchasers chose what they thought would meet the requirements of the case; and that they have received. It is inconceivable that the vendors would have undertaken that the machine would work on the particular soil and under the particular circumstances found at the Sault, without making a thorough investigation into the situation. The machine is capable of digging; its capacity is as great as stated; the difficulty is that the soil on which they sought to operate it will not bear its weight. The question of weight is the very point upon which the purchasers refused to accept the vendors' advice.

Most of the cases upon which the doctrine in question is founded are cases where the subject-matter of the sale was material. Thus, *Jones* v. *Bright* (1829), 5 Bing. 533, was the case of a sale of copper for sheathing a ship. The vendor knew that it was to be used for that purpose. Best, C.J., said (p. 544) that, selling it for that purpose, "he thereby warrants it fit for that purpose." There was no fraud, but there was liability upon the warranty.

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Brown v. *Edgington* (1841), 2 Man. & G. 279, the other case relied upon as establishing the doctrine in question, related to rope sold for the purpose of hoisting wine from a cellar.

In both cases it was perfectly plain, as a matter of fact, that the purchaser was relying on the statement of the vendor as to the fitness of the thing sold.

Jones v. *Just* was a case falling under the fifth head, a sale of hemp. The warranty implied was that it was merchantable.

Drummond v. *Van Ingen* (1887), 12 App. Cas. 284, was a case of the sale of cloth for the purpose of manufacturing into garments. The real point of discussion was whether the fact that the sale was by sample, and that the goods accorded to sample, excluded the warranty. It was held that, because the sample did not disclose the defects, there was nothing to take the case out of the general rule.

Jones v. *Padgett* (1890), 24 Q.B.D. 650, is valuable mainly as a statement that in *Drummond* v. *Van Ingen* the Lords did not in any way depart from the principle laid down in *Jones* v. *Bright* and *Jones* v. *Just*. The question there was whether the purpose was so far known and disclosed to the vendor as to bring the case within the fourth rule, or whether the implied warranty was merely that the goods were merchantable.

As contrasted with cases of this type, there are the cases falling under the third rule. These are best understood by reference to the cases on which that rule is based: *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, and *Oliphant* v. *Bailey* (1843), 5 Q.B. 288.

In the former there was a sale of a specific article known as Chanter's Smoke-consuming Furnace. There was no fraud. Both parties believed the machine would answer the particular purpose, and it was said (p. 405) to be "the ordinary case of a man who has had the misfortune to order a particular chattel, on the supposition that it will answer a particular purpose, but who finds it will not."

In the latter case, the sale was of a patent two-colour printing machine. Because that was a known ascertained article, a machine for printing two colours, the plaintiff could recover the price if the machine was reasonably fit for that purpose,

even though it failed to do the particular work which the defendant desired.

In our own Courts some cases require notice. *Bigelow* v. *Boxall* (1876), 38 U.C.R. 452, was the case of a furnace for the heating of an office. The article itself was defective; and it was held that the case fell within the fourth rule rather than the third.

In *Ontario Sewer Pipe Co.* v. *Macdonald* (1910), 2 O.W.N. 483, the action was for the price of sewer pipe. This pipe, it was held, was not a known and defined article within *Chanter* v. *Hopkins*, but the sale was a sale of merchandise by a manufacturer, and fell within the fourth clause, entitling the defendants to counterclaim for damage sustained by defective pipes.

In *Canadian Gas Power and Launches Limited* v. *Orr Brothers Limited* (1911), 23 O.L.R. 616, the the action was for the price of a dynamo and engine. The circumstances surrounding the sale established clearly that the purchaser trusted entirely to the knowledge and skill of the vendor. In truth, the facts of the case go so far as to make it plain that the case is not one of implied warranty but of express warranty. Mr. Justice Meredith places the case clearly upon this view, and I think this was also the intention of the Chief Justice.

These cover the most important English cases prior to the Sale of Goods Act and cases in our own Courts. Perhaps *Randall* v. *Newson* (1877), 2 Q.B.D. 102, ought to be mentioned. The real value of that case is the discussion of the extent of the warranty, and the holding in harmony with the earlier decisions that there is no exception as to latent and undiscoverable defects.

There is a curious divergence of opinion as to the effect of the Sale of Goods Act. Moss, C.J.O., in *Canadian Gas Power and Launches Limited* v. *Orr Brothers Limited*, refers to decisions in which it is said that the Act only formulates the already existing law. In *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors Limited*, [1910] 2 K.B. 831, Cozens-Hardy, M.R., takes an entirely different view (p. 836): "I rather deprecate the citation of earlier decisions. . . . The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten

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law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may be to some extent have altered the prior common law."

Conversely, decisions upon the wording of the statute must, it seems to me, be received with caution where, as here, we still have the common law.

I do not find anything in the subsequent cases which is really in conflict with the law laid down in the earlier cases, so far as they relate to the matters now in controversy. *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors Limited* is much relied upon by the defendants; but, on perusing the case, it will be found that there is, as put by the Master of the Rolls (p. 836), "ample evidence that the plaintiffs did rely upon the defendants' skill or judgment." That case also turns upon the finding of fact that the goods were not of merchantable quality. The defendants sought to escape liability by an argument based upon the construction proper to be given to the statute.

Throughout this discussion I have treated the case as if the plaintiffs were manufacturers. I think all the cases, if carefully examined, indicate that there is no distinction between a manufacturer and a dealer. This question is discussed and satisfactorily dealt with in the case of *Wallis* v. *Russell*, [1902] 2 I.R. 585; a case which is also of value as shewing the genesis of the clause in the Sale of Goods Act. See also *Brown* v. *Edgington*, 2 Man. & G. 279.

I have not found it necessary to discuss a question which appears to me of importance if the view I have taken is not entitled to prevail. It seems to me that what is here sought by the defendants is an unwarrantable extension of the warranty upon which they rely. The warranty, as I understand it, is that the machine shall be "fit for the particular purpose" for which it is to be used. What the defendants seek is really a warranty that they can successfully accomplish their purpose.

The machine was fit to dig. That, as I would understand it, was the purpose. The complaint is not based upon the unfitness of the machine in that sense, but upon the failure of the scheme designed by the defendants of using a steam shovel in sewer

excavation in the soft soil found in the Sault. See *Shepherd* v. *Pybus* (1842), 3 Man. & G. 868, where, on the sale of a barge, the implied warranty was held to be that 'the barge was reasonably fit for use as an ordinary barge'' and applicable to ''the general use of the barge,'' and not ''fitness for use for the particular purpose for which it was intended by the buyer.''

In all aspects of the case I think the defendants fail, and there must be judgment for the plaintiffs for the amount claimed, with costs.

Judgment for plaintiffs.

REX v. WALDON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. April 7, 1914.

1. CONSTITUTIONAL LAW (§ II A 5—245) — SUNDAY LAWS — DOMINION LORD'S DAY ACT — PROVINCIAL POWER.

The Lord's Day Act, R.S.C. 1906, ch. 153, by the proviso in sec. 5, enables a province to reduce the scope or mitigate the severity of the general prohibition in respect of the topics mentioned therein, but does not clothe the province with power, either itself to deal generally with the matter of Sunday observance, or to confer such powers on municipalities so as to enlarge the scope of the Dominion Act; and a conviction under a municipal by-law so framed under the Municipal Act, R.S.B.C. 1911, ch. 170, cannot be sustained.

[*Rex* v. *Waldon*, 14 D.L.R. 893, 22 Can. Cr. Cas. 122, affirmed.]

Statement

APPEAL from the judgment of Hunter, C.J., of the Supreme Court of British Columbia, *R.* v. *Waldon*, 22 Can. Cr. Cas. 122, 14 D.L.R. 893, 26 W.L.R. 316, quashing a conviction under a municipal by-law as to Sunday observance.

The appeal was dismissed.

Bodwell, K.C., for the appellant.

Woodworth, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The municipality of South Vancouver passed a by-law ''to prevent the sale of goods on Sunday.'' It declared it to be unlawful to sell or expose goods for sale on Sunday, and empowered the convicting magistrate to impose a fine for its infraction of not more than $100, to be enforced by distress, and in default, by imprisonment for not more than

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thirty days with or without hard labour. The by-law, it was conceded, was passed pursuant to powers which the Legislature purported to confer upon municipalities by sec. 53, sub-secs. 129 and 130, ch. 170, R.S.B.C. 1911. These sub-sections authorize municipalities to pass by-laws

> For the regulating of public morals, including the observance of the Lord's Day, commonly called Sunday, and for the prevention of sales or the exposing for sale or the purchase of any goods, chattels or other personal property whatsoever, except milk, drugs and medicine, on Sunday.

The by-law conforms to the sections, but it is contended by the respondent, and it was held by the Court below, that the province had no jurisdiction to confer such powers upon the municipality, and in this result I agree.

There are two statutes in force in this province affecting Sunday observance, 29 Car. II. ch. 7, which was in force at the date of the union of British Columbia with Canada, and has remained in force ever since, and the Dominion Lord's Day Act, ch. 153, R.S.C. 1906. The latter, by its terms, saves existing Sunday laws in force in any province. It has long been settled that statutes of this nature are criminal laws, and hence, since the union of the province with Canada not within the powers of the provincial Legislature to enact, add to or vary. These existing criminal laws may be enforced in the province in accordance with their terms and provisions.

But the prosecution and conviction in this case was not under either of these Acts, but under a by-law which is the creature entirely of the legislature and of the municipality. Parliament is the sole custodian of authority to make, amend or repeal criminal laws. The contention that any other authority than Parliament could delegate power to local bodies by by-law to adopt such laws to suit local ideas, is, in my opinion, utterly unsound.

In dismissing the appeal I wish to guard against it being inferred from what I have said that the province cannot, in any circumstances, regulate or control Sunday trading, or confer powers of, regulation of the same upon municipalities, in matters falling within the class "property and civil rights." The distinction between this case and cases under local laws of the

character of the Liquor License Act is pointed out in *Hodge* v *The Queen* (1883), 9 A.C. 117; and is also noticed in *Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, 46 Can. S.C.R. 502, 20 Can. Cr. Cas. 458.

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Our own Shops Regulation Act is an instance of provincial legislation passed for the regulation of hours and days of closing, not in any way dependent upon Sunday observance laws, but on the B.N.A. Act. The by-law in question, however, is not of that character, but affects to prohibit Sunday trading in, as I think, the interest of public morals, which is a subject of criminal law.

IRVING, J.A.:—The error in the argument in support of the by-law is in assuming that sec. 16 of the Dominion statute (ch. 153) confers upon the province the same power to entrust to a subordinate agency, as is conferred on the province by the B.N.A.Act, 1867, in respect of matters mentioned in sec. 92 of that Act. This auxiliary power is dealt with in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117. The Dominion statute, ch. 153, declares that the 29 Car. II. ch. 7 is not to be construed as repealed or in any way affected. 29 Car. II. ch. 7, as it was enacted in 1676, stands as if it had been specially mentioned and enacted in the original proclamation issued by Governor James Douglas at Fort Langley, on November 19, A.D. 1858, and will continue to stand until repealed by the only body which has by virtue of the B.N.A. Act, 1867, power to deal with criminal law. In my opinion, the province has no power to authorize the municipality to pass the by-law under which this conviction was made.

Irving, J.A.

MARTIN, J.A.:—In my opinion, this case is governed by the principle laid down in *Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, 46 Can. S.C.R. 502, 20 Can. Cr. Cas. 458, and I am unable to regard sub-secs. (129) and (130) of sec. 53 of the Municipal Act as a mere attempt by the provincial legislature to delegate to municipalities the power to make regulations to carry into effect the Sunday Observance Act of 1863, which was in existence here when the Lord's Day Act came into effect on March 1, 1907.

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GALLIHER, J.A., concurred in dismissing the appeal.

McPHILLIPS, J.A.:—This is an appeal from the judgment of the Honourable the Chief Justice of British Columbia (Hunter, C.J.), setting aside the conviction of the respondent for unlawfully selling goods, *viz.*, two loaves of brown bread on Sunday, October 5, 1913, contrary to the Sunday Closing by-law of the corporation of the district of South Vancouver, being a by-law to prevent the sale of goods on Sunday.

Section (1) of the by-law reads as follows:—

1. It shall be unlawful to sell or expose for sale or to purchase any goods, chattels or other personal property whatsoever (except milk, drugs or medicines) between the hours of 12 o'clock in the afternoon on Saturday and 12 o'clock in the afternoon on Sunday.

The respondent sold the two loaves of brown bread at about 11.30 o'clock on Sunday, October 5, 1913, to a little boy, one Alec McCuish, and was paid fifteen cents for them. The learned Chief Justice held that the by-law in its terms goes further than the legislature of the province could go in legislating, and that it prohibits that which is permitted in sec. 12 of the Lord's Day Act (ch. 153, R.S.C. 1906).

The learned counsel for the appellant in support of the conviction which was set aside, in his argument as addressed to this Court, relied strongly upon 29 Car. II. ch. 7, An Act for the Better Observation of the Lord's Day, commonly called Sunday (A.D. 1676), and No. 46, the Sunday Observance Act, 1863, declaring the English Sunday laws in force, as contained in the Revised Laws of British Columbia, 1871, 29 Car. II. ch. 7, being referred to in the schedule to the latter Act; and that there was the power of delegation in the legislature of British Columbia to authorize the passage of the by-law by the municipality.

In my opinion, it may well be said that 29 Car. II. ch. 7 (Imperial) is a part of the criminal law as applicable to British Columbia, as unquestionably it was the law at the time of the union, viz., the 20th day of July, 1871 (Terms of Union, p. 49, vol. 1, R.S.B.C.). Under the Terms of Union, sec. 10, the provisions of the British North America Act, 1867, are applicable in the same way, and to the same extent, as to the other prov-

inces of the Dominion, and as if the colony of British Columbia had been one of the provinces originally united by the Act. That legislation having relation to what may be done upon Sunday, or the Lord's Day, is criminal legislation is not open to any controversy since the decision of their Lordships of the Privy Council in *Attorney General (Ont.)* v. *Hamilton Street R. Co.*, [1903] A.C. 524, 7 Can. Cr. Cas. 326, 72 L.J.P.C. 105, wherein it was held that

ch. 246 of the Revised Statutes of Ontario 1897, intituled "An Act to prevent the Profanation of the Lord's Day,"

treated as a whole, was beyond the competency of the Ontario Legislature; that sec. 91, sub-sec. 27, of the B.N.A. Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada

the criminal law, except the constitution of Courts of criminal jurisdiction.

The Lord Chancellor (Lord Halsbury), at 107, said:—

The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words, which must be construed according to their natural and ordinary signification.

Therefore, the question in the present case is, has the respondent been rightly convicted? but if rightly convicted, it could only have been for an infraction of the criminal law. Now, what is the criminal law relative to the observance of the Lord's Day in British Columbia? To determine this question it immediately becomes necessary to turn to the Criminal Code, and such other legislation of the Dominion Parliament as may have been passed dealing with the observance of the Lord's Day.

Section 11 of the Criminal Code (ch. 146, R.S.C. 1906) reads as follows:—

The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the province of British Columbia.

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29 Car. II. ch. 7, An Act for the Better Observance of the Lord's Day, commonly called Sunday (A.D. 1676), the Sunday Observance Act, 1863, as contained in the Laws of British Columbia Revised 1871, was the law in British Columbia at the time of the Union, sec. 1 of that Act reading as follows:—

1. The law, statutory and otherwise, and the penalties for the enforcement thereof, as at present existing and in force in England for the proper observance of the Lord's Day, commonly called Sunday, as referred to in the schedule hereto, shall be deemed and taken to have been included in the proclamation made and passed on November 19, A.D. 1858, and to be of full force and effect in the said colony, with and under the same penalties *mutatis mutandis* in all respects as if the said laws had been specially mentioned and enacted in the said proclamation of the 19th day of November, A.D. 1858.

In the schedule to the Act the following appears:—

29 Car. II. ch. 7, so far as the same is applicable to the said colony.

In my opinion, after the Union it was not competent for the legislature of the province of British Columbia to enact any legislation in the nature of criminal law, nor was it competent for the Parliament of Canada to confer upon a delegate to the legislature of the province of British Columbia any authority to enact legislation in the nature of criminal law, as the British North America Act reserved the exclusive authority in that regard to the Parliament, the *authority* going to the Parliament of Canada and the legislature of British Columbia, *went* from the paramount authority, the Imperial Parliament, and the scheme of Confederation was the conferring of sovereign authority upon the Parliament of Canada and the legislatures of the provinces as specifically set out in the British North America Act, and within the ambit of such authority the Dominion and Provincial Parliaments may solely legislate. It, therefore, follows that, in my opinion, sec. 53, sub-sec. 130, of the Municipal Act (ch. 170, 2 Geo. V. R.S.B.C. 1911), being in its nature criminal law, is *ultra vires*, and beyond the competency of the British Columbia legislature. The section and sub-section read as follows:—

53. In every municipality the council may from time to time make, alter and repeal by-laws for any of the following purposes or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:—

(130). For the prevention of sales, or the exposing for sale or the purchase of any goods, chattels or other personal property whatsoever, except milk, drugs and medicine, on Sunday.

That there has been previous legislation to the present Municipal Act of the legislature of British Columbia of a like or similar nature since the Union, in my opinion, does not add strength to the contention in the slightest to support the conviction, as it equally was *ultra vires* and beyond the competency of the British Columbia legislature. The result, therefore, in my opinion, is that the existing law dealing with the observance of Sunday in British Columbia is that 29 Car. II. ch. 7, is in force as well as the Lord's Day Act (Dominion) (ch. 153, R.S.C. 1906). That 29 Car. II. ch. 7, is in force is made plain by sec. 16 of the Lord's Day Act (Dominion), which reads as follows:—

16. Nothing herein shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force; and where any person violates any of the provisions of this Act, and such offence is also a violation of any other Act or law, the offender may be proceeded against either under the provisions of the Act or under the provisions of any other Act or law applicable to the offence charged.

The above section, however, does not give force and cannot give force to *ultra vires* legislation, such as that contained in the Municipal Act, and under which the by-law in the present case is sought to be supported. Giving the fullest effect to sec. 16, it can only support in British Columbia the validity of 29 Car. II. ch. 7. In the result, the Acts which to-day are in force in statute 29 Car. II. ch. 7 does not prohibit a baker baking dinners Day, commonly called Sunday, are: 29 Car. II. ch. 7, an Act for the Better Observation of the Lord's Day (commonly called Sunday (A.D. 1676), and ch. 153, an Act respecting the Lord's Day, R.S.C. 1906.

The learned counsel for the appellant strongly argued that the respective Municipal Acts passed by the legislature of British Columbia dealing with the subject of the prevention of sales or purchase of goods, except those enumerated, were passed in pursuance of 29 Car. II. ch. 7, and the legislature had the power to delegate the authority to the municipalities, and that the by-law in question was supported by 29 Car. II. ch. 7. I cannot, with

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all deference to the learned counsel, agree to this contention, as the Act does not in any of its terms make provision for the delegation of any authority or provide for the passage of any by-laws or regulations in the way of the enforcement of its provisions. Further, the by-law in question in its prohibitions is more extensive than the provisions of 29 Car. II. ch. 7, although in the same terms as the Municipal Act—but the learned counsel for the appellant could only rely upon the validity of the provision in the Municipal Act as being supported by 29 Car. II. ch. 7. Section (1) of 29 Car. II. ch. 7, in part, reads as follows:—

> . . . that no tradesman, artificer, workman, labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary calling upon the Lord's Day or any part thereof (works of necessity and charity only excepted): And that every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of five shillings, and that no person or persons whatsoever shall publicly cry, shew forth or expose to sale any wares, merchandizes, fruit, herbs, goods or chattels whatsoever upon the Lord's Day or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried or shewed forth or exposed to sale.

It is evident from the reading of the above that the Municipal Act and the by-law are in terms more extensive than 29 Car. II. ch. 7. No exception is made at all for "works of necessity and charity," and, although it is unnecessary, perhaps, to refer to it, as the conviction in the present case was not under 29 Car. II. ch. 7, yet it is both interesting and instructive to know that the statute 29 Car. II. ch. 7 does not prohibit a baker baking dinners for his customers on a Sunday—this was held in *Rex* v. *Cox* (1759), 2 Burrows 785 at 787, 97 Eng. R. 562, 563 (Lord Mansfield, Denison Foster, and Wilmot, JJ.). Foster, J., said:—

> He was clear that this case was not within the provisions of the Act, but it falls within the exception of works of necessity and charity, and also within the proviso as being a cook's shop. And it is as reasonable that the baker should bake for the poor, as that a cook should roast or boil for them, there is no reason for any distinction.

In *The King* v. *John Younger* (1793), 5 T.R. 449, 452, 101 Eng. R. 252, 255, it was also held that the statute 29 Car. II. ch. 7, does not prohibit a baker baking dinners for his customers on a Sunday. Grose, J., at 452, said:—

> The question is not whether baking for this or that man be a trade, but whether the trade of baking carried on in this way, be a work of labour

prohibited by the statute. The crime imputed to the defendant is the having baked dinners on a Sunday. There cannot be any distinction between dressing dinners for the poor and the rich, as far as respects the baker. It is admitted that dinners for the former may be dressed; then, is it to be endured that it would be no crime to bake for a man who is too poor to bake at home, and yet that the baker must be convicted on a penal law for baking for another person, who happens to be able to bake at home, a circumstance of which the baker cannot be cognizant? This case, therefore, seems to me to come within the proviso relative to cooks' shops. But, even if the words of the Act were more doubtful, as we find a case which was determined in the year 1759 applicable to the present, and which decision, so far from having been overruled, has been acted upon since that time, we ought not to overturn that decision, especially as the case arises upon a penal statute.

In my opinion, had the prosecution in the present case been under 29 Car. II. ch. 7, no conviction could be had following the decisions above referred to, and further, the respondent in selling the two loaves of brown bread would be justified under the Act, as it was (using the language of the Act) the

exercise (of) . . . business . . . work of (his) ordinary calling upon the Lord's Day . . . (being) works of necessity.

It is quite conceivable that people would be brought to starvation if shops and stores are not to be permitted to be open for the sale of bread at least for some time on Sunday, no doubt, though, if the enactment is clear and positive, and no exception is admitted it would be the duty of the Court to enforce the law, because, where there is inconvenience it is not the province of the Court, but that of the legislature to remedy it; however, as I have pointed out, a prosecution of the respondent under 29 Car. II. ch. 7, would have been ineffectual. Then, would a prosecution under the Lord's Day Act (ch. 153, R.S.C. 1906) have been any more effective? In my opinion, it would not have been. No doubt sec. 5 of the Act is very extensive, and prohibits sales of all goods, chattels or other personal property, or business or work being done on Sunday, but works of necessity and mercy are safeguarded by sec. 12 of the Act, and assuredly the present case would be considered to come within the exception. In *Rex* v. *Cox* (1759), 2 Burrows 785, 97 Eng. R. 562, Lord Mansfield said, at 786:—

that the Sabbath would be much more generally observed by a baker staying at home to bake the dinners of a number of families, than by his

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going to church, and those families or their servants staying at home to dress dinners for themselves.

In *The King* v. *Younger*, 5 T.R. 449, [101 Eng. R. 252, 253,] Lord Kenyon, C.J., at 450, 451 said:—

Thirty-four years have nearly passed since the decision of the case of *R.* v. *Cox* (2 Burr. 787) which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this Court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years.

. . . . . .

With regard to the Act of Parliament, on which this conviction is founded, I think we should construe it equitably, so that it may answer the purposes of public convenience, taking care at the same time that Sunday should not be profaned. It was extremely wise to put a mark on that day; by observing it, Christianity may be kept alive. I agree with Mr. J. Foster, that I am for an observation of the Sabbath, but not for a pharisaical observation of it. But, must the laborious parts of the community, who are entitled to some indulgence for the labours of the past week, fare harder on that than on any other day? They must be fed on that day; many of them have not the means of dressing their dinners at home; and those who have, will, if this defendant be convicted be prevented observing the Sabbath. That day will (I think) be better observed if the construction put upon this law in *R.* v. *Cox* be now adopted, than if we overrule that determination and adjudge this to be an offence. That decision falls within the reason of the law, and I am glad to find that it is an authority for us at present.

Bullen v. *Ward* (1905), 74 L.J.K.B. 916, was the case of a tradesman who, in the course of his business, cut up and cooked and fried potatoes sometimes alone, and sometimes with fish, which he sold hot on his premises to the poorer classes. He was charged with exercising his ordinary calling by doing this on Sunday, but it was held that his premises came within the exception in sec. 3 of the Sunday Observance Act, 1677, 29 Car. II. ch. 7) as being a cook's shop for such as otherwise could not be provided, and that he was, therefore, not liable to the penalty imposed by sec. 1 of the Act. Lord Alverstone, C.J. (with whom Lawrence and Ridley, JJ., agreed) at 917, said:—

In my opinion, there was no evidence upon which the magistrates could come to any conclusion other than that the appellant's shop was a cook's shop, as contemplated by sec. 3. I say that, because, after the words

"cook's shops or victualling houses," there are the words "for such as otherwise cannot be provided." In *Rex* v. *Younger*, 5 T.R. 449, it was put by Mr. Justice Buller that these are loose words, and they cannot possibly be said to be intended to give a definite and precise meaning beyond this, that they indicate what the class of cooking is that is permissible, namely, for people who cannot do it for themselves. While I do not think that the appellant's business can be strictly put as a work of necessity or charity, these words in sec. 1 of the Act cannot be overlooked in regarding the intention of the statute. It is found that the appellant cooked for the poorest classes, who came and fetched the food in dishes, always warm. Some ate it in the place and some in the street. It cannot be said to be wrong because some ate it on their way home. We have an enunciation of the law in *Rex* v. *Cox* and *Rex* v. *Younger* that this statute did not mean to prohibit the cooking of meat in the shop for poor people, and that to do so is not an offence within the statute. Counsel for the respondent has pressed us to say that we must construe "meat" as meaning flesh. That is not so. It would be ridiculous to say that, although a man may cook mutton, he must not cook an eel pie. I think that in this case the only evidence before the magistrates brought the trade carried on by the appellant within the protection of sec. 3. The conviction, therefore, must be quashed.

In my opinion, the prosecution should never have been commenced against the respondent. When the facts in the present case are considered two loaves of brown bread are bought on Sunday, unless it were that statute law intervened, what objection could there be to this? Could it be said to be against the common law, or even the moral law to sell bread on Sunday? I think the answer must be in the negative. Let us turn to the greatest of all prayers, the Lord's Prayer: it in part reads, "Give us this day our daily bread"—it would seem to be an enjoined daily request, and the statute law, in my opinion, never intended to invade this right of the daily quest for bread, and assuredly where people have the means to pay for the bread they should do so, and in paying for it, this would constitute no doubt a sale, but a sale of necessity. To make it impossible to procure bread upon Sunday I cannot believe ever was the intention of the legislature, and certainly I would only be impelled to so hold by the most intractable language. Lord Mansfield in *Swann* v. *Broome* (1764), 3 Burr. 1595, said, at 1597 [97 Eng. R. 999, 1000]:—

> Anciently the Courts of justice did sit on Sundays. The fact of this, and the reasons of it, appear in Sir Henry Spelman's Original of terms.
>
> It appears by what he says, that the ancient Christians practised this,

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In his chapter of law-days among the first Christians, using all times alike, he says, "The Christians at first used all days alike for hearing of causes, not sparing (as it seemeth) the Sunday itself." They had two reasons for it. One was, in opposition to the heathens; who were superstitious about the observation of days and times, conceiving some to be ominous and unlucky, and others to be lucky; and, therefore, the Christians laid aside all observance of days. A second reason they also had; which was, by keeping their own Courts always open, to prevent Christian suitors from resorting to the heathen Courts.

But in the year 517, a canon was made, "*Quod nullus episcopus vel infra positus de dominico causas judicare præsumat.*" And this canon (for exempting Sundays) was ratified in the time of Theodocius; who fortified it with an Imperial constitution: "*Solis die (quem dominicum recte dixere majores) omnium omnino litium et negotiorum quiescat intentio.*"

This canon and constitution was followed by others by which no causes should be tried on Sundays, and Lord Mansfield, continuing at p. 1599, said:—

These canons and constitutions were all confirmed by William the Conqueror and Henry the Second, and so became part of the common law of England.

And at 1601, Lord Mansfield further said:—

As to the observation, "That the Courts of justice have never been restrained by Act of Parliament, from sitting on Sundays, and that 29 Car. II. ch. 7, does not extend to giving judgments.

It was needless to restrain them from it by Act of Parliament. They could not do it, by the canons anciently received, and made a part of the law of the land; and, therefore, the restraining them from it by Act of Parliament would have been merely nugatory. But fairs, markets, sports and pastimes, were not unlawful to be holden and used on Sundays, at common law, and therefore it was requisite to enact particular statutes, to prohibit the use and exercise of them upon Sundays, as there was nothing else that could hinder their being continued in use.

That the ancient Christians did not look upon the gathering of people at fairs, the carrying on of markets, and engaging in sports and pastimes on Sunday as being contrary to Christian faith and morals, and when for centuries this was indulged in, and not really until the seventeenth century do we find legislation curtailing the liberty of the subject upon Sunday. All legislation must be construed favourably in the way of the liberty of the subject. I agree that Sunday should be well observed, but certainly it is not to be expected that there will be imposed against the people such trammelling legislation as might bring about starvation or affect the people in their natural right to engage in

innocent sport and pastimes on the one day which to the great majority is their only day of rest and recreation.

Therefore, in construing legislation which affects the natural liberty which the people ought to enjoy—and Christianity has strengthened this natural right by its teachings, and by the example of the ancient Christians—there must be found positive inhibition in the statute to disentitle the Court to apply the decisions of the Courts throughout centuries—that is, that the equitable construction must be adopted, and, in my opinion, the present case is one particularly within the equity of the exceptions as contained in 29 Car. II. ch. 7, and the Lord's Day Act, ch. 153, R.S.C. 1906, were it that the respondent had been proceeded against under either of the last above-mentioned Acts.

In my opinion, the judgment of the learned Chief Justice of British Columbia quashing the conviction was right, and the appeal therefrom to this Court should be dismissed. The conclusion arrived at by me for the foregoing reasons was arrived at after consideration of the authorities already referred to, as well as the following: *Hodge* v. *The Queen* (1884), 53 L.J.P.C. 1; *Atty.-Gen. for the Dom. of Canada* v. *Cain*, [1906] A.C. 542, 75 L.J.P.C. 81; *Ouimet* v. *Atty.-Gen. for Quebec* (1912), 46 Can. S.C.R. 502, 3 D.L.R. 593; 20 Can. Cr. Cas. 458; *Rex* v. *Laity* (1914), 13 D.L.R. 532, 21 Can. Cr. Cas. 417, 18 B.C.R. 443.

Appeal dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 23, 1914.

1. CONSTITUTIONAL LAW (§ II B—325)—REGULATION OF BUSINESS—EMPLOYMENT OF WHITE FEMALES IN PLACES OF BUSINESS OF CHINESE OR OTHER ORIENTALS—PROVINCIAL LAW PROHIBITING WITH PENALTIES.

Chapter 17 of the Sask. statutes, 1912, 2 Geo. V. (Sask.) ch. 17, prohibiting the employment of white women in any restaurant, laundry, or other place of business or amusement which is kept, owned or managed by a Chinaman, Japanese or other Oriental person, is not *ultra vires*, although it imposes fine and imprisonment for its infraction.

[*Rex* v. *Quong Wing*, 21 Can. Cr. Cas. 326, 12 D.L.R. 656, 49 C.L.J. 593, affirmed; *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, and *Re McNutt*, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, 10 D.L.R. 834, referred to.]

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2. ALIENS (§ II—13)—NATURALIZATION—EFFECT—DISCRIMINATION AS TO CIVIL RIGHTS.

Notwithstanding his naturalization in Canada a man born in China and of Chinese parents is a "Chinaman" within the meaning of the statute 2 Geo. V. (Sask.), ch. 17, prohibiting employment of white women in restaurants and other places of business kept by "a Chinaman."

Statement

APPEAL from the judgment of the Supreme Court of Saskatchewan, *R.* v. *Quong Wing*, 12 D.L.R. 656, 21 Can. Cr. Cas. 326, 49 C.L.J. 593, upon a case stated by the police magistrate of the city of Moose Jaw, Sask., upon the conviction by him of the appellant on a charge of employing white females in contravention of the provisions of the Saskatchewan statute, 2 Geo. V. ch. 17.

The appeal was dismissed, Idington, J., dissenting.

The judgment of the Supreme Court of Saskatchewan affirmed the conviction.

The case stated by the police magistrate was, as follows:—

"In the matter of the Act respecting the employment of female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912, and a certain conviction of Quong Wing thereunder made by W. F. Dunn, police magistrate in and for the city of Moose Jaw, in the province of Saskatchewan on the twenty-seventh (27th) day of May, 1912, on the information of W. P. Johnson, chief of police in and for the city of Moose Jaw.

"Case stated by W. F. Dunn, police magistrate in and for the city of Moose Jaw under the provisions of the Criminal Code of Canada in that behalf.

"On the twenty-first (21st) day of May, 1912, an information was laid under oath before me by the above-named W. P. Johnson for that the said Quong Wing on the twentieth (20th) day of May, 1912, at the city of Moose Jaw, in the Province of Saskatchewan, he being a Chinaman and the owner, keeper or manager of a place of business, known as the 'C. E. R. Restaurant,' in the city of Moose Jaw, did employ in the said restaurant, as waitresses, two white women, to wit, one Mabel Hopham and one Nellie Lane, contrary to the Act respecting the employment of white female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912. On the twenty-

seventh (27th) day of May, 1912, the said charge was duly heard before me, the said information having been first amended by striking out the words 'or manager' and substituting in the place thereof the word 'and' so as to make the information read 'owner and keeper' after which the said information was re-sworn, in the presence of both parties and after hearing the evidence adduced and the statements of the said W. P. Johnson and Quong Wing and their counsel I found the said Quong Wing guilty of the said offence and convicted him therefor, but, at the request of the counsel for the said Quong Wing I state the following case for the opinion of this honourable Court.

"I find on the evidence:—

"1. That the accused Quong Wing was born in China and of Chinese parents.

"2. That the said accused was on the date of the alleged offence a naturalized British subject.

"3. That on the twentieth (20th) day of May, 1912, the said accused was the keeper of a restaurant known as the 'C. E. R. Restaurant' in the city of Moose Jaw, in the Province of Saskatchewan.

"4. That on the said twentieth day of May, 1912, the said accused had in his employ as waitresses in the said restaurant one Mabel Hopham and one Nellie Lane, and that the said Mabel Hopham and Nellie Lane are white women.

"The counsel for the said Quong Wing desires to question the validity of the said conviction on the following grounds:—

"1. That it is erroneous in point of law.

"2. That the said Act, chapter seventeen (17) of the statutes of Saskatchewan, 1912, is *ultra vires*.

"3. That the Court had no jurisdiction.

The questions submitted for the judgment of this honourable Court being:—

1. Whether the premises described as being the place in which the alleged white women worked is included in the Act under which the information was laid.

2. Whether any offence under the said Act is disclosed.

3. Whether the accused, being a naturalized British subject, is one of the persons prohibited by the Act from employing female labour.

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4. Whether the said Act under which the said information was laid is *ultra vires*.

5. Whether the conviction was in excess of the jurisdiction of the Court.

G. F. Henderson, K.C., for the appellant.

J. N. Fish, K.C., for the respondent.

FITZPATRICK, C.J.:—The appellant, a Chinaman and a naturalized Canadian citizen, was convicted of employing white female servants contrary to the provisions of chapter 17 of the statutes of Saskatchewan, 1912, and, for his defence, he contends that the Act in question is *ultra vires* of the provincial legislature.

It is urged that the aim of the Act is to deprive the defendant and the Chinese generally, whether naturalized or not, of the rights ordinarily enjoyed by the other inhabitants of the Province of Saskatchewan and that the subject-matter of the Act is within the exclusive legislative authority of the Parliament of Canada.

The Act in question reads as follows:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.

2. Any employer guilty of any contravention or violation of this Act, shall, upon summary conviction be liable to a penalty not exceeding $100 and, in default of payment, to imprisonment for a term not exceeding two months.

In terms the section purports merely to regulate places of business and resorts owned and managed by Chinese, independent of nationality, in the interest of the morals of women and girls in Saskatchewan. There are many factory Acts passed by provincial legislatures to fix the age of employment and to provide for proper accommodation for workmen and the convenience of the sexes which are intended not only to safeguard the bodily health, but also the morals of Canadian workers, and I fail to understand the difference in principle between that legislation and this.

It is also undoubted that the legislatures authorize the mak-

ing by municipalities of disciplinary and police regulations to prevent disorders on Sundays and at night, and in that connection to compel tavern and saloon keepers to close their drinking places at certain hours. Why should those legislatures not have power to enact that women and girls should not be employed in certain industries or in certain places or by a certain class of people? This legislation may affect the civil rights of Chinamen, but it is primarily directed to the protection of children and girls.

The Chinaman is not deprived of the right to employ others, but the classes from which he may select his employees are limited. In certain factories women or children under a certain age are not permitted to work at all, and, in others, they may not be employed except subject to certain restrictions in the interest of the employee's bodily and moral welfare. The difference between the restrictions imposed on all Canadians by such legislation and those resulting from the Act in question is one of degree, not of kind.

I would dismiss the appeal with costs.

Davies, J.

DAVIES, J.:—The question on this appeal is not one as to the policy or justice of the Act in question, but solely as to the power of the provincial legislature to pass it. There is no doubt that, as enacted, it seriously affects the civil rights of the Chinamen in Saskatchewan, whether they are aliens or naturalized British subjects. If the language of Lord Watson, in delivering the judgment of the Judicial Committee of the Privy Council in *Union Colliery Company of British Columbia* v. *Bryden*, [1899] A. C. 580, was to be accepted as the correct interpretation of the law defining the powers of the Dominion Parliament to legislate on the subject-matter of "naturalization and aliens" assigned to it by item 25 of section 91 of the British North America Act, 1867, I would feel some difficulty in upholding the legislation now under review. Lord Watson there said, at page 586:—

> But sec. 91, sub-sec. 25, might, possibly, be construed as conferring that power in case of naturalized aliens after naturalization. The subject of "naturalization" seems, *primâ facie*, to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in

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Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in sec. 91, sub-sec. 25. But it seems clear that the expression "aliens," occurring in that clause, refers to and, at least, includes all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in section 4 of the provincial Act, were, probably, meant to denote, and they certainly include every adult Chinaman who has not been naturalized.

And, at page 587:—

But the leading feature of the enactments consists in this—that they have, and can have no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

Their Lordships see no reason to doubt that, by virtue of sec. 91, sub-sec. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

If the "exclusive authority on all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada" is vested in the Dominion Parliament by sub-sec. 25 of sec. 91 of the B.N.A. Act, 1867, it would, to my mind, afford a strong argument that the legislation now in question should be held *ultra vires*.

But in the later case of *Cunningham* v. *Tomey Homma*, [1913] A.C. 151, the Judicial Committee modified the views of the construction of sub-sec. 25 of sec. 91 stated in the *Union Colliery* decision. Their Lordships say, at pages 156-157:—

Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of sec. 91, sub-sec. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It, undoubtedly, reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protec-

tion and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

Reading the *Union Colliery* case, [1899] A.C. 580, therefore, as explained in this later case, and accepting their Lordships' interpretation of sub-sec. 25 of sec. 91, that "its language does not purport to deal with the consequences of either alienage or naturalization," and that, while it exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of "property and civil rights" within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires*, however harshly it may bear upon Chinamen, naturalized or not, residing in the province. There is no inherent right in any class of the community to employ women and children which the legislature may not modify or take away altogether. There is nothing in the British North America Act which says that such legislation may not be class legislation. Once it is decided that the subject-matter of the employment of white women is within the exclusive powers of the provincial legislature and does not infringe upon any of the enumerated subject-matters assigned to the Dominion, then such provincial powers are plenary.

What objects or motives may have controlled or induced the passage of the legislation in question I do not know. Once I find its subject-matter is not within the powers of the Dominion Parliament and is within that of the provincial legislature, I cannot inquire into its policy or justice or into the motives which prompted its passage.

But, in the present case, I have no reason to conclude that the legislation is not such as may be defended upon the highest grounds.

The regulations impeached in the *Union Colliery* case,

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[1899] A.C. 580, were, as stated by the Judicial Committee, in the later case of *Tomey Homma*, [1903] A.C. 151, at p. 157

> not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *The Union Collieries* v. *Bryden*, [1899] A.C. 580.

The right to employ white women in any capacity or in any class of business is a civil right, and legislation upon that subject is clearly within the powers of the provincial legislatures. The right to guarantee and ensure their protection from a moral standpoint is, in my opinion, within such provincial powers and, if the legislation is *bonâ fide* for that purpose, it will be upheld even though it may operate prejudicially to one class or race of people.

There is no doubt in my mind that the prohibition is a racial one and that it does not cease to operate because a Chinaman becomes naturalized. It extends and was intended to extend to all Chinamen as such, naturalized or aliens. Questions which might arise in cases of mixed blood do not arise here.

The Chinaman prosecuted in this case was found to have been born in China and of Chinese parents and, although, at the date of the offence charged, he had become a naturalized British subject, and had changed his political allegiance, he had not ceased to be a "Chinaman" within the meaning of that word as used in the statute. This would accord with the interpretation of the word "Chinaman" adopted by the judicial committee in the case of *The Union Colliery Company* v. *Bryden*, [1899] A.C. 580.

The prohibition against the employment of white women was not aimed at alien Chinamen simply or at Chinamen having any political affiliation. It was against "any Chinaman" whether owing allegiance to the rulers of the Chinese Empire, or the United States Republic, or the British Crown. In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood, and whether aliens or naturalized.

For these reasons I would dismiss the appeal with costs.

Idington, J. (dissenting)

IDINGTON, J. (dissenting):—The legislature of Saskatchewan, by ch. 17 of the statutes of 1912, intituled An Act to prevent the Employment of Female Labour in certain capacities enacted as follows:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Japanese, Chinaman or other Oriental person;

which is followed by a penal clause under which appellant has been convicted. That conviction has been maintained by the Supreme Court of Saskatchewan in a judgment from which the learned Chief Justice of that Court dissented.

The first question raised is whether or not the appellant, who is admitted to have been born in China, of Chinese parents but was at the time of the alleged offence a naturalized British subject, falls within the Act. It is quite clear that the term "any Chinaman" may, in the plain, ordinary sense of the words, be so construed as to include naturalized British subjects. It is, to my mind, equally clear that, having regard to many considerations, to some of which I am about to advert, a proper and effective meaning may be given to this term without extending it to cover the naturalized British subject.

The Act, by its title, refers to female labour and then proceeds to deal with only the case of white women. In truth, its evident purpose is to curtail or restrict the rights of Chinamen. In view of the provisions of the Naturalization Act, under and pursuant to which the appellant, presumably, has become a

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naturalized British subject, one must have the gravest doubt if it ever was intended to apply such legislation to one so naturalized.

The Naturalization Act, in force long before and at the time of the creation of the Province of Saskatchewan, and ever since, provided by section 4 for aliens acquiring and holding real and personal property, and by sec. 24, as follows:—

> 24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject within Canada, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

These enactments rest upon the class No. 25 of the classification of subjects assigned, by sec. 91 of the British North America Act, 1867, to the exclusive jurisdiction of the Dominion Parliament, and which reads as follows: Naturalization and Aliens.

The political rights given any one, whether naturalized or natural-born British subjects, may in many respects be limited and varied by the legislation of a province, even if discriminating in favour of one section or class as against another. Some political rights or limitations thereof may be obviously beyond the power of such legislature. But the "other rights, powers and privileges" (if meaning anything) of natural-born British subjects to be shared by naturalized British subjects, do not so clearly fall within the powers of the legislatures to discriminate with regard to as between classes or sections of the community.

It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British modes of thinking and acting in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid. For example, is it competent for a legislature to create a system

of slavery and, above all, such a system as applied to naturalized British subjects? This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves.

Again, it may also be well argued that, within the exclusive powers given to the Dominion Parliament over the subject of naturalization and aliens, there is implied the power to guarantee to all naturalized subjects that equality of freedom and opportunity to which I have adverted. And I ask, has it not done so by the foregoing provision of the Naturalization Act?

It is quite clear that, if the Dominion Government so desire, it can, by the use of the veto power given it over all local provincial legislation insist upon the preservation of this equality of freedom and opportunity.

It is equally clear that a casual consideration of this Saskatchewan Act might not arrest the attention of those whose duty it is to consider and determine whether or not any provincial Act should be vetoed. It might well be that, in regard to such an Act respecting aliens, those discharging the duty relative to the veto power might let it go for what it might be worth, knowing that, as to them, Parliament could later intervene; whereas other considerations might arise as to naturalized subjects and the duty to protect those naturalized be overlooked by reason of the general term used.

It may be that the guarantee which I incline to think is implied in the Naturalization Act covers the ground. If so, there is then in this Act that which, as applied to the appellant (a naturalized subject) is *ultra vires* the legislature.

If so, this conviction falls to the ground. Much stress is laid, on the one hand, upon the expression of opinion in the judgment of the Judicial Committee of the Privy Council in the case of *The Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, and, on the other hand, in that in the judgment of the same Court in the case of *Cunningham* v. *Tomey Homma*, [1903] A.C. 151.

I may observe that a decision is only binding for that which is necessary to the decision of the case and add that, perhaps,

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neither expression of opinion now relied upon by the respective parties hereto was actually necessary for the determination of the case. Perhaps neither decision, in itself, can be said to be conclusive by way of governing the questions to be resolved herein. But of the two the former, certainly, so far as one can gather from the report, touches more nearly or directly the point involved in the present inquiry.

Of course, such opinions, even if *obiter dicta*, are entitled to that weight to be given such eminent authority. What was clearly decided in the first case was that such comprehensive language as used in the regulation in question and, I rather think, aimed chiefly at alien Chinamen, was *ultra vires*, and, in the other, that the political right to vote was something within the express power of the legislature to give or withhold or restrict as it should see fit. This later point in no way touches what is raised herein.

With the very greatest respect, I submit that the *obiter dictum*, relative to the limitations of the power existent in the Dominion Parliament by virtue of the assignment to it of paramount legislative authority over the subject of "naturalization and aliens" never was intended to be treated or taken in the sense now sought to be attributed to it, and, if bearing such implication, that it is not maintainable.

Canada, for example, is deeply interested as a whole and always has been in the colonization of its waste lands by aliens expecting to become British subjects, and surely the power over naturalization must involve in its exercise many considerations relative to the future status of such people as invited to go there and accept the guarantees and inducements offered them. To define and forever determine beyond the power of any legislature to alter the status of such people and measure out their rights by that enjoyed by the native-born seems to me a power implied in the power over "naturalization and aliens." Many incidental powers have, as something implied in the other powers, contained in the same category, been held as attached thereto or to be used as part thereof with less excuse for the implication of incidental power there in question than would be involved in going a good deal further than I suggest in the

execution of this power over "naturalization and aliens" the Dominion Parliament may go.

Some of these guarantees might depend on conventions with other powers, and I should hesitate to hamper the exercise of the power by any such limitations thereon as a provincial legislature might think fit to impose. That power must be treated as the other powers categorically assigned to Parliament by section 91 of the B.N.A. Act, 1867, in a wide and statesmanlike fashion. All these considerations have, in a measure, been observed in the provisions of the Naturalization Act, and in framing the provisions I have quoted and other like provisions. No one can, as of right, become naturalized. He must reside for three years in this country and thus become known to those who have to aid in his qualifying himself by shewing that he is of good character. Unless and until he fulfil these conditions he cannot come within the class to which appellant belongs.

The appellant having, under the Naturalization Act (as I think fair to infer) become a British subject, he has presumably been certified to as a man of good character and enjoying the assurance, conveyed in section thereof which I have quoted, of equal treatment with other British subjects, I shall not willingly impute an intention to the legislature to violate that assurance by this legislation specially aimed at his fellow-countrymen in origin. Indeed, in a piece of legislation alleged to have been promoted in the interests of morality, it would seem a strange thing to find it founded upon a breach of good faith which lies at the root of nearly all morality worth bothering one's head about.

Having regard to all the foregoing considerations and the further consideration that this is a penal statute and, therefore, to be read and construed according to the principle applicable to such like statutes, I think this is one of the relatively few instances in which we can depart from the cardinal rule of interpreting all documents, including statutes, according to the plain ordinary reading of the language used, and, with Bowen, L.J., in *Wandsworth Board of Works* v. *United Telephone Co.*, 13 Q.B.D. 904, ask ourselves if these words so read are capable of two constructions and, if so, say:—

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It is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unnecessary powers.

Or say, with Keating, J., in *Boon* v. *Howard* (in 1874), L.R. 9 C.P. 277, at 308:—

If the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail.

Other like cases are collected in Hardcastle (3rd ed.), at 174 *et seq.*

Looked at from this point of view I am constrained to think that this Act must be construed as applicable only to those Chinamen who have not become naturalized British subjects, and is not applicable to the appellant who has become such.

Whether it is *ultra vires* or *intra vires* the alien Chinamen is a question with which, in this view, I have nothing to do.

Yet, in deference to the argument put forward in way of so interpreting the British North America Act that the reservation to Parliament at the end of sec. 91 of the powers enumerated in said section 91 must apply only in its limitation to item number 16 of sec. 92, instead of as usually construed, so far as necessary to each and all of the enumerated powers given by that section, I may be permitted to say that I wholly dissent from the view put forward. I look upon the powers given Parliament in the twenty-nine enumerated classes set forth in sec. 91, so far as necessary to give efficacy thereto, as paramount to anything contained elsewhere as in sec. 92.

Subject thereto, and some other special powers given Parliament, the powers given the legislatures are exclusive and cannot be infringed upon or restricted save by the veto power. There is, however, the possibility of legislation by a legislature being held good until Parliament asserts its powers in conflict therewith.

Until this relation of the powers respectively given Parliament and the legislatures and their order of priority and superiority is thoroughly comprehended and acted upon, there is sure to be confusion in working the system and that confusion invites and induces still greater confusion when the place of the

residual power has to be fixed and the relation thereof to these considered.

The maintenance of the warehouse receipts given banks by virtue of the Bank Act, as against local legislation resting upon authority over property and civil rights, as held in *Tennant* v. *The Union Bank of Canada*, [1894] A.C. 31, illustrates how unfounded is the argument put forward. And the case of the *Grand Trunk Railway Company* v. *The Attorney-General of Canada*, [1907] A.C. 65, relative to the power of a railway company to contract itself out of the provision of the Railway Act, prohibiting such a contract with its employees, is another illustration of how the law of a province, quite good till Parliament asserted its power, by virtue of sec. 91, sub-sec. 29, must bend before such assertion of superior power.

The fact that Parliament has, in regard to naturalization, intervened, has much weight with me in reaching the conclusion I have as a reason why the legislature must not be presumed to have decided to ignore what is enacted by Parliament.

I am by no means to be held as deciding the effect of that legislation by Parliament. All I say, in way of deciding herein, is that until, in such case, the legislature makes it clear that it intended to question the effect of that legislation, I need go no further than say it has not clearly expressed its intention to assert and exercise such a doubtful right.

It is an attempt to cover and classify by an ambiguous term the case of a man who is in truth and fact what the term used clearly implies, and may return home any day, with that of a man who may have bid good-bye forever to his native land, induced to do so by the assurances offered him. I may add that we are not instructed as to the exact relation between China and Great Britain in regard to the position of the appellant, and, for the present purpose, that is immaterial, but I can conceive of further considerations of this sort of legislation rendering more full information necessary than this case does. And, if the like term "Chinaman," as used here and in *The Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, is to be read as extending to such, when naturalized British subjects, then the decision therein must bind us herein.

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I think, therefore, that this appeal should be allowed with costs.

DUFF, J.:—The first question to be considered is a question of jurisdiction which was raised during the course of the argument. The appeal comes before us by leave, under sec. 37(*c*), but an order made under that provision does not conclude the question of jurisdiction which arises here. Sec. 36, sub-sec. "*b*," provides in express terms that there shall be "no appeal in a criminal case except as provided in the Criminal Code." In the judgments of three members of the Court in *Re McNutt*, 47 Can. S.C.R. 259, 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 49 C.L.J. 117, the word "criminal," as it appears in sec. 39, sub-sec. "*c*" (and it is obviously used in the same sense in sub-sec. "*a*," sec. 36) was construed in the broad sense as applying to proceedings for the punishment of offences under provincial penal enactments, which, if passed by a legislature exercising authority unrestricted as to subject-matter would, according to the general principles, be classified as criminal law. See pages 261, 267 and 286.

If these views correctly interpret the word "criminal" in sec. 39(*c*), it would follow, I think, that the appeal in the present case comes within the prohibitions of sec. 36(*b*), and is incompetent.

For reasons, however, which I gave in full, *Re McNutt*, 47 Can. S.C.R. 259, 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 49 C.L.J. 117, I think the phrases "criminal case" and "criminal charge" in these provisions of the Supreme Court Act must be read in the narrow sense there indicated, and in my view the prohibitions contained in sub-sec. "*a*" and "*b*," of sec. 36, have no application to judgments in proceedings under provincial penal statutes.

The statute in question came into force on May 1, 1912, and is in the following words:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a bona fide customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amuse-

ment owned, kept or managed by any Japanese, Chinaman or other Oriental person.

2. Any employer guilty of any contravention or violation of this Act shall, upon summary conviction, be liable to a penalty not exceeding $100 and, in default of payment, to imprisonment for a term not exceeding two months.

3. This Act shall come into force on the first of May, 1912.

On May 27, 1912, the appellant, who was a restaurant keeper, was convicted by the police magistrate of Moose Jaw of the offence of employing white female servants in contravention of the provisions of this Act. On January 11, 1913, the Act was amended by striking out the italicized words in the last two lines of sec. 1, its application being thereby limited to "Chinamen."

The appellant, at the time of the alleged offence, had been naturalized under the naturalization laws of Canada.

The first question for consideration, which is the substantial question on the appeal, is whether, assuming that this statute is not in conflict with any Act passed by the Parliament of Canada, it is within the scope of the legislative powers of the Province of Saskatchewan.

It might plausibly be contended that it is legislation in relation to any one of these three classes of subjects: "local undertakings," sec. 92 (B.N.A. Act), item 10, or "property and civil rights" within Saskatchewan, sec. 92(13), or "matters merely local or private" in Saskatchewan, sec. 92(16). For the purposes of this judgment it may be assumed that the words "any restaurant, laundry or other place of business or amusement" are not in this enactment descriptive of "local works or undertakings" within the meaning of sec. 92(10); and I shall assume further that (although the legislation does unquestionably deal with civil rights) the real purpose of it is to abate or prevent a "local evil" and that considerations similar to those which influenced the minds of the Judicial Committee in *The Attorney-General of Manitoba* v. *The Manitoba License-Holders' Association*, [1902] A.C. 73, lead to the conclusion that the Act ought to be regarded as enacted under sec. 92(16), "matters merely local or private within the province," rather than under sec. 92 (13), "property and civil rights within the province." There can be no doubt that, *primâ facie*, legislation prohibiting the em-

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ployment of specified classes of persons in particular occupations on grounds which touch the public health, the public morality or the public order from the "local and provincial point of view" may fall within the domain of the authority conferred upon the provinces by sec. 92(16).

Such legislation stands upon precisely the same footing in relation to the respective powers of the provinces and of the Dominion as the legislation providing for the local prohibition of the sale of liquor, the validity of which legislation has been sustained by several well-known decisions of the Judicial Committee, including that already referred to.

The enactment is not necessarily brought within the category of "criminal law," as that phrase is used in sec. 91 of the B.N.A. Act, 1867, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in *Hodge* v. *The Queen*, 9 App. Cas. 117, and in the *Attorney-General for Ontario* v. *The Attorney-General for the Dominion*, [1896] A.C. 348, as well as in the *Attorney-General of Manitoba* v. *The Manitoba Licence-Holders' Association*, [1902] A.C. 73, already mentioned, established that the provinces may, under sec. 92(16) of the B.N.A. Act, 1867, suppress a provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by sec. 92(15).

The authority of the legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and truly legislation in relation to a matter which falls within the subject assigned exclusively to the Dominion by sec. 91(25), "aliens and naturalization," and to which, therefore, the jurisdiction of the province does not extend. This is said to be shewn by the decision of the Privy Council in *The Union Colliery Co.* v. *Bryden*, [1899] A.C. 580.

I think that, on the proper construction of this Act (and this appears to me to be the decisive point), it applies to persons of the races mentioned without regard to nationality. According to the common understanding of the words "Japanese, Chinaman or other Oriental person," they would embrace persons

otherwise answering the description who, as being born in British territory (Singapore, Hong Kong, Victoria or Vancouver, for instance), are natural born subjects of His Majesty equally with persons of other nationalities. The terms Chinaman and Chinese, as generally used in Canadian legislation, point to a classification based upon origin, upon racial or personal characteristics and habits, rather than upon nationality or allegiance. The Chinese Immigration Act, for example, R.S.C., 1906, ch. 95 (sec. 2 (*d*) and sec. 7), particularly illustrates this; and the judgment of Mr. Justice Martin, *Re The Coal Mines Regulation Act*, 10 B.C.R. 408, at pp. 421 and 428, gives other illustrations. Indeed, the presence of the phrase "other Oriental persons" seems to make it clear, even if there could otherwise have been any doubt upon the point, that the legislature is not dealing with these classes of persons according to nationality, but as persons of a certain origin or persons having certain common characteristics and habits sufficiently indicated by the language used.

Primâ facie, therefore, the Act is not an Act dealing with aliens or with naturalized subjects as such. It seems also impossible to say that the Act is, in its practical operation, limited to aliens and naturalized subjects. From the figures given by the census of 1911 it appears that, while the total Chinese population of the three western provinces was about 22,000, there were about 1,700 persons born in Canada classed as Chinese, nearly all of whom would be found in those provinces; and these, of course, are natural born subjects of His Majesty. There are at this moment in Wesern Canada, moreover, considerable numbers of people unquestionably embraced within the description "Oriental persons" who have come to this country from other parts of His Majesty's territorial dominions and as regards nationality stand in the same category. The Act would (giving its words their usual meaning) apply to all these; and there can be no sound reason for suggesting that they can, consistently with the objects of the enactment, be excluded from the field of its operation.

The appellant's attack is really based upon a certain interpretation of the decision of their Lordships by the Judicial Committee in *The Union Colliery Co.* v. *Bryden*, [1899] A.C.

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580. Lord Watson, in delivering their Lordships' judgment, at p. 587, said:—

But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia. . . .

They are also of opinion that the whole pith and substance of the enactments or section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

Of the legislation before us it would be impossible to say that "it has and can have no application except to 'Orientals' who are aliens or naturalized subjects," as I have already pointed out. It seems equally impossible to affirm that it establishes any rule or regulation at all comparable to regulations of the character described by His Lordship, viz., "that these aliens or naturalized subjects shall not work or be allowed to work in certain industries," and, lastly, it would be going quite beyond what is warranted by anything like a fair reading of the statute before us to say of it that "it establishes no rule or regulation laying a prohibition upon aliens or naturalized subjects."

Orientals are not prohibited in terms from carrying on any establishment of the kind mentioned. Nor is there any ground for supposing that the effect of the prohibition created by the statute will be to prevent such persons carrying on any such business. It would require some evidence of it to convince me that the right and opportunity to employ white women is, in any business sense, a necessary condition for the effective carrying on by Orientals of restaurants and laundries and like establishments in the Western provinces of Canada. Neither is there any ground for supposing that this legislation is designed to deprive Orientals of the opportunity of gaining a livelihood.

There is nothing in the Act itself to indicate that the legislature is doing anything more than attempting to deal according to its lights (as it is its duty to do) with a strictly local situation. In the sparsely inhabited Western provinces of this country the presence of Orientals in comparatively considerable

numbers not infrequently raises questions for public discussion and treatment, and, sometimes in an acute degree, which in more thickly populated countries would excite little or no general interest. One can without difficulty figure to one's self the considerations which may have influenced the Saskatchewan Legislature in dealing with the practice of white girls taking employment in such circumstances as are within the contemplation of this Act; considerations, for example, touching the interests of immigrant European women, and considerations touching the effect of such a practice upon the local relations between Europeans and Orientals; to say nothing of considerations affecting the administration of the law. And, in view of all this, I think, with great respect, it is quite impossible to apply with justice to this enactment the observation of Lord Watson in the *Bryden* case, [1899] A.C. 580, that "the whole pith and substance of it is that it establishes a prohibition affecting" Orientals. For these reasons, I think, apart altogether from the decision in *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, to which I am about to refer, that the question of the legality of this statute is not ruled by the decision in *Bryden's* case.

I think, however, that in applying *Bryden's* case we are not entitled to pass over the authoritative interpretation of that decision which was pronounced some years later by the Judicial Committee itself in *Cunningham* v. *Tomey Homma*, [1903] A.C. 151. The legislation their Lordships had to examine in the last mentioned case, it is true, related to a different subject-matter. Their Lordships, however, put their decision upon grounds that appear to be strictly appropriate to the question raised on this appeal. Starting from the point that the enactment then in controversy was *primâ facie* within the scope of the powers conferred by sec. 92(1), they proceeded to examine the question whether, according to the true construction of sec. 91 (25), the subject-matter of it really fell within the subject of "aliens and naturalization"; and, in order to pass upon that point, their Lordships considered and expounded the meaning of that article.

At pp. 156 and 157, Lord Halsbury, delivering their Lordships' judgment, says:—

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If the mere mention of alienage in the enactment could make the law ultra vires, such a construction of section 91, sub-section 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

It was hardly disputed that if this passage stood alone the argument of the appellant must fail. But it is said that this passage is *obiter* and is inconsistent with and, indeed, contradictory to certain passages in Lord Watson's judgment in *Bryden's* case, [1899] A.C. 580, which passages, it is contended, give the true ground of the decision in that case and, consequently, are binding upon us. I have already said what I have to say as to the effect of Lord Watson's judgment; but I think this last mentioned argument is completely answered by reference to a subsequent passage of Lord Halsbury's judgment in *Cunningham's* case, [1903] at p. 157. It is as follows:—

That case depended upon totally different grounds. This Board dealing with the particular facts of the case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

That is an interpretation of *Bryden's* case, [1899] A.C. 580, which it appears to me to be our duty to accept.

It should not be forgotten that the very eminent Judges (Lord Halsbury, Lord Macnaghten, Lord Lindley), constituting the Board which heard the appeal in *Cunningham's* case, [1903] A.C. 151, had that case before them for something like six months after it had been very fully argued by Mr. Blake against the provincial view; and, in delivering the considered judgment of the Board, Lord Halsbury, as we have seen, examines and sums up the effect of the decision in *Bryden's* case, [1899] A.C. 580, which the Courts in British Columbia had be-

lieved themselves to be following in passing upon *Cunningham's* case, [1903] A.C. 151. In these circumstances, whatever might otherwise have been one's view of their Lordships' judgment in *Bryden's* case, [1899] A.C. 580, we should not be entitled to adopt and act upon a view as to the construction of item 25 of sec. 91 (B.N.A. Act), which was distinctly and categorically rejected in the later judgment.

There is one more point to be noted. Section 24 of the Naturalization Act, ch. 77, of the R.S.C., 1906, provides as follows:

> 24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject within Canada, with this qualification that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

It is unnecessary to consider whether or not this section goes beyond the powers of the Dominion in respect of the subject of naturalization, or whether "the rights, powers and privileges" referred to therein ought to be construed as meaning those only which are implied by the "protection" that is referred to as the correlative of allegiance in the passage above quoted from the judgment of the Judicial Committee in *Cunningham's* case, [1903] A.C. 151. This much seems clear: The section cannot fairly be construed as conferring upon persons naturalized under the provisions of the Naturalization Act, a status in which they are exempt from the operation of laws passed by a provincial legislature in relation to the subjects of sec. 92 of the British North America Act, 1867, and applying to native-born subjects of His Majesty in like manner as to naturalized subjects and aliens. If the enactment in question had been confined to Orientals who are native-born British subjects it would have been impossible to argue that there was any sort of invasion of the Dominion jurisdiction under sec. 91 (25); and it seems equally impossible to say that this legislation deprives any Oriental, who is a naturalized subject, of any of "the rights, powers and privi-

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leges" which an Oriental, who is a native-born British subject, is allowed to exercise or retain.

ANGLIN, J., agreed with Davies, J.

Appeal dismissed with costs.

N.B.—Leave to appeal was refused by the Judicial Committee of the Privy Council, May 19, 1914.

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Re MUIR ESTATE.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. May 5, 1914.

1. TAXES (§ V C—198)—SUCCESSION DUTY—PROPERTY OUT OF PROVINCE.

A covenant in an agreement under seal for the sale of land, to pay the purchase money, creates a specialty debt and the document being in the Province of Manitoba and the money payable there, though the land is situate in another province, is deemed to be property subject to taxation under the Succession Duties Act, R.S.M. 1913, ch. 187.

[*Commissioner of Stamps* v. *Hope*, [1891] A.C. 476; *Treasurer* v. *Pattin*, 22 O.L.R. 184, followed.]

2. TAXES (§ V C—198)—SUCCESSION DUTY—PROPERTY OUT OF PROVINCE.

The maxim *mobilia sequuntur personam* being clearly excluded in the Manitoba Succession Duties Act, R.S.M. 1913, ch. 187, the movable property of a deceased domiciled Manitoba citizen locally situate out of the province at the time of his death is subject to taxation under the Act.

[*Rex* v. *Lovitt*, [1912] A.C. 212; *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176, specially referred to.]

Statement

APPEAL by the Standard Trusts Company, the executors under the will of Robert Muir, deceased, and by the beneficiaries under his will from an order of the Judge of the Surrogate Court of the Eastern Judicial District of Manitoba made in respect of succession duties claimed by the Province of Manitoba upon the estate of the deceased.

The appeal was dismissed, RICHARDS and PERDUE, JJ.A., dissenting.

W. R. Mulock, K.C., and *J. W. E. Armstrong*, for the executors.

R. B. Graham, for the Provincial Treasurer of Manitoba.

HOWELL, C.J.M.:—I see no reason to interfere with the order in so far as it relates to the debt owned by Little. He was and is living in this province, there is nothing to shew that he will not pay this claim if demanded, and nothing to shew that the asset is not good.

In regard to the agreements for sale of the lands in Saskatchewan, I agree with my brother Cameron that there is contained therein a covenant under seal to pay the purchase money. The debt is, therefore, a specialty and the document being in this province it is property here and liable to taxation within *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476; *Treasurer* v. *Pattin*, 22 O.L.R. 184; and the English cases therein fully referred to.

We are, therefore, in this case, only called upon to consider the first part of sub-sec. (*a*) of the new sec. 5 in the Succession Duties Act (Man.), 4 & 5 Edw. VII. ch. 45. The testator was domiciled here and the property to be taxed is here, and unless this whole statute is *ultra vires* I can see no reason why the duty should not be paid.

By sec. 20 of the Wills Act, R.S.M. 1902, ch. 174 [R.S.M. 1913, ch. 204] no devisee under a will can get title to real estate except by conveyance from the executor. By the Devolution of Estates Act (Man.), ch. 21, 5 & 6 Edw. VII. [R.S.M. 1913, ch. 54], real estate in case of intestacy passes to the personal representative just as personal property and there is power to sell and convey. It is, therefore, clear that all the estate, real and personal, of the deceased passes to and is vested in the executors or administrators alike under a will and in intestacy.

Sec. 6 of the Succession Duties Act, R.S.M. 1902, ch. 161 [R.S.M. 1913, ch. 187, sec. 9], requires the personal representative when he applies for probate or administration to file with the surrogate clerk: (1) a sworn statement with items shewing the then market value of the estate, and (2) the names of the persons to whom the estate is to pass and their several degrees of relationship to the deceased. The section further provides that the personal representative shall, before the issue of the probate or letters of administration, execute with two approved

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sureties a bond to the King to the amount of ten per cent. of the sworn value of the estate conditioned

for the due payment to His Majesty of any duty to which the property coming to the hands of such executor or administrator of the deceased may be found liable.

Section 15 is as follows [R.S.M. 1913, ch. 187, sec. 21]:—

15. Any administrator, executor or trustee having in charge or trust, any estate, legacy, or property, subject to the said duty, shall deduct the duty therefrom, or collect the duty thereon upon the appraised value thereof, from the person entitled to such property, and he shall not deliver any property subject to duty to any person until he has collected the duty thereon.

Section 16 [R.S.M. 1913, ch. 187, sec. 22] gives the executor or administrator power to sell the property to pay the duty the same as for debts.

Sub-sec. (*c*) of sec. 4 of ch. 45, 4 & 5 Edw. VII., declares that all the duties shall be levied and collected *pro rata* out of the whole estate [R.S.M. 1913, ch. 187, sec. 8].

From this glance at the legislation it will be seen that the property is completely vested in the personal representative and that any beneficiary must claim title through him. The property is charged with the payment of this tax and the executor is fully empowered to take money from the estate and pay this claim. He cannot get probate without a direct personal liability to pay; it is as much his duty to pay this charge as to pay ordinary probate fees. It seems to me it is a direct tax upon this property all within this province in the executors' hands and to get possession of which he must agree to pay the tax.

The remarks of Lord Robson in *Rex* v. *Lovitt*, [1912] A.C. 212 at 223, on a similar New Brunswick statute, does not suggest anything *ultra vires;* but on the contrary, he says:—

These provisions shew that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator.

There is no suggestion in his judgment that such taxation is indirect and beyond the power of the province and it would not have seriously to be considered but for the case of *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176. The question of indirect taxation is there fully gone into with reference to a statute of Quebec, and while the direct subject before the Court was the taxation of personal property of the deceased, who at his death was domiciled in Quebec and owned a large quantity of bonds, debentures and shares, all locally situate in New York, all deposited there with a trust company, very wide and inclusive language was used which might be construed to hold that the tax in this case was not within the principle of direct taxation.

The judgment in that case decided that although the deceased was at his death domiciled in Quebec and subject to the law of that province, yet, because of the restrictive language of sec. 92 of the British North America Act, limiting the legislative power to "direct taxation within the province" with power to legislate only as to "property and civil rights in the province" the provincial powers were not as wide as the powers of the Parliament at Westminster, and that the Quebec Act was *ultra vires*, at all events, to the extent of taxing property situate out of the province. Much of the language used in that case is with reference to the Quebec statute, which is different in some respects from the statute before us, but many parts of it apply uncomfortably closely to the point in dispute before us. Towards the end of the judgment, however, in commenting on previous cases, and to harmonise them, the following language is used [15 D.L.R. 294]:

> In the case of *Rex* v. *Lovitt*, [1912] A.C. 223, no question arose as to the power of a province to levy succession duty on property situated outside of the province. It related solely to the power of a province to require as a condition for local probate on property within the province that a succession duty should be paid thereon.

I read that portion of the judgment in the *Cotton* case which holds the tax to be *ultra vires* to refer only to the attempt to tax personal property situate outside the province and it is, therefore, not an authority applicable to the facts in this case.

The appeal will be dismissed. There will be no order as to costs.

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RICHARDS, J.A.:—There is no difficulty, it seems to me, as to the Little debt. The admissions filed shew that it is a simple contract debt, and that it is due by a resident of Manitoba. I think, also, that it should be assumed that, as both parties resided in Manitoba, the contract arose there. The fact that the consideration given was the building of elevators outside of Manitoba, does not affect the matter. I am of opinion that it is liable to the succession duty claimed. As there is no evidence that Mr. Little is unable to pay the debt in full, I think its value should be taken to be the full amount due.

I have, however, had doubts whether the debts due in respect of the lands near Kirkella, in Saskatchewan, were or were not, made specialty debts by the agreements under seal, of sale and purchase, entered into by the testator with certain purchasers, but I have come to the conclusion that they were not. Copies of one of these documents were furnished the Court, and it was agreed that all of the others were, for the purposes of this matter, in the same form. They all affect the land outside of Manitoba, and, apparently, the debtors all are domiciled outside of the province. The instrument begins with a recital that

> the vendor has agreed to sell to the purchaser and the purchaser has agreed to purchase from the vendor (naming the lands) at or for the price or sum of twelve hundred and eighty ($1,280) dollars . . payable in the manner and on the days and times hereinafter mentioned, that is to say: Two hundred and eighty ($280) dollars now paid to the vendor by the purchaser (the receipt whereof is hereby acknowledged) the balance of one thousand ($1,000) dollars in eight equal annual instalments of one hundred and twenty-five ($125) dollars each payable on the sixth day of March in each and every of the years 1908 to 1915, both inclusive, together with interest at the rate of eight (8) per centum per annum, to be computed from March 6, 1907, and to be paid half yearly on each 6th day of March and 6th day of September after the date hereof on so much principal money as shall from time to time remain unpaid until the whole of the principal money and interest is paid (the first payment to be made on the 6th day of September, 1907).

The instrument, in the main features of its operative part, then provides:—

1. That overdue interest shall be treated as purchase money and bear interest;

2. That, on certain default, the whole purchase money shall become due;

3. An attornment clause at a rental equal to the interest;

4. A covenant by the purchaser to insure and keep insured, with a proviso that the vendor may insure and that moneys expended by him in so doing "shall be paid by the purchaser to the said vendor on demand" and in the meantime shall be added to the principal and shall bear interest;

5. A covenant by the vendor to convey "on payment of the said sums of money and interest;"

6. A proviso that on payment of $1,030 of the purchase money "the purchaser *may* ask for and the vendor shall furnish" a conveyance "upon the purchaser executing in favour of the vendor a first mortgage . . . the same to provide for the payment of the balance of the purchase money . . . and to contain a covenant by the purchaser for insurance against fire, as above provided, such mortgage to be on such form as shall be satisfactory to the vendor's solicitor" the purchaser to bear the expense of preparing and registering the same and of all searches and disbursements;

7. A covenant to permit the purchaser to occupy until default;

8. A proviso enabling the vendor, in case of default, to cancel the agreement;

9. Time to be of the essence, and making it lawful for the vendor to re-enter in case of default.

There is no expressed covenant to pay the purchase money or interest. The only expressed covenant on the purchaser's part to pay is that to repay to the vendor on demand moneys expended by the latter in insuring, and there is no evidence that any moneys ever were so expended.

But it is argued that the recital contains or implies a covenant, as it says that "the purchaser has agreed to purchase . . at and for the price of—(naming it)—payable in the manner and on the days and times hereafter mentioned, that is to say," which is followed by amounts and dates of intended payments, ending with "(The first payment to be made on the 6th day of September, 1907)."

The question is full of difficulties and the reported decisions are perhaps hard to harmonize. I take it, however, that the true principle is that stated by Lord Romilly in *Marryatt* v. *Marryatt*, 28 Beav. 224, 54 Eng. R. 352, where after saying that the object of the recital is to ascertain free from any dispute the amount which is to be secured, he says:—

> Though you may infer the promise to pay from the recital, the promise to pay simply raises a mere assumpsit, unless the object of the deed is confined to that acknowledgement, but if the object of the deed is other than that, and merely collateral to it, then the recital amounts to nothing.

In *Isaacson* v. *Harwood*, L.R. 3 Ch. App. 225, a defaulting trustee by deed recited that he held trust funds which he pro-

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posed to secure by a mortgage on his own lands, and conveyed these lands by way of mortgage. The instrument contained a proviso for redemption and a power of sale, but not a covenant to pay.

It was held that the instrument did not create a specialty debt.

Lord Cairns there says, at 228:—

In every case it is a question of the construction of the instrument, what did the parties intend?

Whatever words are used by a party to a deed, if he intends that they shall operate as a covenant, he will be held liable. In the simple case of a debtor acknowledging a debt by a deed under seal, *without any other object declared by the deed*, no doubt it must be assumed that, although no words of covenant are used, the debtor meant to be bound, or else why should he go through the form of executing a deed? But is the present a case of a party acknowledging a debt by deed under seal, with no other object but to acknowledge the debt? It is plain that he had another object.

In *Courtney* v. *Taylor*, 6 Man. & G. 851, a recital was introduced into an instrument under seal to explain how a certain total sum of £577 10s. was made up.

The recital reads:—

But the said principal sum of £525 and the said arrear of interest of £52 10s., making together the sum of £577 10s., is still due and owing from the said Robert Taylor to the said John Courtney and Benjamin Howell, as he the said Robert Taylor doth hereby acknowledge.

It was held not to contain a covenant.

In *Jackson* v. *Yeomans*, 19 U.C.C.P. 394, the proviso for avoidance of a mortgage contained the following:—

And the balance of the above sum, being the sum of $4,000, in three equal payments, to be respectively made in six, nine, and twelve months from date of the deed.

There were a number of covenants and other provisos but no express covenant to pay the money.

Held, that the language above quoted did not create a covenant to pay the money.

In *London Loan Co.* v. *Smith*, 32 U.C.C.P. 530, a mortgage that contained no express covenant for payment had the following:—

This mortgage to be void on payment of $755 with interest at 7 per cent. within one year from date.

Held not to create a covenant.

In *Hart* v. *Eastern Union, etc., Railway*, 7 Ex. 246 (affirmed by the Court of Exchequer Chamber in 8 Ex. 116), the defendants had borrowed £1,000 and by instrument under their corporate seal assigned to the plaintiffs their undertaking, tolls, etc., to hold until the £1,000 and interest should be repaid. That was followed by these words,

> the principal sum to be repaid on the first day of January, 1851.

The instrument contained nothing further. It was held that the deed contained a covenant.

That case seems to me to differ from the one in question in this. What is relied on is in the operative part of the deed, and not in a recital. Then the deed comes within the language of Lord Cairns in *Isaacson* v. *Harwood*, L.R. 3 Ch. App. 225, and of Lord Romilly in *Marrgatt* v. *Marrgatt*, 28 Beav. 224, 54 Eng. R. 352, its object being confined to the acknowledgment of the debt, and the fixing of the time for its payment.

In *Saunders* v. *Milsome*, L.R. 2 Eq. 573, it was held that a recital of a simple contract debt, with a charge on a particular property and an agreement to execute a mortgage of the property, containing a covenant to pay the debt, created a specialty because of the agreement to give the covenant being treated as in equity the equivalent of actually giving the covenant. The same was held in *Kidd* v. *Boone*, L.R. 12 Eq. 89, with regard to an agreement under seal to execute a lease that should contain a covenant to pay rent. I mention the two last above named cases because of the provision in the deed before us that, at a certain stage of the payments, the purchaser may require the vendor to give a deed and take back a mortgage. But that course is not obligatory on the purchaser. He "*may* ask for" the deed, and on so doing must give the mortgage. But he is not obliged to take that course and there is no evidence that any of the purchasers have taken it. For that reason the case does not come within the reason for the decisions in the *Saunders* and *Kidd* cases.

Here, all that is relied on to constitute a covenant is in the recital. That recital leads up to the getting of a title by the purchaser on completing his payments and shews how he is to do so. For the purpose of certainty it recites the amounts to be

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paid for that object and the times of payment. That is its sole reason for being in the deed. It seems to me that the rule in *Marryatt* v. *Marryatt*, 28 Beav. 224, 54 Eng. R. 352, and *Isaacson* v. *Harwood*, L.R. 3 Ch. App. 225, applies, and shews that no covenant is constituted by the recital. It is not given for the mere purpose of acknowledging a debt.

There is no express covenant to pay the purchase-money, or interest. Its absence is the more noticeable because there is, in the body of the document, an express covenant as to moneys that may be expended by the vendor in paying insurance. The deed says that such moneys "shall be paid by the purchaser to the vendor on demand."

With some doubt, I am of opinion that these agreements of sale, as to the lands in Saskatchewan, do not create specialty debts, and that, therefore, the fact of their being found in this province does not bring them within the rule as to specialties, which would make them assets within Manitoba. It seems to me that these debts are merely simple contract debts due and payable in Saskatchewan.

If the debts to which these agreements refer, not being specialty debts, are not within the province, can the Legislature impose succession duties in respect of them?

I can not distinguish the legal position of these assets from those in question in *Cotton* v. *The King*, [1914] A.C. 176, 15 D.L.R. 283, which were in New York, and as to which succession duties were claimed in the Province of Quebec from the estate of the deceased owner, who died domiciled in Quebec.

In that case it was held that the duties could not be claimed. Though the judgment refers to the wording of the statute of Quebec, I take it to go beyond the mere question of wording and to the root of the question, whether a provincial Legislature can impose a succession duty on property not in the province, but in another jurisdiction, which property was, at the time of his death, owned by a person domiciled within the province.

Lord Moulton, at page 189, puts the matter broadly. He says that the question before the Board is "whether a succession duty of the kind contended for by the respondent"—the Govern-

ment of Quebec—"could be imposed by the Provincial Legislature without exceeding its powers."

At page 195 [15 D.L.R. 293] in discussing the matter, he says:—

> To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some person not domiciled in the province. There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from some one who was not intended himself to bear the burden, but to be recouped by some one else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

Though worded differently, I am unable to draw any distinction between the effect of the part of the Quebec Act under discussion in the *Cotton* case and that of sec. 5, sub-sec. (1) (*a*) in the Act of this province as amended in 1905. It seems to me that if the Quebec Act was *ultra vires* as there decided, the part of that section in our Act covering

> all movable property locally situate out of this province, . . . where the owner was domiciled in this province at the time of his death,

was equally beyond the powers of our legislature to enact.

The fact that, before probate issues, the executor must give a bond to secure the succession duties does not, in my opinion, affect the question, so as to make the tax a direct one. The payment is ultimately borne by the beneficiaries, and not by the executor.

Perdue, J.A.

PERDUE, J.A.:—This is an appeal by the Standard Trusts Co., executors of Robert Muir, deceased, and by the beneficiaries under his will, from the Judge of the Surrogate Court of the Eastern Judicial District of Manitoba, in respect of succession duties claimed by the Province of Manitoba upon the estate of the deceased. Certain facts were agreed to by the parties and written admissions of these facts were signed by counsel repre-

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senting the province and by counsel for the executors and beneficiaries. It was agreed that these admissions might be used and read in evidence on the hearing, with power to the Court to draw inferences therefrom.

The testator was at the time of his death domiciled and resident in Manitoba, and his will was proved in the Surrogate Court above mentioned. The deceased in his lifetime owned certain lands in the Province of Saskatchewan, known as the Kirkella lands, and these had been sold by him to various purchasers. It is admitted that "all of these sales were evidenced by agreements for sale under seal" and were all similar in form to the one of which a copy was put in. At the time of the death of the deceased the title to none of these lands had been transferred to the purchasers and the balance due on them was $15,667.60. All of these agreements were in the possession of the deceased in Winnipeg at the time of his death.

The testator had, under a verbal agreement, erected certain grain elevators in the Province of Saskatchewan for one, Little, upon leased lands. By a term of the agreement the testator operated the elevators and the earnings were applied in reduction of the money due from Little to him. At the time of the testator's death the amount due to him in respect of these elevators was $13,400.66. Little resides in Manitoba.

The Surrogate Judge allowed succession duties on both the above sums. The executors and beneficiaries appeal against this allowance and also claim that the Succession Duties Act, R.S.M. 1913, ch. 187, is *ultra vires* of the Legislature of the province.

In regard to the constitutional question raised by the appellants, main reliance was placed upon the late decision of the Privy Council in *Cotton* v. *The King*, [1914] A. C. 176, 15 D.L.R. 283. The question in that case involved the validity of the Quebec Succession Duties Act, ch. 11 of 1906. That statute enacted the following article:—

1191(*b*). All transmissions, owing to death of the property in, or the usufruct or enjoyment of, movable and immovable property in the province shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death (then follow provisions as to rates of payment).

The same statute enacted that the word "property" within the meaning of this section [(1191)(c)] should

include all property, whether movable or immovable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province . . . and all movables, wherever situate, of persons having their domicile or residing in the Province of Quebec at the time of their death.

The construction placed upon the above articles by the Judicial Committee in giving judgment in *Cotton* v. *The King*, 15 D.L.R. 283, was that the words of limitation inserted in the operative clause (1191(*b*)) made it clear that, so far as personal property is concerned, it was not the intention of the Legislature to tax the whole personal property of the deceased wherever situate, but only his movable property, which was locally (*i.e.*, physically) situate within the province.

The Judicial Committee, however, dealt also with the further question that was submitted in the *Cotton* case. That question was the following:—

Whether a succession duty of the kind contended for by the respondent (the Crown) could be imposed by the Provincial Legislature without exceeding its powers.

In considering that question it was assumed that the operative clause specifically extended to the taxation of all property of the testator as defined in the statute so as to include movable property outside the province. The Quebec Act in question, in the view the Committee took of it, made it obligatory upon every heir, legatee, executor, trustee and administrator or notary before whom a will had been executed to forward a complete schedule of the estate with a declaration under oath setting forth various matters relating thereto. On receipt of this declaration the collector of provincial revenue caused to be prepared a statement of the amount of duties to be paid by the declarant. This amount was to be demanded of the declarant, and if not paid within thirty days the collector might sue for the same before any Court of competent jurisdiction in his own district. Lord Moulton, in pronouncing the judgment of the Committee, cites these enactments and then proceeds [15 D.L.R. 293]:—

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Their Lordships can only construe these provisions as entitling the collector of inland revenue to collect the whole of the duties on the estate from the persons making the declaration, who may (and as we understand in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein.

It was held, in the view that their Lordships took of the Act, that the duty imposed by the Act did not fall within the definition of "direct taxation" adopted by them, namely, a tax which is demanded from the very person who it is intended or desired should pay it.

The conclusion in regard to the legislation in question in the *Cotton* case was expressed in these words [15 D.L.R. 293]:—

It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are, therefore, compelled to hold that the taxation is not "direct taxation," and that the enactment is, therefore, *ultra vires* on the part of the provincial Government. On this ground, therefore, the appeal must be allowed.

The testator, Robert Muir, died in June, 1908, and the statute of this province applicable to the present case is the Succession Duties Act, being ch. 161 of the Revised Statutes of Manitoba, 1902, as amended in 1905, by 4 & 5 Edw. VII. ch. 45 [R.S.M. 1913, ch. 187]. The Act as it appeared in the Revised Statutes confined the levy of succession duties to property within the Province of Manitoba, sec. 5. By the amendment of 1905, sec. 5 of the former Act is repealed and a new section substituted, of which I need only quote the following portion:—

5. (1) Save as aforesaid (the exceptions not affecting this case) the following property shall be subject to a succession duty as hereinafter provided, to be paid for the use of the province over and above the fees payable under the Surrogate Courts Act.

(*a*) All property within this province, and any interest therein or income therefrom, whether the deceased person owning the same or entitled thereto was domiciled in Manitoba at the time of his death or was domiciled elsewhere, and all movable property locally situate out of this province, and any interest therein or income therefrom, where the owner was domiciled in this province at the time of his death.

By the interpretation clause,

the expression "property" includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

By sec. 6 an executor or administrator applying for probate or letters of administration shall, before the issue of the probate or letters of administration to him, make and file with the surrogate clerk a statement under oath shewing (*a*) a full itemized inventory of *all the property of the deceased* and its market value, (*b*) the persons to whom the same will pass and their relationship to the deceased, and the executor or administrator shall before the issue of probate or letters of administration deliver to the surrogate clerk a bond in a penal sum equal to ten per cent. of the sworn value of the property of the deceased liable to succession duty, conditioned for the due payment of any duty to which the property coming to his hands may be found liable, or furnish other security satisfactory to the Judge of the Surrogate Court.

By sec. 13 the succession duties shall be and remain a lien upon the property in respect of which they are payable until the same are paid.

Sec. 15 provides that the administrator or executor shall deduct the duty from the property or collect the duty upon the appraised value thereof.

By sec. 16, executors or administrators are given power to sell so much of the property of the deceased as will enable them to pay the duty in the same manner as they may do for the payment of debts of the deceased.

The succession duty payable under the Act is to be computed upon the dutiable value of the property according to a scale set out in the Act. This scale varies from one per cent. to ten per cent. *on the whole estate;* 4 & 5 Edw. VII. ch. 45, sec. 4, sub-sec. 2(*a*). Further, it is provided that

> all duties under this Act shall be levied and collected *pro rata* upon the whole of the estate of the deceased person liable to the duty: *Ibid.* sec. 4, sub-sec. 2 (*c*).

A perusal of the sections above referred to, as well as of other portions of the Act, shew that where a deceased person was at the time of his death domiciled in Manitoba, the intention was to impose a tax in the form of succession duty upon all his property in Manitoba and upon all his movable property locally situated outside that province. Before probate or administration

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will be permitted, the executor or administrator must furnish a sworn schedule of all the property of the deceased wheresoever situated and he must furnish a bond to the amount of ten per cent. of the value of the property liable to succession duty. Probate or administration is then granted and the Provincial Treasurer collects the amount of the duty according to the scale set forth in the Act from the administrator or from the persons liable on the bond, and he collects this duty upon the aggregate value of the property within the province and of the movable property outside the province. The administrator must reimburse himself (or the parties to the bond if they have made the payment), by collecting the duty from the devisees or persons interested in the estate or by deducting it from the estate in his hands, or by selling a part of the property for the purpose. The whole duty may be paid out of the property within the province, before administration has been granted in respect of the movable property in a foreign country, or before such foreign assets have been administered. If the foreign assets of a testator domiciled here should not for some reason ever reach the hands of the Manitoba executor, still he will have to pay the duty upon them under his bond. If the foreign assets have been devised to a person not resident within the province (to take the example given by Lord Justice Moulton) and that person obtains possession of them by merely proving the execution of the will, the Provincial Government can only obtain payment of the duty from the Manitoba executor, who in turn must recoup himself from the property within this province, that is to say, from the devisees of the Manitoba property. The result would be that the devisee of the foreign property would escape the tax which should fall upon him and the devisees of the Manitoba property would be compelled to pay both his tax and their own. This would shew that the incidence of the tax is uncertain. As pointed out in the *Cotton* case, it would be indirect taxation and beyond the powers of the provincial legislature to enact.

I cannot see any substantial distinction between the statute in question in this case and the Quebec statute discussed in the *Cotton* case and declared to be *ultra vires* of the legislature that passed it. It is true that, under the view of the Quebec Act

taken by their Lordships, the executor, administrator or notary making the declaration required by the Act was liable and compellable by process of law to pay the duties, while no such direct liability appears in express words to have been imposed upon the executor or administrator by the Manitoba statute. But although there may be no direct personal liability imposed by the Manitoba statute upon the executor or administrator to pay the duty, there is a form of compulsion applied which is equally as effectual, namely, the withholding of probate or administration until the duties are paid, or payment of them is secured. In an ordinary lawsuit a party is not compelled to file an exhibit which will prove his case, but, if an Act of the Provincial Legislature provides that he shall not be permitted to file the document unless he pays a fee, he is in effect compelled to pay it. That was the form of compulsion applied in the Quebec law stamps case, in which the enactment imposing the tax was held to be *ultra vires*, because the ultimate incidence of the tax was uncertain: *Attorney-General* v. *Reed*, 10 App. Cas. 141.

A merchant is not compelled to import goods for trading purposes, but if he does so, he must pay the import duties. These duties he pays with the intention of recovering them from his customers as part of the price charged for the goods. Such duties are indirect taxes.

It appears to me, after a careful perusal of the *Cotton* case, of *Rex* v. *Lovitt*, [1912] A.C. 212, of *Blackwood* v. *The Queen*, 8 App. Cas. 82, and other cases, that a succession duties Act passed by a legislature of one of the provinces of Canada can only be supported where it imposes a tax on property locally situated within the province.

In *Rex* v. *Lovitt*, the testator was domiciled in Nova Scotia, but had assets in New Brunswick in the form of money deposited in a branch of a bank which had its head office in England. Ancillary probate was granted in New Brunswick to the executors and the money was, on the authority of this, paid to them. Succession duty on this money was claimed under the New Brunswick Succession Duties Act. It was held that the money on deposit as above was, for the purpose of collection and administration as distinguished from distribution, governed by the law

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of New Brunswick where it was locally situated, and that the executors were liable to pay succession duty. The principle of the decision was that the succession duty was a tax laid upon the corpus of the property and that the statute made the payment of that tax a term of the grant of ancillary probate. As Lord Moulton said in the *Cotton* case, 15 D.L.R. 294:—

> In the case of *The King* v. *Lovitt*, [1912] A.C. 212, no question arose as to the power of a province to levy succession duty on property situated outside the province. It related solely to the power of a province to require as a condition for local probate within the province that a succession duty should be paid thereon.

In the *Lovitt* case Lord Robson said:—

> It (succession duty) is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property.

The statute we are considering in the present case seeks to tax not only the property within the province which may be dealt with under the probate granted by the province, but also movable property in other jurisdictions which the Manitoba probate cannot affect, and as to the collection or administration of which it gives no assistance: see Williams on Executors, 10th ed., 269-270, as to the necessity for local probate.

The provincial authority compels the executor or administrator to pay the price of enabling him to collect and administer property situated outside the province, although it is unable to confer and does not confer upon him power so to do.

There is another aspect of the case that may be briefly touched upon. It may be illustrated by reference to the Kirkella lands in question in this suit. Each of the agreements of sale respecting these lands, whether they are or are not to be regarded as specialties, contains an obligation on the part of the testator to transfer the land to the purchaser in fee simple, upon the purchase money being paid. This obligation can only be fulfilled by the executors, upon obtaining ancillary probate, or its equivalent, in the Province of Saskatchewan. Authority to enforce payment of the purchase money and legal power to transfer the lands to the purchasers will have to be conferred upon the ex-

ecutors by the Saskatchewan Courts. To obtain transmission of the Kirkella lands to them as executors, so that they may convey to the purchasers, it will be necessary, by the laws of Saskatchewan, to have the Manitoba probate re-sealed in Saskatchewan. This re-sealing gives the probate issued in this province the sanction of law in Saskatchewan and is the equivalent of ancillary letters probate. On this re-sealing full succession duties upon the lands will have to be paid to the government of Saskatchewan. See Revised Statutes of Saskatchewan, 1909, ch. 41, secs. 108-109; also, ch. 54, secs. 69-71, and ch. 38, sec. 5. There can be no doubt that the province of Saskatchewan is, under the authority of *Rex* v. *Lovitt*, quite within its powers in imposing succession duties upon these lands. The result is that, if the Manitoba statute lawfully imposes the payment of the duty upon the Kirkella lands, these lands will be charged with full succession duty in each province. As said in the *Lovitt* case (p. 224) the Courts will not easily adopt a construction leading to such results.

For the above reasons I think that the decision in the *Cotton* case applies to the Succession Duties Act as amended by the Act of 1905, and that such amended Act was *ultra vires*.

It may be mentioned here that in 1910 the Legislature of Manitoba amended sub-sec. (*a*) of sec. 5 of the Act by striking out the latter part of the sub-section, so as to confine the operation of the Act to property within the province. This amendment was, no doubt, passed in deference to the decision in *Woodruff* v. *The Attorney-General of Ontario*, [1908] A.C. 508. The objections as to the constitutionality of the enactment of 1905 do not, therefore, apply to the Act now in force.

A question may arise as to whether the provisions of the Act as amended in 1905 are severable so that it may be good as to the taxation of the property within the province, although bad as to property outside the province. Looking at the whole Act as amended in 1905, and particularly at all the provisions contained in the new sec. 5, I cannot see how the Act can be severed and the portion that is *ultra vires* be rejected while retaining the remainder. To do so would interfere with the scheme of succession duties contemplated by the amended statute and would be in effect the making of a new Act.

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Even if I could hold the statute to be within the powers of the province to enact, I would still consider the Kirkella agreements as not subject to succession duty under the Act. The agreements do not contain direct covenants to pay, but even if a covenant can be implied from the language of the recital, the instruments are not like money bonds, or covenants to pay money, or mortgages. They are evidence of an agreement by a purchaser to pay purchase money of land which the testator agrees to convey on receiving the purchase money. The lands are in Saskatchewan and will have to be conveyed in accordance with the laws of that province. Before the executors can perform the agreements they must obtain probate in Saskatchewan and have the lands transmitted to them in accordance with the statutes of that province. They have no right to act in reference to these agreements until they have placed themselves in a position to perform the agreement upon the part of the vendor. They should not receive purchase money when they have no power to convey. For this reason I do not think that these agreements, although under seal, are to be considered as property situated within the province or as property affected by the Manitoba probate. The locality of the agreements should be in the province where the lands are situated, where the purchasers reside and from which the executors must receive their authority to perform the agreements on the part of the testator. I do not think that the cases of *Treasurer of Ontario* v. *Pattin*, 22 O.L.R. 184; *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476; and *Winans* v. *Attorney-General*, [1910] A.C. 27, apply to agreements such as those in question. In the first two of these cases the specialty instruments were ordinary mortgages to secure moneys, in the third case the question arose concerning foreign negotiable bonds payable to bearer and passing by mere delivery. The instruments in the present case relate to dealings with lands outside this province and involve mutual obligations on the part of both parties to them which can only be performed under the laws of the province where the lands are situated.

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CAMERON, J.A.:—The original Succession Duties Act in this province was passed in 1893. It was subsequently amended and

appears in the revision of 1902 as ch. 161. By ch. 45 of 4 & 5 Edw. VII., sec. 5 of ch. 161, R.S.M. 1902, was repealed and a new section substituted. Sub-sec. 5(1) of the substituted section reads (in parts) as follows:—

> 5. (1) Save as aforesaid the following property shall be subject to a succession duty as hereinafter provided, to be paid for the use of the province over and above the fees payable under the Surrogate Courts Act;
>
> (*a*) All property within this province, and any interest therein or income therefrom, whether the deceased person owning the same or entitled thereto was domiciled in Manitoba at the time of his death or was domiciled elsewhere, and all movable property locally situate out of the province, and any interest therein or income therefrom, where the owner was domiciled in this province at the time of his death.

And (2)(*c*):—

> Provided that all duties under this Act shall be levied and collected *pro rata* upon the whole of the estate of the deceased person liable to the duty.

Robert Muir, the testator, died in 1908, and the subsequent amendments to the Act, except in so far as they relate to procedure, do not affect his estate. The Act, with these various amendments, appears in the latest revision as ch. 187.

Although this Act has in substance been in force in this province for more than twenty years, its constitutionality has not been impeached hitherto. This question has now been raised by reason of the decision of the Judicial Committee in *Rex* v. *Cotton*, [1914] A.C. 176, 15 D.L.R. 283, delivered November 11 of last year, while this appeal was pending.

In my opinion the agreements for sale of lands made with the deceased as vendor and payable to him in this province (and in his possession at the time of his death) were specialty debts. Though they contain no express covenant to pay, yet I think such a covenant can readily be implied from their terms. It is a matter of intention to be gathered from terms of the documents as the intentions of the parties are expressed thereby: see Addison on Contracts, p. 51; *Farrell* v. *Hilditch*, 5 C.B.N.S. 853; *Lay* v. *Mottram*, 19 C.B.N.S. 479; *Aspdin* v. *Austin*, 5 Q.B. 683; *Hart* v. *Eastern Union Ry. Co.*, 7 Ex. 246, 8 Ex. 116. These authorities have been referred to in our own Courts: *Waterous* v. *Wilson*, 11 Man. L.R. 287; *Abell* v. *Harris*, 16 Man. L.R. 547.

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In order that an asset may be liable to probate duty under Stamp Duties Acts it must be such as the grant of probate confers the right to administer, and, therefore, one which exists within the local area of the probate jurisdiction. This was held by the Judicial Committee in a scrutiny of the Victoria Act in question. That Act did not in terms make the assets, situate outside Victoria, of a testator domiciled in Victoria, liable to duty. But no doubt was entertained as to the right and power of the Legislature so to enact: *Blackwood* v. *Regina*, 8 App. Cas. 82.

As between a debt by contract, which is merely a chose in action, and a debt by specialty, the former has no other local existence than the residence of the debtor, but

> inasmuch as a debt under seal or a specialty had a species of corporeal existence by which its locality might be reduced to a certainty and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia*, where it was "conspicuous," *i.e.*, within the jurisdiction within which the specialty was found at the time of death: *per* Lord Field in *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476 at 482.

In *Stern* v. *Regina*, [1896] 1 Q.B. 211, it was held that certificates of shares in a foreign company on which a form of transfer and of a power of attorney had been endorsed and executed in blank may be liable to probate duty if they are marketable in England and operative by delivery.

So also in *Winans* v. *Attorney-General*, [1910] A.C. 27, it was held by the House of Lords that foreign bonds and certificates payable to bearer, passing by delivery, and marketable on the London Stock Exchange, when physically situate in the United Kingdom at the death of the owner, were liable to estate duty under the Finance Act, 1814, even though deceased was a foreigner domiciled abroad.

In *Harding* v. *Commissioner*, [1898] A.C. 769, the testator, domiciled in Victoria, was possessed of personal property in Queensland, which the authorities sought to make liable for succession duty in that colony. It was held that the terms of the Queensland Act must be read in the sense given the similar English Act by the English tribunals

> that the statute does not extend to the will of any person domiciled out of Great Britain, whether the assets are locally situate there or not: p. 773.

An amending Act, passed after the grant of the probate, declaring the duties chargeable in respect of all property in Queensland whatever the domicile of the testator, was held inapplicable by its terms. If applicable it would have been retrospective and conclusive.

In *Lambe* v. *Manuel*, [1903] A.C. 68, the property in Quebec of a testator domiciled in Ontario, was held not chargeable with duty in the former province, on the ground that the duty is imposed on such property only as the successor claims under the Quebec law, whereas the taxes in question were claimed on property devolving under the Ontario law, and *Harding* v. *Commissioner*, [1898] A.C. 769, was quoted and approved.

In *Woodruff* v. *Attorney-General of Ontario*, [1908] A.C. 508, following *Blackwood* v. *Reg.*, 8 App. Cas. 82, it was held that movables locally situate without Ontario, transferred by the testator with intent that the transfer should take effect only on his death, were not within the provisions of the Ontario Act, R.S.O., 1897, ch. 24.

> The pith of the matter seems to be that the powers of the provincial legislature being strictly limited to "direct taxation within the province" (B.N.A. Act, sec. 92, sub-sec. 2) any attempt to levy a tax on property locally situate outside the province is beyond their competence: p. 573.

The securities there in question were in New York outside the province and delivery to the transferees took place there also. The facts of the case before us are clearly outside those of the *Woodruff* case.

In *Rex* v. *Lovitt*, [1912] A.C. 212, the testator, resident and domiciled in Nova Scotia, at his death had a considerable sum on deposit with the branch of the Bank of British North America, at St. John, New Brunswick. It was held that the executors were liable to pay duty on this amount under the New Brunswick law making all property liable to duty whether the deceased was domiciled there or not. The New Brunswick Act excludes the application of the maxim *mobilia sequuntur personam* as to personal estate within the province belonging to persons domiciled elsewhere, but retains it as to property of citizens of that province situate outside the province: *per* Lord Robson, p. 222. The contention that the true subject matter of the tax was not the

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property, but the succession or title to it accruing to the successor, was rejected by their Lordships, who distinguished the case of *Lambe* v. *Manuel*, [1903] A.C. 68, and referred to *Harding* v. *Commissioners*, [1898] A.C. 769, as expressing the opinion that a Colonial Legislature might impose a succession tax on property within the province though such property might pass under the law of another domicile. The provisions of the New Brunswick law were held to assimilate the tax thereby created to a probate duty.

> It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property: p. 223.

It may be that the effect of such construction is to subject the property to a double tax and while the Courts will lean against such a construction to the statute, nevertheless, if the meaning be clear, effect must be given to it.

In view of the foregoing it would seem logical to conclude that these agreements for sale, debts by specialty, payable in this province and locally situate here at the time of the testator's death, are properly subject to our Act.

The appeal from the Supreme Court to the Privy Council in *Cotton* v. *Rex*, [1914] A.C. 176, 15 D.L.R. 283, was allowed upon two grounds. In the first place it was held that the wording of the Quebec Act there in question did not, as did the New Brunswick Act, expressly exclude the application of the maxim *mobilia sequuntur personam*. Whatever might be the powers of the legislature "it has chosen to exercise them only so far as the property within the province is concerned." And as the property in question was wholly without Quebec and within the State of New York, it was held not taxable under the Act. Though this branch of the decision disposed of the appeal, their Lordships went further and discussed the question: Whether a succession duty of the kind contended for by the respondent could be imposed by the Provincial Legislature without exceeding its powers. That is to say, they considered the validity of the Act as if the limiting words "in the province" had been deleted from the operative section of the Act, 1191(*b*), quoted at p. 177. Would

the section so amended be within the powers of the Legislature by reason of the taxation imposed by it being "direct taxation within the province in order to the raising of a revenue for provincial purposes" within sec. 92 of the British North America Act? Their Lordships adopt the definitions of direct and indirect taxation as set forth in previous decisions of the Board.

A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as excise or customs.

In applying these definitions to the Quebec Act, their Lordships entered on a close examination of the terms of the Act (pp. 193, 194) imposing the tax. They find, amongst other things, that the notary before whom the will was executed, as well as any one of the devisees or legatees, might be called upon by the collector of inland revenue to pay the whole of the duties, that he must thereupon pay, and recover the amount so paid from the persons interested.

The whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear, but to obtain from other persons and their Lordships are, therefore, compelled to hold that the taxation is not "direct taxation," and that the enactment is, therefore, *ultra vires*.

It is argued, on this decision, that, as in this province it is the executor or administrator who is directed to pay, or secure the payment of, the duties before probate or administration is granted and as he must look to the parties interested to be recouped, the tax is indirect and, therefore, beyond the competence of the Provincial Legislature to levy.

The executor is directed by sec. 6 to file a statement shewing the property of the deceased and the persons entitled and must before the issue of the letters probate file a satisfactory bond for the payment of duties payable on property coming to his hands. The duties are payable upon the death of the testator or within eighteen months thereafter or such further time as may be given by a Judge of the Surrogate Court (secs. 13, 14). The duty is to be deducted by the executor having in charge any estate, legacy or property therefrom or collected from the persons entitled (sec. 15). In case payment of the duty is sought to

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be avoided the Judge of the Surrogate Court may make an order directing the persons entitled to appear before him and shew cause why the duties should not be paid. Thus it appears that the probate may be granted, and it frequently, if not usually, is granted, before the payment of the duties, the ultimate payment of which is secured by the bond. The "persons entitled" are those indicated as those who are intended to pay. The deduction to be made from "any estate legacy or property" under sec. 15 is merely another way of stating that the executor, instead of collecting from the legatees or devisees personally, is to deduct the amount from the shares of such legatees or devisees before paying them over. Under these provisions I consider that the duties imposed are intended and directed to be paid by the estate, or, to put it more accurately, by the persons interested in the estate. Before the duties are actually paid the executor may have in hand funds of the estate sufficient to pay them. In that case there can surely be no doubt that the tax has been paid directly by the estate or those entitled. Or it may happen that the executor may advance the duties and subsequently reimburse himself when funds become available. But it is difficult to see how a matter of simple detail, such as that would be, can affect the substance or the real mode of the transaction. In the one case as in the other the executor would be merely the agent in making the payment for the persons entitled, who are those that are intended to pay and do actually pay. On a comparison of the terms of our own Act with those of the Quebec Act, as set out and examined in the judgment of the Privy Council in *Cotton* v. *Rex*, [1914] A.C. 176, 15 D.L.R. 283, it does seem to me that they differ so widely that that judgment cannot be held to govern the construction to be here applied.

It has been pointed out that the division of taxes into direct and indirect is far from logical. Take the income tax, universally regarded as a direct tax. In the case of income derived from lands or houses it is paid directly by the landlord, but ultimately by the tenant. A direct tax on land, vested and assessed in the name of a trustee, is directly payable by and enforceable against the trustee, though ultimately paid by the real owners. In case of income from shares in corporations the tax is paid

directly by the corporation as a rule and deducted from the dividends. In each of these cases, though they are generally regarded as direct taxes, the ultimate payer is reached but by an indirect method. And in the case of so-called indirect taxes, they may be paid directly by the ultimate payer. Examples are given in the articles on the subject "Taxation" in the Encyclopedia Britannica, to which I would refer. In the case of taxes on imported goods, universally regarded as indirect, a purchaser of goods abroad bringing them with him across the frontier, is assessed directly for, and must directly pay, the tax payable. It follows that

> the division of taxes into direct and indirect is thus based on no real intrinsic difference. It is a classification for convenience sake based upon a rough observaton of conspicuous, or apparently conspicuous, differences in the modes of levying taxes and nothing more: *Ibid.*

Succession duties under our Act have been generally regarded as direct taxes. Those upon whom the succession devolves have been looked upon as those who have to pay them directly. The fact that the payment may be made, temporarily, by the executor, has not been regarded as constituting a tax direct upon the executors, but indirect upon the devisees or others interested. The executor has been regarded merely as an agent in making the payment. The case of a corporation making a payment of an income tax and charging it against the dividends payable to parties ultimately liable seems analogous. In the one case as in the other there is no question that the method of payment is more or less indirect, but in neither case is the indirectness of the levy considered so substantial as to withdraw the taxes in question from the classification of direct taxes. Throughout transactions of both classes the parties who are to pay are clearly ascertained and defined and the payment in the meantime by the executor or corporation is incidental merely, a payment through an agency which leaves the substance of the transaction unaltered. No doubt it is possible by a statute imposing a succession tax to make the method by which the tax is to be ultimately recovered so involved and circuitous that it would become necessary to regard it as transferred thereby from its proper classification and constituted an indirect instead of a direct tax. That,

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it would seem, was the effect of the provisions of the Quebec Act as examined by Lord Moulton in *Cotton* v. *Rex*, and which he found went beyond the competence of the Quebec Legislature. But under our Act the persons who pay or for whom the executor makes payment are clearly determined. The Act directly imposes the tax upon the estate, or, rather, upon the persons entitled thereto. The executor is utilized as the agent to collect from those entitled to the estate the duties and to pay the same to the treasury. It is very different from a typical case of indirect taxes, such as customs duties paid by an importer, who pays them independently, expecting to be reimbursed ultimately by parties who may purchase from him, and who are unascertained by him at the time he makes his own payment. I submit, therefore, with deference, that the mode of payment of these duties as prescribed by the statute, while it may in certain instances, be more, or less indirect, is, on the whole, and looking at the transaction as it in substance is, essentially direct.

My conclusion, therefore, is that we must read the judgment in *Cotton* v. *Rex* in the light of the unusual provisions of the Quebec law therein referred to. The corresponding provisions of our law are simple and effective in carrying out what I have no doubt was the intention of the Legislature, that is, to make the tax payable directly by the parties beneficially interested in the estates of deceased persons. No question as to the validity of our statute has been heretofore raised, as the opinion has been universal in this province that the Act was unquestionably within the powers of the Legislature and that construction is amply warranted by the previous decisions of the Privy Council to which I have referred.

The provisions of our Act, quoted above, cover property within the province, whether the deceased was domiciled there or not, and movable property outside the province when the owner was domiciled therein. The intention is clear beyond question. We have here a specialty debt found within the province, properly within the province of a testator domiciled therein, and, therefore, coming within the section under the authorities. In my humble opinion the duties prescribed by the Act are direct taxes within the province under sub-sec. (2) of sec. 92 of

the British North America Act, and the statute is, therefore, within the exclusive powers of the Legislature to enact.

I entertain no doubts as to the propriety of the order appealed from with reference to the Little debt.

I would dismiss the appeal.

HAGGART, J.A.:—Assuming that the Succession Duties Act [R.S.M. 1913, ch. 187] is *intra vires* of the Legislature of Manitoba, I shall first consider whether or not the wording of the statute is wide enough to cover the assets of an estate such as those in question.

The interpretation clause defines the expression "property" as including

> real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

It is to be observed that the definition is not limited to assets within the boundaries of Manitoba. In the same interpretation clause in the definition of "aggregate value" and for the purpose of ascertaining whether the estate is wholly or partially exempt, and also ascertaining the percentage of duties, it is directed that "there shall be included the value of any property of the deceased outside of Manitoba at the date of his death." In defining what estates do not come under the Act, sec. 4, sub-sec. (*a*) enacts that the Act shall not apply to estates of less than $4,000 in value,

> unless the aggregate value of the estate, including any portion or portions thereof situate out of Manitoba is such that if the whole estate were in Manitoba the dutiable value would exceed $4,000.

And in sub-sec. (*b*) of the same section, providing for the limit of $25,000, it is directed that in ascertaining the amount there is to be included "property not situated in Manitoba."

Section 5, as amended by the statutes of 1905, ch. 45, which was in force at the time of the death, says:—

> Save as aforesaid the following property shall be subject to succession duty.

And sub-sec. (*a*) of sec. 5, says:—

> All property within this province . . . and all movable property locally situated out of this province and any interest therein or income

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Haggart, J.A.

therefrom where the owner was domiciled in this province at the time of his death.

I think that there is no question as to the intention of the Legislature to make such assets as those in question subject to taxation on the decease of a domiciled citizen of Manitoba and I think also that the words of the Act are wide enough to express that intention.

It was urged that the Parliament could never have intended to pass legislation that would be so inequitable as to subject an estate perhaps to taxation here and in the Province of Saskatchewan for the reason that it might be necessary in realizing upon the Kirkella land securities to take out ancillary letters of administration and to pay a succession duty also in that province. I can conceive of even a more extreme case. The expansion of business in this new country has induced many men to establish large branches in the provinces to the west, and if a Manitoba citizen had a branch or agency in each of the other three western provinces, connected with each of which he had large assets the taxation under the succession duties of each province would almost amount to confiscation.

Lord Robson, in *Rex* v. *Lovitt*, [1912] A.C. 212, after saying that by the comity of nations most countries recognized the doctrine *mobilia sequuntur personam*, and that the movables, no matter where they were situate, were governed by the law of the domicile of the deceased, proceeds to say, on page 221:—

> The principle or practice thus defined is considered just and expedient as between nations, and our Courts give it full effect in the construction of taxing statutes both English and Colonial. But its application may be excluded by the use of apt and clear words in a statute for that purpose. The question now to be determined is whether that has been done in the present case by a legislature having full authority in that behalf.

I think that the Manitoba Legislature have in apt and clear words enacted that these assets shall be subject to taxation under the Succession Duties Act.

It was further contended that the enactment is *ultra vires;* that the Legislature went beyond the powers defined by sec. 92, sub-sec. (2) of the British North America Act, and that this is not "direct taxation within the province." Whether you consider it as a tax against the property, a tax upon the transmis-

sion, a tax upon the succession or a tax against the successor, whether he be a trustee or a beneficiary, it is not indirect like customs or excise. It is paid out of the property coming into the hands of the representative of the deceased.

Again, these agreements for the sale of the Kirkella lands are specialty debts and are situate at the place where the specialties were found at the creditor's death, that is, the city of Winnipeg.

The case before us is not unlike *Treasurer of Ontario* v. *Pattin*, 22 O.L.R. 184. Pattin was a resident of Windsor, in Ontario. At his death in that town he was the owner of a large number of mortgages upon real estate in Michigan. The mortgagors lived in that State and the mortgages covered real estate there. These mortgages were in Pattin's custody at Windsor at the time of his decease. It was held by the Court of Appeal in Ontario that by the artificial rule of law these mortgages were *bona notabilia* in the Province of Ontario, and were subject to be and were in fact comprised in the list of properties held by the personal representative upon his application for letters of administration in Ontario. The Court consisted of four Judges, one of whom, Garrow, J.A., dissented, but it was for the reason that he was not satisfied that the evidence shewed conclusively that the deceased had lost his domicile of origin in Michigan and had acquired a new domicile in Ontario. Here the agreements in question respecting the Kirkella lands were evidence of the indebtedness and constituted a security for the debt as did the Pattin mortgages, and they were sealed instruments capable of creating debts by specialty.

As to the other asset known as the Little debt, there can be no question as to its liability to taxation. All that is required is to ascertain its "dutiable value," that is, its fair market value after deducting all expenses in connection with its collection or realization.

The appeal should be dismissed.

Appeal dismissed.

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BERNARD v. FAULKNER.

Alberta Supreme Court, Walsh, J. October 1, 1914.

1. MORTGAGE (§ VI I—135)—FORECLOSURE—DEFICIENCY — PERSONAL REMEDY—CONDITIONS PRECEDENT TO.

The application of a mortgagee after foreclosure for leave to enforce his personal remedy against the mortgagor may be granted, provided the mortgagee is still prepared to re-transfer the land to the mortgagor upon being paid in full, and the mortgagee in the framing of the vesting order may properly be saved against his implied liability under sec. 52 Land Titles Act (Alta.).

[*Lockhart* v. *Hardy*, 9 Beav. 379; *Bank of Toronto* v. *Irwin*, 28 Gr. 397; *Kenny* v. *Chisholm*, 19 N.S.R. 497 (affirmed in appeal to the Supreme Court of Canada—unreported); *Noble* v. *Campbell*, 21 Man. L.R. 597, specially referred to.]

2. MORTGAGE (§ I B—5)—WHAT CONSTITUTES—FORM—SUBSTANCE—MORTGAGEE'S RIGHTS; HOW DETERMINED.

A mortgage, no matter what its form, is but a security for the payment of the money covered by it, and this principle governs in determining the mortgagee's rights.

Statement

MOTION by a mortgagee after foreclosure for leave to enforce his personal remedy and for a clause in the vesting order saving him from the implied covenants of sec. 52 Land Titles Act (Alta.).

The motion was granted.

A. H. Goodall, for plaintiff.

Walsh, J.

WALSH, J.:—The plaintiffs in this mortgage action, upon their application for a final order of foreclosure and vesting order after an abortive sale, ask that the remedy against the defendants upon the covenant to pay be preserved by including in the order a paragraph reserving their rights in this respect and directing that none of the covenants implied under section 52 of the Land Titles Act shall apply to it. The motion has been referred to a Judge by the Master in Chambers.

In *Colonial Investment* v. *King*, 5 Terr. L.R. 371, McGuire, C.J., dismissed the action which was upon the mortgagor's covenant after a final order of foreclosure and vesting order, partly upon the ground that as the order contained nothing to shew that the plaintiff intended to reserve the right to sue on

the covenant, the charge created by the mortgagor had become "merged in the complete ownership of the inheritance." It is, I suppose, because of this that the plaintiff asks for the protection to which I have referred. Although there is still the difference between a mortgage under our Land Titles Act and one under either the English or Ontario systems which existed at the time of and was pointed out in the above case, I can see no reason upon principle why the same rights should not be accorded to a mortgagee of land in this province as are enjoyed by one in England or Ontario save, of course, as they may be affected by any law of the province. In all of these jurisdictions a mortgage, no matter what its form, is but a security for the payment of the money covered by it. Upon payment being made the mortgage must be discharged. Upon default being made in payment, the mortgagee's right is to have the land sold or the mortgagor's interest in it foreclosed. I am unable to see that the mere fact of a mortgage in this province being but a charge upon the land makes any distinction in the principles to be applied in determining the mortgagee's rights, for our Courts give effect to the charge in a proper case in exactly the same way as do the Courts in those jurisdictions in which some title in the land is vested in a mortgagee, namely, by an order which determines the mortgagor's estate and vests his title in the mortgagee.

In England a mortgagee who has obtained a final order of foreclosure can, notwithstanding this, still pursue his remedy against the mortgagee unless he had in the meantime so dealt with the property as to make it impossible for him to restore it to the mortgagor in the condition in which he got it. In *Lockhart* v. *Hardy*, 9 Beav. 379, the Master of the Rolls says, "If a mortgagee obtains a foreclosure first and alleges that the value of the land is insufficient to pay what is due to him, he is not precluded from suing on the bond. . . . I apprehend that so long as the mortgagee holds the estate and is able to give effect to the mortgagor's right to redeem, he may proceed on the bond." This was followed in *Palmer* v. *Hendrie*, 27 Beav. 349, and 28 Beav. 341; *Campbell* v. *Holyland*, 7 Ch.D. 166, and

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Kinnaird v. *Trollope*, 39 Ch.D. 636, and is the view adopted by all the text writers on the subject.

This appears as well to be the rule in Ontario: *Platt* v. *Ashbridge*, 12 Grant 106; *Bank of Toronto* v. *Irwin*, 28 Grant 397; *Munsen* v. *Hauss*, 22 Grant 279, and in Nova Scotia, *Kenny* v. *Chisholm*, 19 N.S.R. 497 (affirmed in appeal to the Supreme Court of Canada—unreported), and in Manitoba, *Noble* v. *Campbell*, 21 Man. L.R. 597.

Is there anything in the Land Titles Act which puts a mortgagee of land in Alberta, who has become registered as the owner of it under a vesting order issued in his mortgage action in any different plight from a mortgagee of land in England or any of the other provinces of Canada. I do not think that there is. It has been suggested to me that sec. 52 of the Act applies to a vesting order and that under it, the plaintiff as transferee of the land is impliedly bound to indemnify the defendant from liability under the covenants of his mortgage. This may be so, but even if it is, that is only an implied liability which must give way to something which expressly relieves the transferee from it. It is perfectly competent under sec. 131 for an ordinary transferee who takes title to mortgaged lands to relieve himself from personal liability for the mortgage debt by apt words in the transfer and so, I think, may a plaintiff in such a case as this be freed from such implied liability by the express language of his vesting order. The same result must follow here as elsewhere from an attempt on the part of the mortgagee after foreclosure to enforce his personal remedy against the mortgagor. The foreclosure must thereby be opened up and the plaintiff be prepared to re-transfer the land to the mortgagor upon being paid in full.

I have not had the advantage of argument on behalf of the defendant who was not represented before me but in the light of the authorities presented to me by the plaintiff and of others which I have found, I see nothing to disentitle the plaintiff to the relief which he asks and the order will go accordingly.

Motion granted.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 14, 1914.

1. CONTRACTS (§ IV A—316)—PERFORMANCE; BREACH—WHO MUST PERFORM—UNFORESEEN CONTINGENCIES.

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although through unforeseen contingencies its performance has become unexpectedly burdensome or even impossible.

[*Inland Investment Co. v. Campbell*, 16 D.L.R. 410, varied, but on this principle affirmed.]

2. DAMAGES (§ III F—340)—LOSS OF PROFITS—FROM BREACH OF CONTRACT—GENERAL RULE—CONTEMPLATION OF PARTIES.

The general rule as to damages recoverable by one party against the other for breach of contract imposes such damages as might arise naturally from such breach of contract itself or from such breach committed under circumstances in the contemplation of both parties at the time of the contract.

[*Inland Investment Co. v. Campbell*, 16 D.L.R. 410, varied, but on this principle affirmed; *Hadley v. Baxendale*, 9 Ex. 341, and *Hamilton v. Magill*, 12 L.R. Ir. 186, specially referred to.]

Statement

APPEAL from the judgment of Macdonald, J., *Inland Investment Co. v. Campbell*, 16 D.L.R. 410, in favour of the plaintiff in an action for breach of a land subdivision agency agreement.

The appeal was allowed in part varying the judgment and fixing damages without a reference at $1,000, RICHARDS, J., dissenting as to amount.

A. J. Andrews, K.C., and *W. H. Curle*, for defendant, appellant.

Howell, C.J.M.

HOWELL, C.J.M., agreed in the result with CAMERON and HAGGART, JJ.A.

Richards, J.A.

RICHARDS, J.A. (dissenting in part):—I agree with the learned trial Judge and with my brother Cameron that the defendant did bind himself to sell the lots on the terms set out in the agreement, and to pay over 55 per cent. of the cash payments to be got on the making of the sales. I also agree that the defendant did not bind himself to collect any of the postponed payments. But I take the learned trial Judge's view that, in assessing the damages, consideration should be given to the probability, if not practical cer-

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tainty, that some of the purchasers would make postponed payments because of their obligations to do so. As to settling the damages, I agree with my brother Cameron, that this Court should fix them and save the cost of the reference to the Master.

There were over 800 lots in the 80 acres covered by the plan put on under the agreement. The defendant bound himself to sell 150 lots in each period of three months elapsing after the date of the agreement, till all of the lots should be sold. Five such periods elapsed after the making of the agreement, but before the end of the sixth this action was begun. As the defendant would have fulfilled his covenant, as to each period, if he had made the sales for that period on its last day, I think there was, when the action was commenced, no liability in respect of the sixth period, and that, therefore, the plaintiff is only entitled to claim in respect of 750 lots (the number found by the learned trial Judge), that is, 150 for each of the five completed periods. The defendant sold 181 lots; so that his liability is only as to 569 sales that he failed to make. As to one-fourth of these—say 143—he was bound to make sales on which he got $5 cash per sale. As to the other 426 he had covenanted to get $10 cash down on each. The total realized in cash on the making of these sales, if they had been made, would be $4,975. The fifty-five per cent. of this, that he would have been bound to pay the plaintiffs, is $2,736.25. Even if it could be established that none of the purchasers would have paid any of the postponed payments, the damage suffered by the plaintiffs would, I think, be at least that sum, $2,736.25.

The learned trial Judge directed that, in computing the damages in respect of the postponed payments, the Master should be guided by the proportion of such payments made in respect of the 181 sales that were accomplished. Ordinarily I should think that a correct holding. But, in view of the hard times that have come in the business world generally, I think the proportion of postponed payments that would probably have been made would be less than the proportion paid in respect of the 181 lots. Then, considering that the land, which apparently is really only useful for farming, is less cut up than it would have been if some of the 569 lots had been fully paid for and the plaintiffs compelled

to convey them, and considering, also, that the plaintiffs would probably have been put to serious expense in getting rid of the purchasers' rights under uncompleted agreements, I think that a small sum only should be allowed in addition to the $2,736.25. It seems to me that $3,000 in all would be a fair amount to award as the plaintiffs' total damages.

PERDUE, J.A., agreed in the result with CAMERON and HAGGART, JJ.A.

Perdue, J.A.

CAMERON, J.A.:—This is an action for damages for the breach of an agreement under seal, dated April 24, 1912, made between one Millidge (and by him assigned to the plaintiff), and the defendant. The agreement is not one for the sale of lands, but an agreement by an owner giving an agent the exclusive right to sell the lands described therein, whereby the defendant agreed to subdivide and register a plan of a part of the land in the manner therein provided, and covenanted to sell the lots shewn on the plan in accordance with the terms of the provision in the agreement. This provision is fully set out in the judgment of Mr. Justice Macdonald, who tried the case and gave judgment in favour of the plaintiff, with a reference to the Master to ascertain the damages.

Cameron, J.A.

The provision is that the defendant shall sell not less than 150 lots within three months from the date of the agreement, and not less than the like number in each successive three months until the whole should have been disposed of. The terms on which the lots should be sold to purchasers are fixed by the agreement. The total number of lots sold, if the agreement had been carried out, would have been in excess of 800. Some 181 were actually sold, but on only a small proportion of these were all the instalments paid.

The defendant was unable to sell the remainder of the lots for the reason that speculation in real estate of this character collapsed during the currency of the agreement. There does not appear, in point of fact, to be any particular evidence on this point. Nor can I see any positive evidence establishing the breach of contract, of which the plaintiff complains. But the case has been treated throughout as if no sales had been made

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under the contract save those set forth in the statements filed and admitted, and as if the defendant could and would have carried out the contract on his part had the speculative fever continued to affect the public. Through the happening of unforeseen contingencies the defendant found himself unable to find purchasers for these lots at the ridiculously high figures fixed by the agreement, and thus the agreement became impossible of performance.

It is well established law that

> where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible: Pollock, Contracts, 8th ed., p. 431.

Jones v. *St. John's College*, L.R. 6 Q.B. 115; *Thom* v. *Corporation of London*, 1 A.C. 120.

This agreement was and is perfectly lawful, and there is no question that the defendant has, by his covenant deliberately entered into, made himself liable for the breach which has actually taken place. The difficulty is to arrive at a proper measure of damages for that breach. The general rule as to damages recoverable by one party against the other for a breach of contract is that such damages are allowed as arise in the natural course of things from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. This statement of the law (authoritatively laid down in *Hadley* v. *Baxendale*, 9 Ex. 341) has been criticised as not entirely accurate. Parties to a contract do not contemplate its breach, or the probable results of a breach. Chief Baron Palles, in *Hamilton* v. *Magill*, 12 L.R. Ir. 186 at 202, holds the proper statement of the law to be

> such damages as might arise naturally from such breach of contract itself, or from such breach committed under circumstances in the contemplation of both parties at the time of the contract.

In this view the circumstances present in the minds of the parties to this contract certainly included the energetic prosecution of the sale of the lots by the defendant, the payment of the

initial instalments, the payment over by the defendant of the proportion thereof payable to Millidge, as also of the proportion of any further instalments that might be received by him. I think it can also be assumed that the sale of all the lots by the defendant was regarded by the parties as possible and, perhaps, probable, though by no means certain, for the defendant was given the option of taking over any of the lots upon terms stated though not bound to do so, and the possibility of default by the defendant was foreseen and provision made for the determination of the agreement thereupon. On the termination of the agency in the manner provided, it was no doubt conceded that the owner could and would resume possession.

That there was in contemplation, however, a liability on the part of the defendant for the deferred payments, if these were not made after the lots were actually sold is difficult to believe. That there should be a liability therefor when the lots had not been sold at all, and the failure to sell was not due to the defendant's neglect or want of energy, could not possibly have been contemplated by the parties. Damages in either case would be of a highly speculative character, difficult, if not practically impossible, of calculation. What was directly in contemplation of the parties, in respect of the deferred payments by purchasers, was the liability of the defendant to account therefor when they came to his hands. He did not bind himself to collect, nor did he guarantee these payments. His right to 45 per cent. of these payments was evidently relied upon as a sufficient inducement energetically to prosecute their collection. In view of the altered circumstances after the making of the agreement and its partial performance, the contention that the returns on the sales already made should constitute a basis for fixing the damage sustained by reason of the failure to sell those remaining undisposed of, cannot, in my view, be accepted. Some additional payments might have been made, but it is impossible to estimate with any degree of accuracy, their number or amounts. It would become the merest guess work.

It is further to be remembered that the plaintiff has the land, that is, with the exception of the lots which have been, or will be, paid for in full. The time for the sub-division of the

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second eighty acres did not arrive, so that our considerations must be confined to the first eighty only. The land now has value as land for farm purposes only.

In arriving at the amount of the damages, we need not go into a close calculation, for we must assume a certain latitude in the matter. Notwithstanding the express terms of the covenant there is shewn in the agreement an apprehension that the public might decline to seize the opportunities offered. The learned trial Judge justly states that neither party deserves any particular sympathy. As has been pointed out, the plaintiff retains the unsold land which, owing to its situation, is of considerable value. He would retain it, also, if initial payments had been made on the unsold lots and the purchases had not been completed. It is not an easy matter to arrive at a conclusion, but, after consideration, I would say that the sum of $1,000 damages is ample compensation for the breach.

I would dispense with the reference directed by the learned trial Judge and amend the judgment appealed from accordingly. The plaintiff is entitled to the costs of the action up to and including the trial. There will be no costs of this appeal.

Haggart, J.A.

HAGGART, J.A.:—By an agreement made on April 24, 1912, between one Millidge, the assignor of the plaintiffs, and the defendant, the defendant agreed to sell not less than 150 lots within three months, and thereafter not to sell less (I take it the parties meant to say *to sell not less*) than 150 lots in each successive three months until all of the lots described in a certain subdivision to be made should have been sold, and the terms to be given to the purchasers were that ten per cent. of the purchase price should be paid in cash and 10 per cent. in equal successive monthly instalments, provided that 25 per cent. of the lots might be sold for 5 per cent. cash and 5 per cent. a month in monthly instalments. Lots 25 ft. by 120 ft. were to be sold at not less than $100 and those of a greater area should be at a porportionately larger price. The plaintiffs were to receive 55 per cent. and the defendant 45 per cent. of the moneys received from purchasers. To satisfy the covenant, the defendant would, up to the time of bringing this suit, have to sell 750 lots. He only sold 181 lots. Be-

fore the close of the trial counsel for both parties admitted that the plaintiffs had received their proportion of the moneys shewn in ex. 13, being the statement of October 17; but the plaintiffs disputed the right to make the deductions in respect of lands cancelled and moneys refunded to purchasers. I agree with the trial Judge that the contract has been proved and a breach has also been proved.

The trouble here arises, have we evidence before us to prove the damages sustained. The defendant did not guarantee the payments. Substantially the defendant paid over to the plaintiffs their proportion of the moneys collected. We have not before us the data to decide whether the defendant is entitled to credit in respect of the $390 under the heading of "lots cancelled, re-sold and twice settled for" whatever that means, and the $985 under the heading of "moneys refunded to purchasers," making a total of $1,375. 55 per cent. of which, namely, $726.75, the defendant charges against the plaintiffs.

On the trial the plaintiffs' counsel suggested that if it should be held that the plaintiffs were entitled to damages, that these damages might be reduced by the value of the property still remaining with them not having been sold.

There is some evidence given as to the value of the property by the plaintiffs' witnesses. One Maber, who has been engaged in the real estate business, says he considers the property to be worth at the present time $100 an acre. It is not clear what area will remain on the plaintiffs' hands, nor what he should be charged with. The onus is strictly on the plaintiffs. The plaintiffs' claim is not the most meritorious one. The plaintiffs are in no better position than Millidge, who was one of the originators of the scheme to sell what are really worthless lots to the Winnipeg people. If an attempt had been made to sell at Brandon, the people approached to purchase might, before closing the bargain, think of inspecting the location of the property.

I am not sure that the trial Judge was not right in making the reference. It is suggested by my brother Judges that we ought to save the parties the expense of this reference and endeavour, as a jury, to make the best estimate we can of the damage actually sustained on the material before us.

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INLAND INVESTMENT CO. v. CAMPBELL.

For the above reasons, it is with some reluctance I assent to a general verdict being given for the plaintiffs for $1,000, the amount agreed upon.

Appeal allowed in part.

BROOK v. CANADIAN PACIFIC R. CO.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 13, 1914.

1. RAILWAYS (§ II D—72)—INJURY TO ANIMALS BY TRAINS — CATTLE GUARDS; GATES—"UNUSED HIGHWAY"—RAILWAY ACT.

The Railway Act, R.S.C. 1906, ch. 37, does not forbid, either by sec. 254 or otherwise, the erection of a farm crossing in lieu of cattle-guards at a road allowance which is unused as a highway and is in fact used as farm land, and where a railway company and an adjoining farm owner concur in so treating an "unused highway" the farm owner is bound under sec. 255 to keep the gates on each side of the railway closed when not in use, and damage to the owner's animals through his own neglect to perform such statutory duty is not recoverable from the railway company no negligence on the part of those in charge of the train being shewn.

Statement

APPEAL from the judgment of His Honour Judge Mickle, County Court Judge, in favour of the plaintiff in an action for damages for the loss of a horse which got upon the defendants' track.

The appeal was allowed, HAGGART, J.A., dissenting.

L. J. Reycraft, for the defendants.

H. F. Maulson, K.C., for the plaintiff.

Richards, J.A.

RICHARDS, J.A.:—The plaintiff owned the north-east quarter of a section and the north-west quarter of the section next adjoining it on the east. The road allowance between these quarter sections was unimproved, and was unused as a highway because it ran through a small lake a short distance north of the plaintiff's land, and through another a short distance south of his land. The defendants' right of way crossed both of these quarter sections and the road allowance between them, in a direction that, for purposes of this action, may be called from east to west.

Before the plaintiff owned or occupied his land the defendants fenced their right of way, putting a farm crossing, with

gates, at each quarter section and swing gates at the intersection of the road allowance with their right of way. They did not erect cross fences or cattle guards at the intersection.

The plaintiff did not fence off the road allowance from his quarter section. Instead of doing so he put a gate across it from the north-east corner of one of his quarter sections to the north-west corner of the other. For years he used the part of the road allowance between such gate and the railway, together with adjoining portions of his quarter sections, as one field for pasturing his cattle and horses. During that period he used, as a farm crossing, the gates put in by the defendants at the intersection with the road allowance. The gates opposite the road allowance were left open one day and his horses, which were in the field, got through them on to the right of way. One of them, a mare, was killed by a train of the defendants going east, under circumstances shewing no negligence on the part of those in charge of the train. It seems to me that, as between the plaintiff and the defendants, the road allowance should not be considered to be a highway. They both treated it as part of the plaintiff's field, he by using it as such and treating the gates as a farm crossing, and they by putting up and maintaining those gates. Section 255 says:—

> The persons for whose use farm crossings are furnished shall keep the gates on each side of the railway closed, when not in use.

Patently these gates were erected by the defendants for the use of the occupier of the field, of which the road allowance formed part, and were accepted and used by the plaintiff as such. There is nothing in the Act, that I can find, that forbids the erection of a farm crossing at a road allowance which is unused as a highway, and is in fact used as farm land. It would be unjust to hold that the plaintiff, using the crossing as such, should be freed from liability attaching to it as such. As the plaintiff did not keep the gates closed, I think he cannot recover, as the accident happened through his neglect to perform the statutory duty imposed on him by sec. 255.

I cannot assent to the plaintiff's contention that the gates in question should be treated as a defective fence.

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With deference, I would allow the appeal with costs, set aside the judgment appealed from and enter judgment for the defendants without costs.

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

Haggart, J.A. (dissenting)

HAGGART, J.A. (dissenting):—As the parties to the suit for some years before the accident had acquiesced in the existing conditions, as the plaintiff had enclosed portions of the two quarter sections, including the portion of the highway lying between these parts, in one field, placing a fence across the road along the northern limit, no one objecting thereto, and as the crossing in question was treated and used as a farm crossing by both parties, and the whole enclosure as the field of the plaintiff, I thought on the argument that justice would be done by applying the law so far as the same applies to farm crossings which imposes on the persons for whose use farm crossings are furnished the duty of keeping the gates at each side of the railway closed when not in use: Railway Act, R.S.C. ch. 37, sec. 255.

The fences along the right of way of the railway were built twenty years ago, and the plaintiff entered into possession of the farm about eight years ago. When the railway fences were erected the land was vacant. In crossing the road between sections 33 and 34, the defendants did not erect cattle guards on each side of the highway and turn the fences into the respective cattleguards, as required by sec. 254; but in lieu thereof put in the swinging gates used at farm crossings. Now, would the facts that the plaintiff, perhaps to save expense and have one enclosure instead of two, and that he used the crossing as an ordinary farm crossing absolve the defendants from the duty imposed by sec. 254 to erect cattle guards and the consequent liability under sec. 427, sub-sec. (2) for the full amount of damages sustained by the person injured by reason of the omission to do the act required to be done by the statute. I do not think there was anything done by the parties to relieve them or either of them from their statutory obligations.

As pointed out by the trial Judge in his reasons wherein he

gives the principal facts of the case, this allowance for a road is still a highway. The soil and freehold are vested in His Majesty for the use of the province, and the municipality or any one affected could have the road opened and the gates removed as obstructions.

I do not think the horse was "at large" before it got on the right of way. The horse was "at home." *Palo* v. *C.N.R. Co.*, 14 D.L.R. 902, 29 O.L.R. 413, 16 Can. Ry. Cas. 1. The defendants have not, to my mind, established

> that such animal got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent

as required by sub-sec. 4 of sec. 294, as amended by sec. 8, ch. 50, 9 & 10 Edw. VII. Dominion statutes.

The portion of the road allowance enclosed is none the less a highway because of the existence of the railway gates and the gate erected by the plaintiff. Any person desiring to use this highway could remove these gates as obstructions, if no breach of the peace were committed. If, then, this had been done, and a horse got on the right of way of the railway, as did the horse in question, where there was no proper highway crossing, then the defendants would be liable whether it belonged to the plaintiff or some other person. The defendants could have protected themselves by complying with the Railway Act. Having omitted to do what the statute requires the defendants are liable under sec. 427, sub-sec. (2).

I would dismiss the appeal.

Appeal allowed.

CAMPBELL v. NORTHERN CROWN BANK.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 13, 1914.

1. DAMAGES (§ III J—200)—DETENTION OF PERSONAL PROPERTY—VINDICTIVE AND SPECIAL DAMAGES—RIGHT TO.

In an action of detinue the plaintiff, though successful on the main issue, is not entitled to vindictive damages; nor can he recover special damages unless claimed by his pleadings.

APPEAL from the judgment of His Honour Judge Mickle of the County Court in plaintiff's favour. Statement

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Statement

The action was brought for the return of a mare which had been seized by the defendant and for damages for plaintiff's having been deprived of the use of the horse. The defence set up was that the horse was under seizure at the time it was sold to the plaintiff and the lien note under which it was seized was in the possession of one E. A. Burbank for collection. Defendant also held a chattel mortgage on the horse and seized under the same. The lien note had been paid in full by the defendant. The case was tried before a jury which brought in a verdict for the plaintiff for the return of the mare and damages for $3.50 for each working day from January 8 to April 7, making $266 in all.

The appeal was allowed in part.

A. B. Hudson, for the defendant.

H. F. Maulson, K.C., for the plaintiff.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—In this case the damages in an action of detinue in the County Court, tried at Rossburn, before His Honour Judge Mickle, were fixed by the jury at $3.50 for each working day from January 8 to April 7, $266 in all. No special damage is alleged and therefore none is recoverable. Bullen & Leake, p. 54; Odgers on Pleading (8th ed.), 196:—

> Special damages may be given besides the value of the goods, if such damages have been sustained, and are not too remote and are claimed in the statement of claim. Vindictive damages cannot be awarded in an action of trover or detinue: Halsbury's Laws of England, vol. 27, p. 909.

Mr. Maulson for the plaintiff, did not attempt to uphold the verdict on the ground that it was given for special damage, but on the ground that they were vindictive or punitive in character. This ground, however, is plainly not justified by authority. He alleged that the proceedings in the first action of replevin by the bank were, on their face, beyond the jurisdiction of the County Court. But those proceedings were never impeached and still stand. The verdict for the return of the horse must remain, but that for damages must be set aside, and a verdict for $10 substituted therefor. The appeal must, in my op-

inion, be allowed, and the judgment entered must be amended, in accordance with the foregoing. The defendant bank had to come to this Court for relief and must be given its costs of this appeal.

The plaintiff is entitled to his costs in the County Court.

Appeal allowed in part.

REX v. MULVIHILL.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. January 27, 1914.

1. CONTINUANCE AND ADJOURNMENT (§ II—7)—CRIMINAL TRIAL — AFFIDAVITS.

An application by the accused to postpone a criminal trial because of the absence of his witnesses is to be made after plea pleaded, and although in an ordinary case an affidavit in common form is sufficient, yet where from the nature of the case, or from the affidavit on the opposite side, the court has reason to suspect that the application is not made *bonâ fide* for the purpose of obtaining material evidence but merely for delay, the court will require to be satisfied specially by affidavit, (*a*) that the persons are material witnesses; (*b*) that there has been no neglect in omitting to apply to them and endeavouring to procure their attendance, and (*c*) that there is reasonable expectation of counsel being able to procure their attendance at the future date if a postponement be granted.

[*R.* v. *D'Eon*, 1 W. Bl. 510, 3 Burr. 1513, 96 Eng. R. 295, applied.]

2. APPEAL (§ VII E—320)—QUESTIONS OF LAW—CRIMINAL APPEAL—REFUSAL TO POSTPONE TRIAL.

The discretion of the trial judge at a criminal trial in refusing to grant a postponement to enable the defence to make enquiries as to the antecedents of two Crown witnesses who had not been examined at the preliminary enquiry, is not a question of law which can be reserved under Cr. Code 1906, sec. 1014.

[*R.* v. *Johnson*, 2 Car. & K. 354, referred to; *R.* v. *Blythe*, 15 Can. Cr. Cas. 224, 19 O.L.R. 389, considered.]

3. WITNESSES (§ II B—37)—CROSS-EXAMINATION OF ACCUSED—QUESTION AFFECTING CREDIBILITY.

When the accused becomes a witness on his own behalf he may be cross-examined as to whether he has been convicted of any offence, even though the conviction is altogether irrelevant to the matter in issue, the inquiry being relevant as affecting the credibility of the accused.

[*Ward* v. *Sinfield*, 49 L.J.C.P. 696, and Canada Evidence Act, 1906, sec. 12, referred to.]

4. WITNESSES (§ II B—43)—CROSS-EXAMINATION—STATEMENT OF ACCUSED IN PRIOR PROCEEDING—ABSENCE OF RECORD.

An accused person on a murder trial giving testimony on his own behalf may be asked whether or not he made a certain statement at the inquest although the original depositions are not available in court; and he has no right to demand before answering that he be

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informed of what was taken down in the depositions; but if use is to be made of the latter to contradict him the original deposition should be produced.

5. WITNESSES (§ III—54)—CONTRADICTION ON IMMATERIAL MATTER.

Where the accused giving evidence on his own behalf in a criminal trial is asked, in the course of his cross-examination as to some previous offence about some irrelevant fact, the Crown is bound by his answer and cannot tender testimony in contradiction thereof. (*Per* Galliher, J.A.)

[*R.* v. *Muma*, 17 Can. Cr. Cas. 285, 22 O.L.R. 227, approved.]

Statement

CRIMINAL appeal on a case stated by Murphy, J.

The conviction was affirmed, MCPHILLIPS, J.A., dissenting.

Macintyre, for prisoner.

H. W. R. Moore, for the Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I concur with the judgment of my learned brother IRVING.

Irving, J.A.

IRVING, J.A.:—The questions involved come before us on a case stated by the Honourable Mr. Justice Murphy, before whom, sitting at Clinton, B.C., the accused was brought for trial on October 16, 1913, upon a charge of murder alleged to have been committed at Burns Lake, on the Grand Trunk Pacific Railway line of construction, on July 29, 1913.

An inquest was held upon the body of the deceased at which the accused attended and gave evidence. Afterwards he was brought before a magistrate and committed for trial. He, in the meantime, was in custody in the provincial gaol at New Westminster.

At Clinton, on the opening of the assize, Mr. Macintyre, at the request of the learned Judge, undertook to act as prisoner's counsel.

He was then informed by the counsel for the Crown of two things:—

1st. That the depositions taken at the inquest had not been received from the coroner, and

2nd. That the Crown intended to give in evidence the testimony of the two men Ray Olson and Joseph Sarvent, who had not been examined at the preliminary hearing before the magistrate. At the same time a copy of a letter written by Constable

McInnes—the constable stationed in the vicinity of Burns Lake —containing a resumé of the evidence which would probably be given by the two men, was handed to Mr. Macintyre.

Mr. Macintyre thereupon applied to the Judge for a postponement of the trial, and the first question submitted to us is, was the accused entitled to a traverse of the trial to the spring (*i.e.*, the next) assizes? which would mean a postponement for some six or seven months. His counsel claimed that he was taken by surprise by the introduction of this new evidence, and he asked that he might be given a better opportunity of obtaining evidence in answer to that which would be given by these two men.

The postponement of the trial of a criminal charge is always a matter of anxiety to a Judge—so much can be said in almost every case for and against the motion, whether the application is by the Crown or by the prisoner.

The principle upon which a Court proceeds in putting off a trial were very fully considered in the case of *R.* v. *D'Eon* (1764), 1 Wm. Blackstone 510, 3 Burr. 1513, 96 Eng. R. 295, where an information was filed, *ex officio*, against the defendant for a libel on the French Ambassador. In that case it was laid down by Lord Mansfield that no crime was so great, and no proceedings so instantaneous, but that, upon sufficient grounds, the trial may be put off; but to grant a postponement of a trial on the ground of absence of witnesses three conditions are necessary, 1st, the Court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shewn that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and 3rd, the Court must be satisfied that there is a reasonable expectation that the witnesses can be procured at the future time at which it is prayed to put off the trial.

The application should be made after plea pleaded, and although in an ordinary case an affidavit in common form is sufficient, yet where from the nature of the case, or from the affidavit on the opposite side, the Court has reason to suspect that the application is not made *bonâ fide* for the purpose of obtaining material evidence, but merely for delay, the Court

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will examine particularly into the grounds for the application; and it will require to be satisfied, *specially*, by affidavit, firstly, that the persons are material witnesses, which must be sworn to positively, and not merely on belief; secondly, that there has been no neglect in omitting to apply to them, and endeavouring to procure their attendance; and thirdly, that there is a reasonable expectation of counsel being able to procure their attendance at the future date, if granted: 3 Burr. 1514-5.

But, notwithstanding these requirements, it is the constant practice at the Old Bailey not to put off trials for the absence of witnesses to character only, on account of the facility of making such applications in delay of justice: *per* Lawrence, J., in *Rex* v. *Jones* (1806), 8 East. 31, at 34, 103 Eng. R. 256, at 257.

No affidavit was filed or sworn in the case now before us. We are told that the learned Judge dispensed with the making of an affidavit, and agreed to accept the representation of prisoner's counsel. It is to be regretted that there should be any departure from the established practice—established in 1764 (if not before) and continued until this day—on so delicate and important a matter as the postponing of a criminal trial on so grave a charge. We have, however, the representations of the prisoner's counsel set out in the stated case. They are contained in the following extract:—

> Mr. Macintyre, counsel for the accused, thereupon asked for a traverse until the following assizes upon the grounds that the memorandum was evidence directly against the accused and much stronger than any given at the preliminary; that these men were in the neighbourhood at the time the alleged offence was committed, that there was no reason why their evidence might not have been given at the preliminary and being offered now it was impossible for the accused to prepare to meet their testimony by enquiring into their antecedents and the reason their evidence had not been given at the preliminary and was now being given; that the accused had no means and was unable in any case to have prepared his defence; that he was a stranger in the province and had been incarcerated in Westminster since his preliminary; that whilst in Westminster he had sent word to Vancouver to obtain the services of a lawyer but, apparently, the message miscarried, and that from the very nature of the evidence proposed to be given, it was clear that he ought to have time to prepare to meet it.

These representations and statements, if they were embodied in an affidavit, would fall far short of the special affidavit required by the established practice. In particular there is no assertion that the evidence which he hoped to obtain would be available in May, 1914.

Again, the foundation of his application is not that he now knows of certain material witnesses, but that he wishes to enquire into the antecedents of Olson and Sargent.

In the case *Regina* v. *Johnson* (1847), 2 Car. & K. 354, this same ground was put forward. There the witnesses who had not been examined at the preliminary examination were to be called, in order to shew previous attempts on the part of the accused, who was charged with poisoning, of a kind similar to that charged in the indictment. Alderson, B., said:—

> This appears to me to be an entirely new application. Suppose that the trial was to be postponed, and that the prosecutors were to discover fresh evidence before the next assizes, is it again to be postponed? I cannot think this is a sufficient ground for postponing the trial.

His Lordship, nevertheless, consulted with Rolfe, B. (afterwards Lord Cranworth), and ultimately refused the application. This seems to me very weighty authority as to the insufficiency of the grounds put forward by the prisoner's counsel for postponing the trial at all.

But, although Mr. Justice Murphy was unwilling to postpone the trial till the spring, he intimated that he was willing to allow the case to stand over for about two weeks, that is, until the Vernon assizes, but this the prisoner's counsel declined, as, owing to his other engagements, it would be impossible for him to give, in the proposed interval, any attention to the preparation of the defence.

The case continues:—

> And he intimated that, unless the adjournment were granted until the spring assizes, the trial might as well go on. And the trial accordingly proceeded.

In these circumstances I am of opinion that, assuming that this is a question of law within the meaning of sec. 1014 of the Code, it must be answered in the affirmative and against the prisoner.

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Before parting with the matter dealt with in the first question, I would like to say that, in my opinion, the question is not one that can or should be reserved under sec. 1014. Riddell, J., expressed the same view in *Rex* v. *Blythe* (1909), 15 Can. Cr. Cas. 224, 19 Ont. L.R., at p. 389, and although an appeal was taken from his decision, this point was not questioned by the prisoner's counsel.

In *R.* v. *Lewis* (1909), 78 L.J.K.B. 722, it was held that the discretion of a Judge in discharging a jury was not a question of law for the Court of Appeal to deal with.

In *R.* v. *Hughes* (1910), 22 O.L.R. 344, 17 Can. Cr. Cas. 450, the indictment contained two counts. According to the report of the proceedings at the trial, no request was made for separate trials, but it was stated in argument that such a request had been made. Maclaren, J.A., said:—

> Assuming that the request was made it was, under sec. 857, a matter for the discretion of the trial Judge. We have no right to review that discretion, or to substitute our own for it. Appeals to this Court are limited to questions of law.

Meredith, J.A., said:—

> (It is) a question of procedure rather than law. . . .

He then in the result adds:—

> If the question is not one of law, there was no power to reserve it.

The other three judges concurred.

It is a matter of procedure, and rests largely in the discretion of the trial Judge. It was not matter (under the old practice) that would appear on the return to a writ of error, nor would it have been dealt with by the Court of Crown Cases Reserved, which Court had power under 11 and 12 Vict. ch. 78, to consider "any question of law." Sir James Fitzjames Stephen in his Digest of the Law of Criminal Procedure, says, p. 199:—

> Such questions may not relate to irregularities of practice which may constitute a mistrial.

There is high authority (Abbott, C.J.), in delivering the opinion of the Judges in *The Queen's* case (1820), 2 Bro. & Bing. 284 at 315, 129 Eng. R. 976 at 988, for saying

that nice and subtle distinctions are avoided in our Courts as much as possible, especially in matters of practice, on account of the delay, confusion and uncertainty to which such distinctions naturally lead.

In disposing of matters arising at a trial a very great deal is, of necessity, committed to the discretion of the trial Judge, and Courts of Appeal are very loth to interfere with the exercise of such discretion. In *R.* v. *Crippen*, [1911] 1 K.B. 149 at 157, there is a reference to the Court of Appeal interfering with the discretion of the trial Judge which supports the above statement. It is to be noted that under 890 (*c*) the statute has made a determination of the Judge as to allowing an amendment a question of law which may be reviewed.

In connection with the statement of the learned trial Judge that it was in the course of the trial that the prisoner's counsel intimated that he would ask for a reserved case, it is to be observed that the application and refusal for a postponement of the trial must be determined (if at all) upon the material presented to the Court at the time of the application, and not by what subsequently appears in the course of the trial. I have therefore avoided dealing with much which was pressed upon us during the argument.

The other two questions can be dealt with more shortly. The second question is:—

Q. Was I right in permitting the counsel for the Crown to ask the accused if he had been charged with or committed the offences referred to in the above questions.

In cross-examination (Phipson, 5th ed., pp. 463 and 474), a witness may be asked not only as to facts in issue, or directly relevant thereto, but all questions tending (1) to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment; or (2) to expose the errors, omissions, contradictions and improbabilities in his testimony; or (3) to impeach his credit by attacking his character, antecedents, associations, and mode of life; and in particular, by eliciting (*a*) that he has made previous statements inconsistent with his present testimony; or (*b*) that he is biassed or partial in relation to the parties to the cause; or (*c*) that he has been convicted of any criminal offence.

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In *Rex* v. *D'Aoust* (1902), 3 O.L.R. 653, at 655 & 656, 5 Can. Cr. Cas. 407, at 410 & 411, on a case reserved, where prisoner, accused of robbery, had been cross-examined as to a number of previous convictions, Armour, C.J.O., pointed out the difference between our Act and the English, and said:—

> Nor is there any other provision limiting in any way the cross-examination of a person charged with an offence who becomes a witness in his own behalf.

Osler, J.A., said:—

> When he (the prisoner) does so, he puts himself forward as a credible person, and, except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination.

The other three Judges, Maclennan, Moss, and Garrow, JJ. A., concurred.

Section 12 permits a witness to be questioned as to whether he has been convicted of any offence; and to prove it, if denied, even though the conviction is altogether irrelevant to the matter in issue: *Ward* v. *Sinfield*, 49 L.J.C.P. 696, at 697.

The second question should, in my opinion, be answered in the affirmative. I express no opinion as to the propriety of those questions, but I take advantage of the occasion to quote what was said by Lord Mersey in the *Titanic Investigation*:—

> According to the practice of the English Bar, unless there is evidence to warrant a gross imputation being made, counsel should not make it by question.

It was pressed upon us that this cross-examination prejudiced the prisoner in the eyes of the jury. It may be well to point out that we have to deal with questions of law, and the question of "substantial wrong" does not arise unless and until it is shewn that there was some error in law.

The third question, which is,

> 3. Was I right in permitting the accused to be cross-examined on his alleged testimony at the inquest in the absence of the original depositions?

must also be answered in the affirmative. See sec. 16 of the Evidence Act, R.S.B.C. 1911, ch. 78. This is a reproduction of Imp. Stat. 28 & 29 Vict. ch. 18, sec. 5. Under this section a witness may be asked whether he has said a certain thing or

not at the inquest. He has no right to ask before answering that he wants to see or hear what has been taken down in the depositions. If, however, the matter is carried further, and the document is to be used for the purpose of contradicting him, then it must be produced.

MARTIN, J.A.:—Three questions are stated for our consideration, and I answer them thus:—

Q. 1. In the negative, and to determine it I must first pass upon the contention of the Crown that it is not open to this Court to review the discretion of the learned trial Judge, which is submitted to be absolute, and it is further suggested that his decision in the exercise of his discretion on the facts before him is one of fact, and not one of law, and, therefore, cannot be reserved under sec. 1014. To clear the ground, I deal with this latter point first, and after mature reflection have reached the conclusion that it cannot be sustained. It is the duty of the trial Judge to first find the facts upon which his discretion may be grounded, or as the Court of King's Bench (Appeal side) put it, unanimously, in *R.* v. *Fortier* (1903), 7 Can. Cr. Cas. 417, at 420:—

> The facts of the case are found by the petty jury (or the Judge when he is constituted the trier of the facts) and the questions of law are decided in all cases by the Judge.

Having then found the facts, as to which he is on an application of this kind, the sole "constituted trier," he proceeds to give a decision thereon, in other words, he exercises his discretion. There is, in my opinion, no distinction in principle between this discretion and any other ruling that a Judge has to give upon facts found by himself or by a jury; the application of the Judge's mind to facts as found, in order to give a ruling thereon, is just as much a question of law, or at least legal practice founded upon facts, in the one case as in the other, because, as Lord Chancellor Halsbury said, in *Sharpe* v. *Wakefield*, [1891] A.C. 173, at 179,

> "discretion" means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.

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There are undoubtedly cases in which the discretion has been held to be absolute, either upon a statute or *ex necessitate rei*, but, even in those cases, the Court appealed to must look to see that there are facts which supply a foundation for the exercise of the discretion, because, if such facts do not exist, neither does the right to exercise the discretion because that right could only be invoked by the occurrence of the facts. This, for example, is recognized in magistrates' cases, in one of which, *R.* v. *Evans* (1890), 54 J.P. 471, Lord Chief Justice Coleridge said:—

> It is true that there is a rule of this Court that the discretion of magistrates is not to be interfered with, so long as that discretion is based on fitting materials.

and applying that expression to the facts, the Court held that

> We think he (magistrate) has exercised this power of adjournment unreasonably, and that he ought now at once to proceed with the hearing.

Some examples of absolute discretion are (1) the right of a Judge to relax the general rule of evidence, and allow the Crown to give further evidence after the close of the prisoner's case: *R.* v. *Wong On* (1904), 8 Can. Cr. Cas. 423, 10 B.C.R. 555, also to allow leading questions—*Lauder* v. *Lauder* (1855), 5 Ir. C.L. 29, at 38, an unanimous decision of the Irish Common Pleas *en banc*, and approved in *Ex Parte Bottomley* (1909), 2 K.B. 14, 21, and see also *Ohlsen* v. *Terrero* (1874), L.R. 10 Ch. 127, and *cf. R.* v. *Crippen*, [1911] 1 K.B. 149, on another point of evidence; (2) the determination of the hostility of a witness, *i.e.*, "in case the witness shall, in the opinion of the Judge prove adverse," because the Judge's discretion must be principally, if not wholly, guided by the witness's behaviour and language in the witness-box"—*Rice* v. *Howard* (1886), 16 Q.B.D. 681; (3) the granting of a view under sec. 958 of the Criminal Code; (4) the discharging of the jury after disagreement and postponing the trial "on such terms as justice may require" under sec. 960 Crim. Code, which discretion by subsec. 2 it is declared that "it shall not be lawful for any Court to review," differing, in this respect, from the right to discharge for disobedience and postpone under the preceding sec. 959, sub-sec. 3; (5) the discharging of the jury without giving a verdict because of the illness or drunkenness of one of them, or

otherwise: *R.* v. *Charlesworth* (1861), 31 L.J.M.C. 25, citing, at p. 47, the highly commended judgment of Crampton, J., of the Irish Court of Queen's Bench in *R.* v. *Conway* (1845), 7 Ir. L.R. 149, and *R.* v. *Lewis* (1909), 78 L.J.K.B. 722; (6) the keeping of the jury together under sec. 945, sub-sec. 3; and (7) I should think, the admission of the unsworn evidence of children under sec. 1003 C.C., and sec. 16 of the Can. Evidence Act, whereby the matter rests "in the opinion of the Court" or justices, etc., which is the same expression as was held to confer an absolute discretion in my second illustration. I observe that the Court of Appeal in Ontario in *R.* v. *Armstrong* (1907), 12 Can. Cr. Cas. 544, 15 O.L.R. 47, did in fact review this discretion, exercised by a magistrate, doubtless because no objection was taken, and the decision in *Rice* v. *Howard*, which is particularly applicable to the behaviour of children, was not brought to the attention of the Court.

But in the case at bar it is a rule of law or at least a matter of judicial practice that we have under consideration, according to *Charlesworth's* case, 21 L.J.M.C. 31 at p. 40, also in *Lewis'* case, 78 L.J.K.B. 722, it is said, inferentially, at least, by the Court of Criminal Appeal, to be one of law, though the Court could not review the discretion there exercised as it had been held to be an absolute one depending upon necessity, and therefore no legal objection could be taken to it.

I have given some examples of discretions that will not be reviewed, but it is not difficult to instance some everyday ones which will be—viz.: (1) the admission of dying declarations; (2) of confessions; (3) of statements made by females in rape and kindred offences; and (4) amendments, as provided by sec. 890, sub-sec. 3 of the Criminal Code, expressly giving an appeal. The first three of these have been reviewed frequently by this Court, as a matter of course, though in each of them the trial Judge has first had to find the facts and then exercise his discretion in the form of a decision to admit or reject the evidence before it could go to the jury, or be considered by himself in discharging equivalent functions; and it is obvious that if the matter were determined finally by the way in which he found the facts, then there was nothing more in it than a pure

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question of fact which this Court, admittedly, could not have reviewed. *R.* v. *Woods* (1897), 2 Can. Cr. Cas. 159, 5 B.C.R. 585; and *R.* v. *Louie* (1903), 7 Can. Cr. Cas. 347, 10 B.C.R. 1 (and *cf. R.* v. *Spuzzum* (1906), 12 Can. Cr. Cas. 287, 12 B.C.R. 291), are illustrations of the first: *R.* v. *Lai Ping* (1904), 8 Can. Cr. Cas. 467, 11 B.C.R. 102; and *R.* v. *Bruce* (1907), 12 Can. Cr. Cas. 275, 13 B.C.R. 1 (and *cf., R.* v. *Viau* (1898), 7 Que. K.B. 362, 2 Can. Cr. Cas. 540) of the second; and *R.* v. *McGivney*, 15 D.L.R. 550, 22 Can. Cr. Cas. 222, in which we gave judgment on the first day of this term, of the third.

In *R.* v. *Davis*, 16 D.L.R. 149, 22 Can. Cr. Cas. 431, which we also decided this term, it was not suggested by either counsel that we could not review the discretion exercised by a trial Judge in refusing to order a separate trial under sec. 857.

In the light of the foregoing I find myself wholly unable to reach the conclusion that we must refuse to entertain the present application to review what was done on the motion to postpone the trial. If I could bring myself to take the view that it was a question of fact and not of law, I should have to refuse, but, on the authorities, it is clearly not a question of fact, and to say that it has been held to be a question of legal practice (apart from the holding I have cited that it is one of law) is only another way of saying it is in one sense one of law, because, though there is a technical distinction between rules of practice and of law, *e.g.*, as in that rule of practice requiring a jury to be instructed not to convict on the unconfirmed testimony of an accomplice, which has become such a part of the established procedure in criminal trials that a Judge "is blameable if he departs from" it (to use Mr. Justice Blackburn's words in *Charlesworth's* case, 31 L.J.M.C. 25 at 42), yet there is no essential distinction. And I am fortified in this view by the case of *R.* v. *Wade* (1825), 1 Moo. C.C. 86, wherein the Judges of England sitting to hear a Crown case reserved by Mr. Justice Bayley, reviewed the discretion he had exercised in discharging a jury thereby, in effect, postponing the trial, so that a witness might receive instruction upon the nature of an oath, before the next assizes, and declared the trial Judge's action "improper," which could only have been done if the

matter were one of law, because no questions of fact were reserved for or entertained by that Court. And in *R.* v. *Conway*, 7 Ir. L.R. 149, it was expressly decided by Pennafather, C.J., and Burton, and Perrin, JJ., that the discretion was reviewable, see pp. 165, 187, 190-1, 193; and while both these decisions may, in some respects more or less conflict with later ones, yet they establish what was never questioned, viz., that the review was essentially a question of law. And, finally, I cite our own decision in *R.* v. *Lai Ping*, 8 Can. Cr. Cas. 467, 11 B. C.R. 102, upon objection taken by the Crown, wherein the Court (consisting of four Judges) held that

> the question as to whether the trial Judge was right in coming to the conclusion that the confession was voluntary is a question of law and can be reserved as such,

p. 106. The headnote of the case (11 B.C.R. 102) is incorrect, the ruling being given in the form of a query, whereas only one of the four judges expressed doubt upon the subject.

I shall, therefore, with all deference to other opinions, venture to continue to hold the opinion that within the true meaning of sec. 1014, it at least partakes of and contains the elements of a "question of law" until I am corrected by a higher tribunal.

I conceive our duty to be (*a*) in cases which are not reviewable to see if there is a foundation for the exercise of the right as already explained; and (*b*) in cases which are, to consider the matter on the facts as found and certified to us by the trial Judge, we have no jurisdiction to find the facts ourselves as that would be to usurp his function and to give an appeal on fact, which is prohibited, except in certain specified cases, *e.g.*, secs. 1012 and 1021.

As pointed out in *R.* v. *Spintlum*, 15 D.L.R. 778, 22 Can. Cr. Cas. 483, which we decided last term, a discretion of this kind must only be "reviewed with great care." We were referred to the Quebec case of *McCraw* v. *The King* (1907), 13 Can. Cr. Cas. 337, but it is of no assistance as the point was not reserved or raised, and it is stated at p. 340, that the Judge acted by consent and specially fixed the hearing in the same way. But, fortunately, I have found a decision of the Court of Appeal in

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Sackville West v. *The Attorney-General* (1910), 128 L.T.N.S. 265, 26 Times L.R. 33, which settles the matter, and shews what our duty is in an application to postpone a trial under the English, and our rule 458, as follows:—

> The Judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms (if any) as he shall think fit.

I pause here to say that these essential expressions on discretion are very similar to those in sec. 884 C.C., relating to change of venue which were considered in the *Spintlum* case, [*R.* v. *Spintlum*, 15 D.L.R. 778] and are, apparently, unfettered powers, yet in the *Sackville West* case, 128 L.T.N.S. 265, it was held that the Court of Appeal had the power to interfere with the discretion, but

> it would only be in the most extraordinary circumstances that an application to review the decision of the learned Judge as to the conduct of the business of his own Court could succeed; that the only case in which the Court of Appeal would so interfere would be if satisfied that the decision was such that, notwithstanding any exercise by the learned Judge of the power of control which he would have over the action when it came on for trial, justice did not result and he had failed to see that such would be the effect of his decision.

Taking, as I must, this declaration of the law as my guide, I now consider the learned Judge's action. The facts in brief are, that after the grand jury had brought in a true bill on Monday, October 13 (which by an admitted clerical error is given in the case as the 15th) the present appellant's counsel, Mr. Macintyre, at the request of the Court on that day was good enough to undertake the defence of the accused. He then was told that two of the Crown's witnesses, Sarvent and Ohlson, whose names, were, it is admitted, on the back of the indictment, had not been called at the preliminary inquiry, as their evidence had not then been obtained by the Crown, and realizing, from the minute of their proposed evidence that was given him by the Crown counsel, that said evidence would tell strongly against his client, he applied for a postponement of the trial till the next assizes (in the spring) on three grounds: (1) that the accused, who had been in custody at the Coast from the time he was committed for trial, was taken by surprise; and (2)

that he wished to examine into the antecedents of the new witnesses, and reasons for their not giving evidence at the inquiry, and (3) that the accused was without means and unable to prepare his defence. This application was objected to by the Crown on the ground of expense (which, of course, is no ground at all), and that it would be impossible to ensure the attendance of the Crown witnesses if they once dispersed. No affidavits were filed on either side, but statements of fact were made without objection by counsel, so we are again compelled to do what we had to do in the *Spintlum* case, and take these statements as equivalent to facts, and the Judge so acted on them, but I repeat what we said in that case, about the great desirability of these applications being founded on proper materials to meet the special circumstances according to the established practice for a great many years, which it is unsafe for Crown or subject to depart from, and causes great difficulty and embarrassment in this Court in attempting to review the matter. The learned Judge refused to grant a postponement till spring, but offered one till the Vernon assizes in about two weeks, which was refused because counsel had engagements which would prevent him from "giving any attention to the preparation of the defence" herein, and so the motion was refused and the trial proceeded.

We have no information on the record respecting the locality in which the antecedents of the two witnesses were to be investigated, or the means of communication by telegraph or otherwise—in short, the matter is left, on behalf of the accused, in a most unsatisfactory state. It has been expressly decided that a postponement will not be granted for the purpose of making inquiries respecting fresh witnesses not called before the committing justices: *R.* v. *Johnson* (1847), 2 C. & K. 354; nor because the accused had no knowledge of the evidence to be produced against him: *R.* v. *Slavin* (1866), 17 V.C.C. 205. I have not overlooked the expressions of Mr. Justice Butt in *R.* v. *Flannagan* (1884), 15 Cox C.C. 403, at p. 407, as to the course he might feel justified in adopting in the circumstances of that case, and at the stage of the trial (the proposed evidence not having been obtained till that morning) in regard to new wit-

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nesses not on the back of that indictment (though undue stress should not be laid upon this last fact in the case at bar) and, if I am called upon to say so, I consider them appropriate to the case he had in hand, but they furnish no ground for overturning the discretion herein exercised. It may be said that the learned Judge herein has himself shewn that he doubted the exercise of his discretion by reserving a case on the point, which he ought not to have done had he been free from doubt, but on mature reflection, I think that he may well be deemed to have taken the course he did, not from any doubt of the propriety of his own act but because he did not in a capital case wish to deprive the condemned man of the benefit of having the matter reviewed by a higher tribunal, which would have a much better opportunity of arriving at a proper conclusion upon further argument and consultation of authorities not available on circuit in Cariboo, and, in my opinion, if it is proper for me to say so, he did wisely, as this subject of the review of judicial discretion in criminal cases is a difficult one which has occasioned me much labour and research, and I have gone into it at this length because of the importance of it and the strange lack of much direct authority thereupon. We have no decision of this Court which assists us, the two reported cases, *R.* v. *Morgan* (1893), 2 B.C.R. 329, and *R.* v. *Gordon* (1898), 2 Can. Cr. Cas. 141, 6 B.C.R. 160, being quite dissimilar. I can only say that the result of my repeated consideration of the facts before the learned Judge is that I find myself quite unable to say that there are here those extraordinary circumstances as required by the Court of Appeal in England, *supra*, which would justify our interference with the discretion in question, even after making due allowance for the fact that in a capital case I should personally be inclined to construe the rule as much as possible in favour of the accused. By the statute, the learned Judge was vested with a large discretion, entailing a like responsibility upon his shoulders, and I shall conclude with the words of Lord Chief Justice Cockburn in *R.* v. *Charlesworth*, 31 L.J.M.C. 25, at 33, "far be it from me to say that he acted wrongly."

Questions 2 and 3 I answer in the affirmative, but though I

have no doubt about the strict legal right of the Crown counsel to ask the questions complained of, yet I feel bound to say that, as a matter of forensic propriety, the question put to the accused concerning his complicity in the murder of fifteen men whose corpses were found in the spring after the snow disappeared seems difficult to justify, whatever the instructions to counsel may have been, seeing that it was admitted by said counsel that if the accused had been indicted for that offence he had, nevertheless, been acquitted. The necessity for asking such a question in such, in my long experience, unprecedented circumstances, is not apparent from the record, and it is difficult to imagine how the necessity could have arisen for asking it from a man who was admittedly innocent of the damaging imputation carried by it. While we have to accept the statement of counsel as to what is necessary in the conduct of his cases, yet the responsibility of asking such a question as this is so heavy that he should be prepared with a satisfactory explanation in case his action is challenged.

The result is that, in my opinion, all the questions should be answered in favour of the Crown, and the conviction sustained.

GALLIHER, J.A.:—I concur in the judgment of my learned brother Irving, and I merely wish to mention one case in view of some authorities that were handed in to us yesterday by Mr. Macintyre on the second question, and also a point in the same connection that was raised in the hearing before us: *Rex* v. *Muma* (1910), reported in 22 O.L.R. 227, 17 Can. Cr. Cas. 285 (the unanimous judgment of the Court of Appeal of Ontario), and was on the point that, where the witness as here (the accused) is asked in cross-examination about some irrelevant fact that is not directly connected with the issue as to his having committed some previous offence, the Crown is bound by his answer and cannot produce witnesses to contradict him. As to the right to ask such a question there is a difference between the English law and the law in that respect as it is in Canada.

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McPHILLIPS, J.A.:—In proceeding to consider the case reserved for consideration I propose to deal with questions 2 and 3 before taking up the consideration of question 1.

Q. 2. Was I right in permitting the counsel for the Crown to ask the accused if he had been charged with or committed the offences referred to in the above questions?

The questions referred to follow.

In his cross-examination the counsel for the Crown asked the accused, who took the stand on his own behalf, the following questions:—

Q. Do you know a bartender named Harry James? A. Yes, sir.

Q. Do you remember trying to hold a saloon up where he was at in Seattle, a saloon belonging to Jamison & McFarland? A. No, sir.

Q. He laid you out with a bottle? A. No, sir.

Q. Don't you remember that? A. No, sir, that was not me, there aint a man in the world can say so.

Q. Do you remember being in Taft? A. I never was in Taft in my life.

Q. Now be careful, just think a moment? A. No, sir, never.

Q. I cannot from memory—I forget the exact year, but this will recall it to mind. One spring in Taft, a few years ago, when the railroad construction was in full bloom, and the snow went off in the spring, fourteen or fifteen corpses were uncovered, men that had been killed in the winter, and no one knew about it. Now weren't you one of the men that were indicted for killing those men? A. No, sir.

Q. Weren't you indicted and tried and acquitted? A. No, sir, there is no man can say so.

Mr. Macintyre:—In the case of a prisoner, the moment he goes into the box, it is well known he puts himself at the mercy of the Crown, certainly the Crown counsel ought to have some instructions; that man has simply sworn he was never indicted.

THE COURT:—I don't think I can stop it.

The law of England differs from the law of Canada in this respect, that in England the accused, if he gives evidence, cannot be asked any question tending to shew that he has committed or been convicted of, or been charged with, any offence other than that he is then charged with, or is of bad character, unless it is admissible evidence to shew that he is guilty of the offence then charged, or he has personally, or by his advocate, asked questions of the witnesses for the prosecution to establish his own character, or given evidence of his good character, or the defence is such as to involve imputations on the character

of the witnesses for the prosecution. (Criminal Evidence Act, 1898, 61 & 62 Vict. ch. 36.)

The Canada Evidence Act, sec. 12, reads as follows:—

12. Questioning the witness as to whether he has been convicted of any offence. A witness may be questioned as to whether he has been convicted of any offence, and, upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

2. The conviction may be proved by producing:—

(*a*) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction if for an offence punishable upon summary conviction purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(*b*) proof of identity. 55-56 Vict. ch. 29, sec. 695.

It was held in *The King* v. *D'Aoust* (1902), 5 Can. Cr. Cas. 407 (Court of Appeal for Ontario), that an accused person examined as a witness on his own behalf may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence—it being held that the question is relevant to the issue as affecting the credibility of the accused as a witness.

Osler, J.A., in the *D'Aoust* case, draws attention to the difference between the Imperial Criminal Evidence Act, 1898, and the Canada Evidence Act, 1893, and its amendments, 61 Vict. ch. 53, and 1 Edw. VII. ch. 36, and at p. 411 said:—

The right, and if such it can be called, the privilege of the accused now is to tender himself as a witness. When he does so he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness as regards liability to and extent of cross-examination.

It will, however, be observed that the questions put by the Crown counsel were not questions directed to any previous convictions, but to, in the one case, the alleged attempt to rob in a saloon, and, in the other, his acquittal, not conviction, upon an indictment for murder.

Were it not for the very high authority of the Court of Appeal for Ontario, and in view of the proper ethical rules that

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should govern counsel, and also considering the very loose way the questions were put by Crown counsel, indicating, especially in the reference to the murder charge, the absence of any precise or definite instructions, or any well-founded knowledge of the occurrences, my opinion would be that the questions were improper, and should not have been asked—they certainly had the tendency to prejudicing the accused. The question having relation to the murder charge was revolting in its nature, and carries condemnation on its face, as the form in which it is put is not that he was convicted, but *indicted, tried* and *acquitted;* therefore the accused was innocent, and the effect could only be to prejudice the accused in the minds of the jury, that although acquitted, he may have been, nevertheless, guilty of a crime which cries to heaven, and the accused went "unwhipp'd of justice."

In the case of *The King* v. *Pollard* (1909), 15 Can. Cr. Cas. 74 (Court of Appeal for Ontario), it was held that a single prior act of the like criminal nature as the subject of the charge, but not connected therewith, is not evidence proving the criminal intent of the act charged; in that case the Crown introduced evidence in reply to the denial of the accused of a prior offence, and a new trial was ordered—here, of course, no error of that nature took place.

Osler, J.A., in the *Pollard* case, at pp. 81-82, said:—

I entirely agree with the observation of Kennedy, J., in the passage where he says (*The King* v. *Bond*, [1906] 2 K.B. 389), at p. 398:—"If as is plain we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England" (recognized as he points out by the Legislature in creating exceptions to it) "which" (to the credit, in my opinion, of English justice) "excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."

In the very recent case of *Rex* v. *Bridgewater*, [1905] 1 K.B. 131, that was a Crown case reserved, and came before a Court composed of Lord Alverstone, C.J., Lawrence, Kennedy, Ridley, and Channell, JJ., the prisoner was arrested in possession of stolen property, and said in answer to the charge that he was acting under instructions from a detective, and at

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the trial at quarter sessions the detective was cross-examined as to whether he had not employed the prisoner as an informer. It was held that the nature or conduct of the defence was not such as to involve imputations on the character of the witnesses for the prosecution under sec. 1, sub-sec. (*f*), (ii) of the Criminal Evidence Act, 1898, so as to render the prisoner liable to be cross-examined as to previous convictions.

The *Bridgewater* case, [1905] 1 K.B. 131, was considered in *R.* v. *Hurd* (1913), 10 D.L.R. 475, 23 W.L.R. 812, 21 Can. Cr. Cas. 98, a prosecution for theft; the accused was asked questions upon cross-examination by counsel for the Crown relating to money which had been lost in sleeping cars on other occasions when he had been, as suggested, in such cars—the questions were not objected to and were answered by the accused, who denied all knowledge of such losses. The Crown, as in this case, made no attempt to prove the facts suggested. The trial Judge directed the jury to disregard these questions and answers, and any inferences suggested by them (which was not done in the case now being considered). It was held that full justice was done to the accused by the trial Judge's direction, and it was his duty to give such direction, independently of whether the questions were properly asked or not, and it was not necessary to decide whether they were properly asked.

In this case, counsel for the Crown contends that the conduct of the defence involves imputations on the character of the witnesses for the prosecution. Upon reading the whole of the evidence I cannot so hold.

Lord Alverstone, C.J., in the *Bridgewater* case, [*Rex* v. *Bridgewater*, [1905] 1 K.B. 131] said, at 134:—

> I must repeat what I have said before, namely, that raising a defence even in forcible language is not of necessity casting imputations on the character of the prosecutor or his witnesses. No doubt imputations may be cast upon their character quite independently of the defence raised, either by direct evidence or by questions put to them in cross-examination.

In my opinion, although I am compelled to admit it would not appear to be error in his not doing it, the learned trial Judge might have very properly disallowed the questions as being at

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the very least vexatious and not relevant to any matter proper to be inquired into, being questions as to alleged occurrences of remote date, not affecting present credibility, the defence having given no evidence of the good character of the accused. (Taylor, sec. 1460, 36 Sol. Jo. 158; Stephen, General View, 2nd ed., 27.)

It follows that I am constrained to answer question 2 in the affirmative.

Question 3 is as follows:—

3. Was I right in permitting the accused to be cross-examined on his alleged testimony at the inquest in the absence of the original depositions.

The questions asked were:—

Q. Now do you remember giving evidence at the inquest? A. Yes, sir.

Q. Of Kelly? A. Yes, sir.

Mr. Macintyre:—Any depositions here?

Mr. Moore:—I haven't seen them.

Mr. Macintyre:—My learned friend cannot go into it now.

THE COURT:—He can cross-examine on it, I don't know but legal rebuttal evidence, but he can cross-examine on it.

Q. You recall giving evidence at the inquest of Kelly's body at Freeport? A. What did you say?

Q. You remember giving evidence at the inquest of Kelly? A. I gave some.

THE COURT:—You were under arrest at the time? A. Yes, sir.

Q. (By Mr. Moore). Arrested on suspicion at that time. And the coroner told you, being under arrest, he stated you were not obliged to testify if you did not want to. A. No, sir.

Q. You swore to that? A. They asked me there if I was going to say anything—asked me about the card game, that was all.

Q. You say that the coroner did not give you that warning, you need not to say anything unless you felt like it? A. He might have, I don't know.

Q. You wouldn't swear he didn't? A. No.

Q. And then you went on to say that you went to bed at ten or eleven o'clock—between ten and eleven o'clock on the night of the shooting, and did not wake up until next morning, isn't that a fact? A. No, sir.

Q. Isn't that a fact? A. I told them—they asked me if I could guess the time that me and Kelly had the trouble, I told them I thought it was between ten and eleven o'clock.

Q. And you went to bed right after that, and did not have a drink all that night, didn't you say that? and did not have a drink all that night, didn't you say that? A. No, sir, I went outside——

Q. You have told us now I am asking you as to your evidence then. Didn't you also tell the same story to the constable when he came there—in other words, when he first came to Freeport? A. I told him that.

Apparently, this is permissible, if it is not intended to contradict the witness by the writing, and I assume we must in this case concede that such was not the intention.

A matter for remark though is this—the Crown counsel stated at the trial, although he proceeded to examine the accused upon the depositions, that he had never seen them.

I feel entitled though to assume, and do assume, that in the cross-examination the Crown counsel was instructed by some person who heard the accused give his testimony, otherwise his questions could only be hypothetical.

Although the course adopted here may be technically allowable, it would seem to me to be very close to working substantial wrong, unless the trial Judge, in charging the jury, makes it plain to them that the answer of the accused having relation to what he said at the coroner's inquest must be taken as true.

In the circumstances of this case I would answer question 3 in the affirmative.

Question 1 now remains for consideration, and it reads as follows:—

> Q. 1. Was the accused entitled to a traverse of the trial to the spring assizes, his counsel claiming to have been taken by surprise by the introduction of the evidence of Olson and Sarvent so that he might have a better opportunity to obtain evidence in answer to that evidence?

It would appear from the statement of facts accompanying the question, that the accused was without means and was undefended by counsel. The learned trial Judge, however, requested Mr. A. D. Macintyre, who was present in Court, to act for the accused, and Mr. Macintyre acceded to the request made.

It then developed that the two witnesses mentioned above were to be called, not being witnesses examined upon the preliminary inquiry.

Mr. Macintyre urged that the prisoner was surprised by the proposed calling of those witnesses, and the evidence to be adduced, and that the case should be traversed to the spring assizes (a postponement to the Vernon or Kamloops assizes would have been profitless to the accused)—the grounds urged were that the accused was a stranger in the province, and the

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accused had been since his arrest incarcerated in gaol in New Westminster, a place far distant from the scene of the occurrence; and this evidence, of greater cogency than any given at the preliminary inquiry, to be now adduced, was such that time ought to be allowed to the accused to meet it.

It would not appear that any affidavits were filed to support the application made, but the whole application proceeded upon the statements of counsel, which I will assume will be deemed the material upon which this question is to be reviewed by this Court—if reviewable, and it is to be noted that the application was renewed during the course of the trial.

The facts here would seem to be within *R.* v. *Flannagan*, 15 Cox 403, where a postponement was granted upon the ground that evidence additional to that adduced before the magistrate, and not communicated to the prisoner before the trial, was intended to be introduced.

The section of the Code dealing with the subject is 901.

In *Reg.* v. *Johnson* (1847), 2 C. & K. 354, Alderson, B., refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be afforded of investigating the evidence and characters of certain witnesses who had not been examined before the magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased.

I am not, though, of the opinion that questions of postponement of trial can be concluded upon precedents—they surely must be decided upon the particular facts of each case.

Conditions in this country greatly differ from those obtaining in England, especially where, as in this case, the scene of the occurrence is remote, and means of communication most difficult.

The question for consideration is—was the denial of the application for a postponement something not according to law done at the trial?—and the further question, if answered in the affirmative—did the denial cause some substantial wrong or miscarriage?

To arrive at a correct conclusion in such a grave matter is

indeed most trying, and to do so justly, all the proceedings, in my opinion, preliminary, subsequent, or incidental to the trial, may be rightly looked at.

I cannot dismiss from my mind that the submission of the question to the Court of Appeal indicates that the learned trial Judge has some considerable doubt in the matter, and who could be better advised as to all the surrounding facts, and the position in which the accused was placed—a stranger in the country, without means, and undefended up to the day of trial, and then has for the first time brought to his notice the fact that two witnesses, not called at the preliminary inquiry, although resident at the place of the occurrence, are to give evidence against him.

Further, without the evidence of these witnesses, it is reasonable to suppose no conviction could have been obtained, or if obtained, would have been, most probably, set aside; as without the evidence of these witnesses, at most it would only have been a mere suspicion of guilt, and would lack the material ingredients necessary to constitute proof of the offence.

In passing, it may be remarked that the learned trial Judge said in his charge, referring to the evidence of Olson and Sarvent, "It is the whole strength of the Crown's case."

Take the case as presented by the Crown—it is only one based upon circumstantial evidence, and in the result the accused was compelled to go to trial for murder there and then, with only his own evidence available as to the attendant facts regarding his own acts upon the night of the occurrence.

Nothing is to be done to rob the subject of a fair trial, and to admit of this, there must be reasonable opportunity afforded for the accused to meet the accusation brought against him, otherwise it offends against natural justice.

It is difficult to deal with this question by the citation of authorities. It is, however, instructive to find what the common law was, and although we now have sec. 901, sub-sec. (2) in the Code, in my opinion, the trial Judge must exercise his discretion judicially upon any application made for postponement, and must proceed upon legal and judicial grounds, and

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if he fails in this, it is reviewable. In *Rex* v. *Crippen* (1911), 80 L.J.K.B. 290, Darling, J., at p. 293, said:—

> It does not appear to have been laid down in any case that if a Judge exercises his discretion in a way different from that in which the Court of Appeal would have exercised it, that fact alone is sufficient ground for quashing a conviction. The only case in which anything of the kind was suggested was *Wright* v. *Wilcox*, 19 L.J.C.P. 333, 9 C.B. 650, where Chief Justice Wilde said, "The time at which evidence is to be received, must be in the discretion of the Judge, the exercise of that discretion being subject to the review of the Court."
>
> None of the other Judges said anything to that effect.

But we have here the learned trial Judge himself exhibiting doubt as to the exercise of his discretion by granting a reserved case. Darling, J., at p. 293, in the *Crippen* case, 80 L.J.K.B. 290, further said:—

> The evidence admitted in this case was admissible evidence, and the Lord Chief Justice saw no reason why it should not be given. He exercised his discretion, and there is no reason why we should interfere, even if we have the power to do so. At the same time, if it were shewn that the prosecution had done anything unfair—had set what has been called a trap—which had resulted in injustice to the prisoner, this Court would have full power to deal with the matter. In such a case the Court would probably come to the conclusion that there had been a miscarriage of justice, and would exercise the power conferred upon them by section 4 of the Criminal Appeal Act, 1907.

The English Act, sec. 4, so far as pertinent to this inquiry, reads as follows:—

> 4. (1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that . . . the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, in any other case shall dismiss the appeal.

Unquestionably we have a complete power as a matter of fact, greater power in that we can grant a new trial where we come to the conclusion that a miscarriage has resulted.

I unhesitatingly acquit the Crown counsel in this case of intentionally setting a trap, but, in the result, it has amounted to that, and the refusal of postponement to the spring assizes worked, in my opinion, unfairness to, and caused injustice to the accused, and thereby a miscarriage of justice took place.

In Russell on Crimes, 7th English edition, and 1st Canadian

edition (1910), footnote (*a*), p. 1997, this language is to be found:—

> At common law a person indicted for misdemeanour was entitled to traverse or postpone the trial till the assizes or sessions next after the finding of the indictment—see 4 Bl. Com. 351, 4 Chit. Cr. L. 278, 2 Pollock & Maitland Hist. Eng. Law 649.

Now, what is the Court to do? Here follows section 901, sub-sec. (2):—

> 2. If the Court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such Court may grant such further time and may adjourn the trial of such person to a future time in the sittings of the Court, or to the next or any subsequent session or sittings of the Court, and upon such terms, as to bail or otherwise, as to the Court seem meet, and may, in the case of adjournment to another session or sittings, respite the recognizances of the prosecutor and witnesses accordingly.

The Court may grant further time, adjourn the trial to a future time in the same sittings, or to the next or any subsequent sittings of the Court, but surely he must do this judicially, and how can it be done judicially if well accepted and understood principles of law are ignored?

In Halsbury's Laws of England, vol. 9, at p. 365, sec. 709 in part reads:—

> The prosecution may call witnesses who were not examined before the committing justices and whose names are not on the back of the indictment. Notice of intention to call such witnesses should be given to the defendant, and copies of their proofs should be supplied to the defendant and to the Court.

The case of *R.* v. *Ward* (1848), 2 C. & K. 759, is referred to as the authority for the proposition. Turning to that case, Cresswell, J., said:—

> It is therefore by no means incumbent on the prosecutor to abstain from giving at the trial any additional evidence which may be discovered subsequently to the taking of the depositions. But at the same time it is only fair that the prisoner's counsel should be apprised of the character of such evidence.

It would appear that this evidence was known to the prosecution on August 19, if not before, and counsel for the accused complains that not only was it for the first time mentioned at the eleventh hour, October 15, the day of trial, but as given

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was not as disclosed in the memorandum for the first time handed to him on that same day. The learned trial Judge in the reserved case states this:—

> During the course of the trial Mr. Macintyre claimed that the memorandum of the evidence (and it was not brought before this Court) given to him of the evidence to be given by Roy Olson and Joseph Sarvent, did not all disclose the evidence as actually given by them, and intimated that he would ask for a reserved case on the ground that without the evidence of these two witnesses it would be impossible to convict the accused, and that in fact the case against the accused depended upon their evidence.

I am of opinion, with all due and proper deference to the learned trial Judge, who had a most difficult task to perform—sitting in a remote district of the province—at a Court of Assize—where witnesses had come from great distance and at great expense, and an adjournment might mean probable loss of evidence, that the refusal of the adjournment of the trial to the spring assizes, upon the peculiar and extraordinary circumstances then presented to the learned trial Judge, namely, the accused undefended to the last moment, and no knowledge of the most material evidence to be adduced against him until the last moment; detained in custody since arrest, hundreds of miles away from the scene of the occurrence, and tried likewise hundreds of miles away from any possible witnesses on his behalf; the means of communication being one of long delay and most expensive; the accused being without means and, perhaps, unaware by being undefended up to the moment of trial, that the Crown would, at its expense, if requested, summon and produce all available witnesses the accused desired, was not a right exercise of the discretion committed to the learned trial Judge, and that he did not proceed judicially, and it was something done not according to the law at the trial, and caused the accused substantial wrong, and miscarriage was thereby occasioned at the trial.

In my opinion, and this is said with the greatest of respect for and deference to the learned opinions of my brothers, who are of a contrary opinion, that it would be against natural justice in this, a capital case, to be constrained to hold that the refusal to postpone the trial is a matter—notwithstanding the

peculiar and extraordinary circumstances—not reviewable by this Court—in my opinion no legal obstacle stays the arm of this Court.

It follows that, in my opinion, the appeal must be allowed, the conviction quashed, and a new trial directed upon the grounds and for the reasons here stated.

Conviction affirmed.

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1. APPEAL (§ VII E—320)—CRIMINAL APPEAL—QUESTIONS OF LAW—REFUSAL TO POSTPONE TRIAL.

Where the Court on an application under Cr. Code section 901 has, in the exercise of judicial discretion, refused to allow a postponement of a criminal trial, there can be no review of the decision by an appellate Court and the question presented does not constitute a question of law upon which there may be a reserved case under the provisions of section 1014 of the Criminal Code.

[*R.* v. *Charlesworth*, 1 B. & S. 460; *Winsor* v. *The Queen*, L.R. 1 Q.B. 390; *Rex* v. *Lewis*, 78 L.J.K.B. 722; *Rex* v. *Blythe*, 15 Can. Cr. Cas. 177, 19 O.L.R. 386; *Reg.* v. *Johnson*, 2 C. & K. 354; and *Reg.* v. *Slavin*, 17 U.C.C.P. 205, referred to; *R.* v. *Mulvihill*, 22 Can. Cr. Cas. 354, affirmed; and see Annotation on Postponement of Criminal Trials at end of this case.]

2. APPEAL (§ III F—98)—EXTENSION OF TIME—OBJECTION THAT APPEAL NOT COMPETENT—CRIMINAL APPEAL—CR. CODE (1906), SEC. 1024.

On a motion to extend the time for appealing under Cr. Code 1024 from the affirmance of a conviction for an indictable offence from a provincial appellate Court to the Supreme Court of Canada, the latter Court will enter upon the question of the competency of the appeal and if of opinion that the question is not appealable will refuse the extension.

[*R.* v. *Mulvihill*, 18 D.L.R. 189, affirmed.]

Statement

APPLICATION, on behalf of the appellant, for extension of the time for giving notice, as required by section 1024 of the Criminal Code, of an appeal from the judgment of the Court of Appeal for British Columbia, *R.* v. *Mulvihill*, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, whereby the conviction of the appellant upon an indictment for murder was sustained, McPhillips, J.A., dissenting.

The application was refused.

Coté, in support of the application.

J. A. Ritchie, contra.

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Idington, J.

IDINGTON, J.:—Unless we are prepared to declare that it is arguable that it may be held to be law that a prisoner has a legal right to insist upon postponement of his trial in any case where some evidence to be adduced against him has been brought to the notice of his counsel for the first time on the day of the trial, this motion must be refused.

The proposed appeal here is based upon the dissenting opinion of Mr. Justice McPhillips, which in turn rests upon facts which imply nothing more than I have stated. A good many more facts are set forth therein, but none adding anything to the strength of the alleged legal right, or interfering in any way with the discretion assigned the learned trial Judge in such case.

It would not be in the interests of the administration of justice to grant an indulgence such as now asked to permit of the presentation of such a case.

It may, in some cases where like indulgence may be asked, not be so easy as here to grasp all that really is involved in the proposed appeal.

The motion must be refused.

Duff, J.

DUFF, J.:—After full consideration of the circumstances I think the application ought not to be granted. The question which counsel for the accused desires to raise upon appeal to this Court is the question whether the accused was entitled to a traverse of the trial in the circumstances mentioned in the reserved case. My opinion is that, in this respect, the case does not present a question of law within section 1014 of the Criminal Code. I have reached this conclusion after the most anxious consideration of the judgment given in the Court below in which the considerations in favour of the view that a question of law is stated are set forth with great fullness and ability. I can only say that, having come to a very clear conclusion that the appellant's appeal on this point would be hopeless, and that being of the opinion of my learned brothers, I think no possible object could be served by granting the application.

The right to invoke the jurisdiction of the Courts by way of

appeal from a conviction after a trial at the assizes given by section 1014 of the Criminal Code is a strictly limited one. The Code does not contemplate that an accused person should be entitled as of right to claim redress by way of appeal in every case in which it alleged that the trial Judge has made a mistake as, for instance, in respect of a question which is left to his discretion; the appeal given is by way of case stated and the case must present some question of law. In respect of cases not falling within section 1014 or section 1021 a right is given by section 1022 to apply to the Minister of Justice who has power to order a new trial.

ANGLIN, J.:—The defendant applies to extend the time for service of notice of appeal to this Court under section 1024 of the Criminal Code. The judgment of the Court of Appeal for British Columbia affirming his conviction for murder was pronounced on the 27th of January, 1914. He had the right to give notice of appeal within the fifteen days thereafter which section 1024 allows. But, having permitted that time to expire without giving notice, he now asks indulgence on the ground that he had not until quite recently the means to launch or prosecute the appeal which he desires to take. Before granting an extension of time to serve the notice it is our duty to satisfy ourselves that the proposed appeal involves a question of law which could be reserved under section 1014 of the Code and would properly form the subject of an appeal to this Court.

Anglin, J.

The learned trial Judge reserved three questions for the opinion of the Court of Appeal:—

(1) Whether the prisoner was entitled to a traverse of the trial to the Spring Assizes.

(2) Whether the trial Judge was right in permitting counsel for the Crown to ask the accused when he was giving evidence on his own behalf if he had been charged with or had committed certain offences.

(3) Whether the trial Judge was right in permitting the accused to be cross-examined on his alleged testimony at the inquest in the absence of the original depositions.

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The Court of Appeal unanimously answered the second and third questions in the affirmative; and it has been decided in *McIntosh* v. *The Queen*, 23 Can. S.C.R. 180, 5 Can. Cr. Cas. 254, that the right of appeal to this Court is confined to questions upon which there has been dissent in the provincial Court of Appeal. The defendant's right of appeal is, therefore, restricted to the first question. Three of the five Judges of the provincial Court of Appeal held that this was not a question of law which might be reserved under section 1014, and four of them that, if it were, it should be answered in the negative. Mr. Justice McPhillips dissented from the opinion of the majority on both grounds.

Section 901 of the Criminal Code declares that "no person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any Court." By sub-section 2, power is conferred on every trial Court, in its discretion, to grant an adjournment of trial to any prisoner.

The grand jury indicted the defendant on the 13th of October, 1913. On that day he was assigned counsel, who was informed that the Crown proposed to call two witnesses whose names were on the indictment, but who had not given evidence at the preliminary investigation. A copy of the memorandum purporting to state the substance of the testimony which these witnesses were expected to give was also furnished him. There is no doubt that this evidence was of vital importance and disclosed facts not stated at the preliminary investigation. Counsel for the prisoner moved to traverse the trial in order to have an opportunity to "inquire into the antecedents (of these witnesses) and the reason their evidence had not been given at the preliminary investigation and was being now given," and on other general grounds. The Crown opposed postponement because of the expense involved and the great danger of loss of material evidence. The Court offered to transfer the case to the Vernon Assizes to be held a fortnight later. Counsel for the defence declined to accept this offer, saying it would be useless to him, and the trial proceeded, on the 16th October, resulting in the defendant being convicted of murder.

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While it is possible to conceive of cases in which it would be clear that there had not been any exercise of judicial discretion in granting or refusing postponement of trial, and in such cases there might be error of law which would be properly reviewable, where, in what was clearly an exercise of his discretion, the trial Judge has refused a postponement because he was "of the opinion" that further time should not be allowed (sec. 901, sub-sec. 2 (Crim. Code)), I am satisfied that the propriety of that exercise of discretion is not reviewable by an Appellate Court and is not properly the subject of a reserved case under section 1014. The principle which underlies the decisions in *The Queen* v. *Charlesworth*, 1 B. & S. 460, and *Winsor* v. *The Queen*, L.R. 1 Q.B. 289, 390, approved in *Rex* v. *Lewis*, 78 L.J.K.B. 722, applies. I am, with respect, unable to appreciate the distinction which it is suggested exists between the discretion conferred where "the matter rests in the opinion of the Court," 18 D.L.R. 189 at 199, and this case where the Court is empowered to postpone, if it "is of the opinion" that it should do so.

If the propriety of the refusal of the postponement is a question of law (*Rex* v. *Blythe*, 19 O.L.R. 386, pp. 389, 392), reviewable under section 1014 *et seq.* of the Criminal Code, I agree with Martin, J.A., and Irving, J.A., that, under the circumstances of the present case, interference by an appellate Court would be out of the question: *Reg.* v. *Johnson*, 2 C. & K. 354; *Reg.* v. *Slavin*, 17 U.C.C.P. 205, at p. 211.

I am, for these reasons, of the opinion that the extension of time asked for must be refused.

Brodeur, J.

BRODEUR, J.:—By the provisions of article 1024 of the Criminal Code there is an appeal to this Court by any person convicted of any indictable offence if the Court of Appeal has not been unanimous. But notice of appeal should be served on the Attorney-General within fifteen days after the judgment appealed from has been rendered. However, this Court or a Judge thereof may extend the time within which the notice of

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appeal should be given. The object of the present application is to obtain that extension.

The applicant has been convicted of murder in the month of October last. He was, by the sentence of the Court, to be executed on the 29th of December last. On the 23rd of December, just a few days before the date fixed for the execution, his counsel applied for a reserved case and a reprieve was granted until the 30th day of January. The Court of Appeal rendered its judgment on the 27th of January last. The execution of sentence was postponed until the 4th of April, 1914.

Instead of giving notice of appeal to this Court, as required by law, the applicant waited until the 17th of March to apply for an order extending the time for serving upon the Attorney-General of the province the notice of appeal. I have gone into the merits of the case in order to satisfy myself as to whether the case presented some serious doubts, and I failed to see any good reason why we should grant the delay asked for.

The only point of importance which was reserved by the trial Judge and about which there was a dissenting opinion in the Court of Appeal was whether the trial Judge had exercised a proper discretion in refusing to postpone the trial to the Spring Assizes.

It was not established that the ends of justice would have been served by postponing the trial to the Spring Assizes. On the contrary, it was to be feared that the witnesses could not be procured at the future time at which it was prayed to put off the trial.

The witnesses about whom the prisoner wanted to have some information were well known to him, had been in relation with him for some time, and he knew of the antecedents of those witnesses.

It has been stated in *Rex* v. *Jones*, in 1806, 8 East 31, at p. 34, that it is the constant practice of the Old Bailey not to put off trials for the absence of witnesses to character only.

For these reasons the present application now made to this Court should be dismissed.

Application refused.

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Annotation

Criminal trial; when adjourned or postponed.

Annotation—Continuance and Adjournment (§ II—8)—Criminal Law—Postponement of trial—Cr. Code (1906) sec. 901.

Archbold (Criminal Pleading, 22nd ed., 110) says:—

"Indictments for felonies are tried at the same assizes or sessions at which they are preferred to and found by the grand jury. They may, however, be postponed to the next assizes or sessions at the instance of the prosecutor or the defendant on shewing to the Court a sufficient cause for the delay, such as the unavoidable absence or illness of a necessary and material witness, the existence of a prejudice in the jury, and the like."

A Superior Court will not on the application of the accused order a magistrate holding a preliminary enquiry to forthwith commit for trial, although a *primâ facie* case is admitted by the accused and committals had been made by the same magistrate of others charged with the same offence on similar evidence. A Superior Court will not interfere with the magistrate's discretion as to adjourning the enquiry when the discretion is exercised in good faith and he must be allowed a reasonable time after the close of the evidence to reach a decision: *Re Ying Foy*, 15 Can. Cr. Cas. 4, 114 B.C.R. 254.

Section 901 of the Criminal Code (1906) provides that no person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any Court, or to imparl, or to have time allowed him to plead or demur to any such indictment.

If the Court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such Court may grant such further time and may adjourn the trial of such person to a future time in the sittings of the Court, or to the next or any subsequent session or sittings of the Court, and upon such terms, as to bail or otherwise, as to the Court seem meet, and may, in the case of adjournment to another session or sittings, respite the recognizances of the prosecutor and witnesses accordingly: Sec. 901 (2).

In such case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings without entering into any fresh recognizances for that purpose: sec. 901 (3).

An application to postpone a trial by jury in consequence of the absence of material witnesses must be supported by special affidavit shewing that the witnesses are material: *R.* v. *Dougall* (1874), 18 L.C. Jur. 85.

It is no ground of "surprise" that the prisoner had no knowledge of the evidence to be produced against him, for no one is obliged, by pleading, or otherwise, to disclose the evidence by which his case is to be supported. It is sufficient that the party is fully apprised of the case or charge which it is proposed to prove against him; and he must then, being so informed, prepare himself to repel it: *R.* v. *Slavin* (1866), 17 U.C.C.P. 205.

On an application by the Crown to postpone a criminal trial because of the absence of Crown witnesses, the Court may accept the statement of the Crown counsel that reasonable efforts were made to procure their attendance without requiring proof upon oath. The accused is not entitled to detailed information as to the efforts made to procure their attendance: *McCraw* v. *The King*, 13 Can. Cr. Cas. 337.

Although the Crown elects to proceed with a criminal trial in the

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Annotation

Criminal trial; when adjourned or postponed.

Annotation *(continued)*—**Continuance and Adjournment (§ II—8)—Criminal Law—Postponement of trial—Cr. Code (1906) sec. 901.**

absence of a material witness, and although the trial has commenced, the Court has power to grant an adjournment to enable the Crown to get the witness: *R.* v. *Gordon*, 2 Can. Cr. Cas. 141, 6 B.C.R. 160. But an adjournment of a speedy trial was refused as contrary to the spirit of the Speedy Trials Act, where it was sought by the Crown for the purpose of getting better evidence that a witness examined on the preliminary enquiry was absent from Canada and that in consequence his deposition then taken might be read: *R.* v. *Morgan*, 2 B.C.R. 329.

An order made on the opening day of the sittings of the Criminal Court and before a true bill had been found against the accused that the trial should be postponed at the request of the prosecution in the event of an indictment being found, was supported in an English case: *R.* v. *Doran* (1914), 10 Cr. App. R. 67; but bail should be offered if the offence is bailable. *Ibid.* And in case of an epidemic preventing the attendance of the witnesses before the grand jury, Baggalley, L.J., postponed a trial without requiring the bill to be sent up before the grand jury at that session, but the prisoner was admitted to bail until the next assize: *R.* v. *Taylor* (1882), 15 Cox C.C. 8. But, in general, a trial will not be postponed to the next assizes before a bill is found: *R.* v. *Heesom*, 14 Cox C.C. 40.

Where it appears by affidavit that a necessary witness for the prisoner is ill, or that a witness for the prosecution is ill, or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner, the Court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness' depositions before a magistrate: Roscoe Cr. Evidence, 11th ed., 185.

If the application is made on the ground of the absence of a material witness, the Judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not: *R.* v. *Savage*, 1 C. & K. 75.

Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination this witness could give material evidence for the prisoner, Cresswell, J., after consulting Patteson, J., held that this was a sufficient ground for postponing the trial, without shewing that the prisoner had at all endeavoured to procure the witness' attendance, as the prisoner might reasonably expect, from the witness having been bound over, that he would appear: *R.* v. *Macarthy*, Carr. & M. 625.

In *R.* v. *Palmer*, 6 C. & P. 652, the Judges of the Central Criminal Court postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attorney for the prosecution, that a witness, whose evidence was sworn to be material, was too ill to attend, and they refused to refer to the deposition of the witness to ascertain whether he deposed to material facts.

A trial for murder was postponed till the next assizes by Channell, B., upon an affidavit of a medical man as to a witness being unable to travel, although such witness was not examined before the magistrate, and although the trial had been fixed for a particular day: *R.* v. *Lawrence* (1866), 4 F. & F. 901.

Annotation (*continued*)—**Continuance and Adjournment** (§ II—8)—**Criminal Law—Postponement of trial—Cr. Code (1906) sec. 901.**

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Annotation

Criminal trial; when adjourned or postponed.

In *R.* v. *Johnson* (1847), 2 C. & R. 354, Alderson, B. refused to postpone the trial of a prisoner charged with murder, where the postponement was sought to give an opportunity of investigating the evidence and characters of certain witnesses for the prosecution who had not been examined before the committing magistrate, but who were to be called to prove previous attempts by the prisoner on the life of the deceased.

It is now recognized as a rule of practice that a trial will not be put off on account of the absence of witnesses to character: *R.* v. *Jones* (1806), 8 East 34.

Where the prisoner applies to postpone the trial, he will be remanded and detained in custody till the next assizes or sessions, or will be admitted to bail, but he is never required to pay the costs of the prosecutor: *R.* v. *Hunter*, 3 C. & P. 591.

Where the application is by the prosecutor, the Court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognizances: *R.* v. *Beardmore* (1836), 7 C. & P. 497; *R.* v. *Parish* (1837), id. 782; *R.* v. *Osborne* (1837), id. 799; see also *R.* v. *Crowe*, 4 C. & P. 251.

Before any application can be made to postpone the trial, notice should be given to the opposite party, in order that he may attend and oppose it. Upon this an affidavit must be made, stating the names and places of abode of the absent witnesses, and that they are material to the prosecution or defence. Affidavits in corroboration may be filed. It is, in general, necessary, in the affidavit of the absence of a material witness, to state at what time his return may be expected; but this may be, in some cases, dispensed with; as if he is on board a ship in His Majesty's service, in which case the party making the affidavit cannot swear this, because he is ignorant of the instructions given to the commander. And it seems, that an affidavit, stating the witness is not expected to return till a particular day, is sufficient, it being an implied assertion, that he is expected at that time: 2 Chit. R. 411. It is also stated to be necessary for the oath to be positive that the witness absent is material, and not merely that the deponent believes him to be so; for nothing is more easy than generally to swear to a belief of this description: 1 Bla. R. 514. In some cases, the sources of the proposed required evidence should be stated with punctuality. When there is no cause for suspicion of mere desire to delay, it will be sufficient generally to swear that the absent party is a material witness, without whose evidence the party cannot safely proceed to trial; that he has endeavoured, without effect, to serve him with a subpoena, and that there is a reasonable ground to expect his future attendance: 8 East 37. And the affidavit should also state the notice to the opposite party, and the service of it upon him. But if there is any cause of suspicion, the Court will require the circumstances to be specifically stated, on which the application is grounded; that the party absent is a material witness; that the applicant has used all his exertions to procure his attendance; and that there is a reasonable expectation of his being able to attend at the time to which the trial is proposed to be deferred. It must, in general, be made by the party applying, though, in some cases, his attorney, or a third person, has been allowed to do it

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Annotation

Annotation (*continued*)—Continuance and Adjournment (§ II—8)—Criminal Law—Postponement of trial—Cr. Code (1906) sec. 901.

Criminal trial; when adjourned or postponed.

in his stead, as if he be abroad, or unable to appear: Tidd Prac. 834. It should regularly be made two days at least before the intended trial; but when the necessity of the witness was not known until afterwards, it may be applied for at a nearer period. When the motion is granted, it is seldom for more than the next term or the ensuing assizes: Chitty Cr. Prac., 492.

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KROM v. KAISER.

Alberta Supreme Court, Hyndman, J. October 7, 1914.

VENDOR AND PURCHASER (§ I C—17)—*Objections to title—Time for perfecting—Tender of purchase price—Sufficiency of tender.*]—Action by the plaintiff to enforce an agreement for the sale of realty.

J. Shaw, of *Short, Ross, Selwood & Shaw*, for the plaintiff.
O. E. Culbert, for the defendant.

Hyndman, J.

HYNDMAN, J.:—Without reviewing the numerous authorities on the points involved in this action, I am of the opinion that there should be judgment for the plaintiff. If the plaintiff at the time of the motion brought, though not the registered owner of the land and though he had no complete documentary evidence of an equitable interest, nevertheless had some right or interest in it, I think that would be sufficient to enable me to order a reference as to title. In the case at bar the plaintiff gave evidence that he had paid in full for the land in the year 1912, and was entitled to a transfer at any time. He also swore that the reason for delay was due to an arrangement between him and the defendant whereby the title was to be made direct from the registered owner to the defendant. This is denied by the defendant. However, since the beginning of the action, the plaintiff has become and is now registered as owner of the land subject only to a caveat filed by the defendant, and, in my opinion, therefore, it is not necessary to order a reference as to title. There was no tender of the balance of the purchase price before action, and the tender which was alleged to have been made later was not a complete and proper one as the exact amount owing

was not offered. Even if it had been a good tender, I think the plaintiff should have been given a reasonable time in which to perfect his title. It does not seem to me equitable that the defendant should be allowed to take advantage of the plaintiff's delay in acquiring a registered title at a time when he himself was in default and had theretofore asked for and been granted a written extension of time for payment. Furthermore I find that it was not a condition precedent that the plaintiff should tender transfer prior to the issue of the writ. I am in accord with the reasoning of Wetmore, C.J., in *Maybery* v. *Williams*, 15 W.L.R. 553. The provisions of the agreement in that case with regard to payment and transfer are identical with the clause in the agreement in question in this action. I therefore order that it be referred to the clerk to ascertain what amount is due and owing by the defendant to the plaintiff under the terms of the agreement sued on and judgment entered for that amount together with costs to be taxed on the District Court scale. The plaintiff shall, within 10 days from the entry of judgment, deposit with the clerk a properly executed transfer of the land in favour of the defendant, together with certificate of title free of encumbrances except the caveat filed by the defendant. On payment into Court of the full amount of the judgment and interest within 3 months from date of the formal entry of judgment including the costs of drawing the transfer, the said transfer and certificate of title shall be delivered to the defendant, otherwise all his right, title and interest to the land in question in the action shall be absolutely barred and foreclosed and the caveat mentioned above shall be removed from the register in the Land Titles Office. Leave is hereby granted to apply in Chambers at any time before the expiration of the said 3 months for an extension of time for payment as aforesaid or for sale instead of foreclosure.

The defendant's counterclaim is dismissed without costs.

Judgment for plaintiff, reference ordered.

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MATHESON v. KELLY.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 13, 1914.

[*Matheson v. Kelly*, 15 D.L.R. 508, affirmed.]

APPEAL (§ VII I—346) — *Discretionary matters — Costs — Right of appeal.*]—Appeal from decision of Mathers, C.J.K.B., *Matheson v. Kelly*, 15 D.L.R. 508, on a question of costs.

W. H. Trueman, for plaintiff, appellant.

A. E. Hoskin, K.C., for defendant, respondent.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—This is an appeal from the judgment of the Chief Justice of the Court of King's Bench in respect of the disposition which he made of the costs, special leave to appeal having been granted by him. Much of the argument was devoted to a discussion of the meaning and effect of the provisions contained in 7 & 8 Edw. VII. ch. 12, sec. 3, r. 952, of the present King's Bench Act, R.S.M. 1913, ch. 46, r. 934, and secs. 47 & 48 of the same Act, it being contended by the defendants, the respondents, that no appeal, even by leave, may be brought from the disposition of the costs made by the trial Judge.

In *Shillinglaw v. Whillier*, 19 Man. L.R. 149, it was held by this Court that 7 & 8 Edw. VII. ch. 12, sec. 3, in effect repealed sec. 13 of the Libel Act, R.S.M. 1902, ch. 97, and sub-sec. (*a*) of r. 931 of the then King's Bench Act, being sub-sec. (2) of r. 934 of the revision now in force.

The above sub-section provided that,

> where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge before whom the action or issue is tried or the Court otherwise orders.

It was held that the effect of 7 & 8 Edw. VII. ch. 12, sec. 3, which is now embodied in the King's Bench Act, as r. 952, was to confer upon the trial Judge absolute discretion as to the awarding of costs in actions of slander, although sec. 13 of the Libel Act declared that the Judge before whom the action was tried should not award costs to the plaintiff where he recovered merely

nominal damages. The decision did not deal with the question whether an appeal would or would not lie from the decision of a Judge on a question of costs where leave to appeal had been given by him, or whether he, having exercised his "absolute discretion," could grant leave to appeal from his exercise of it.

Since the decision in *Shillinglaw* v. *Whillier, supra,* was given, the present revision of the statutes has come into force and we find that 7 & 8 Edw. VII. ch. 12, sec. 3, has not been treated as a repealing enactment, doing away with or replacing the former r. 931, or as one amending or modifying secs. 57 and 58 of the old King's Bench Act, which rule and sections we find embodied in the present revision as r. 934 and secs. 47 and 48. The present revision of the statutes came into force on February 2, 1914, and the order appealed from was made on January 24 last. It does not appear to be necessary to discuss whether the revision altered the previous state of the law, or whether an appeal lay by leave from the decision of a Judge upon a pure question of costs under the provisions of the law as they stood prior to the revision. The Court has considered the present case upon its merits, and has come to the conclusion that no sufficient ground has been shewn for interfering with the discretion exercised by the Chief Justice of the King's Bench in the disposition he made of the costs. The appeal should, therefore, be dismissed, with costs. No opinion is pronounced upon the effect of the enactments above referred to, or whether an appeal lies to this Court from the decision of a Judge upon a question of costs where leave to appeal has been given.

In *Tytler* v. *Genung*, 16 D.L.R. 581, 24 Man. L.R. 148, an expression of opinion by myself is found as to the exercise of discretion by a Judge in dealing with the costs of the action (p. 592). This expression of opinion was not necessary for the decision of the appeal, as the judgment appealed from was reversed solely upon other grounds. There was no intention to decide whether or not an appeal might be brought from a decision upon a question of costs merely. It was only intended to call attention to the principles which had been laid down in the English decisions as governing the exercise of discretion by a Judge in such a

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case, without saying that there was, under the existing state of the law in this province, an appeal in any case against the exercise of that discretion.

Appeal dismissed.

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MOSCOVITCH v. DESAMBOR.

Quebec Court of Review, Archibald, Martineau and Beaudin, JJ. September 22, 1914.

1. BROKERS (§ II B—17)—REAL ESTATE—COMPENSATION—DEFAULT OF OTHER PARTY.

An agent to whom an owner of realty has promised a commission in the event of his finding a purchaser, is for the loss of this commission entitled to damages against the defendant who after offering to purchase refuses without cause to carry out his undertaking which was duly accepted by the owner at the agent's instance; although the agent may by fresh and renewed efforts have later on earned a commission by finding another purchaser for the same property.

Statement

APPEAL from the judgment of Quebec Superior Court, Sir Charles P. Davidson, C.J., maintaining the plaintiff real estate agent's action for damages by way of loss of commission owing to the default of the other party.

The appeal was dismissed, MARTINEAU, J., dissenting.

J. P. Whelan, for appellant.

Jacobs, Hall, Couture & Fitch, for respondent.

Archibald, J.

ARCHIBALD, J., concurred with BEAUDIN, J.

Martineau, J. (dissenting)

MARTINEAU, J. (dissenting):—The facts in this case are as follows: The plaintiff, a real estate agent, knowing that one Detonnancour had a property for sale, and having ascertained from him the price at which he was ready to sell and the other conditions of the sale, called upon the defendant and suggested to him that he should buy this property. The defendant consented thereto, but, instead of making an offer pure and simple, was induced by the plaintiff to sign the following document:—

Montreal, September 21/11.

Mr. S. Moscovitch.

I authorize you to buy property situated on St. Lawrence Bld., Nos. 1329-31-33-35-37. Conditions as follows: Price, $15,000, etc. . . . This offer stands good until Tuesday, September 26th, 1911.

(Sgd.) A. P. DESAMBOR.

This offer to purchase was accepted by Detonnancour. The sale, nevertheless, was not completed, and, without entering into the facts which justify this conclusion, I may say, and the Court is unanimous on this point, that the fault thereof lies with the defendant.

Thereupon plaintiff sued the defendant for $375. In my humble opinion plaintiff based his action solely on the fact that, by the writing above mentioned, the defendant appointed him his agent; that, as such, he is entitled to claim a commission of 2½% as the value of his services. I believe that if this were so this Court would be unanimous in dismissing the action because the plaintiff was not the agent of the defendant but the agent of the vendor who would have paid him his commission had the sale been effected. But the majority of the Court is of the opinion that the demand is not based exclusively on this alleged mandate; that the pleadings shew that the plaintiff also claims this sum as damages resulting by reason of the defendant's failure to comply with his offer to purchase, and that the defendant has himself interpreted in this manner the twofold nature of the plaintiff's claim. The question at issue is, therefore, the following:—

Has an agent to whom a vendor has promised a commission, in the event of his finding a purchaser, a recourse in damages against a prospective buyer who, after agreeing to purchase, refuses without cause to complete his purchase?

The trial Judge and the majority of this Court decide the question in the affirmative, basing their decision upon art. 1053 C.C. I regret that I am not able to concur in that view. Art. 1053, in my opinion, only deals with damages resulting from *delicts* and *quasi delicts*, and if the plaintiff has any action in damages it could be only in virtue of art. 1065, C.C. Now this article, it seems to me, only allows such recourse to a creditor; that is to say, to the one who is entitled to compel the execution of the obligation assumed by the other party. Third parties who may suffer from the inexecution of this obligation have no such action since there is no privity of contract between them and the debtor, and since it is essentially from this privity of contract that the action in damages arises. I believe, in the present

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case that, if the agent's contract allowed him to recover his commission from the vendor by the sole fact of his finding a purchaser, then, the vendor would have a recourse in warranty against the buyer, in default, to obtain the reimbursement of the moneys so paid as damages suffered by him, the vendor, as a reason of this failure on the part of the defendant; but such was not the contract in this case. As a matter of fact Detonnancour paid nothing to the plaintiff. But then this agent worked for nothing.

This is so; but in the first place it may be answered that he was not working for the defendant, and, in the second place, that he himself made his agreement with the vendor and that he could, foreseeing this always possible eventuality, draft the contract otherwise.

For these reasons, too summarily expressed, I realize to render justice to the question at issue, I would be of opinion to quash the judgment of the trial Judge and dismiss the action with costs.

Beaudin, J.

BEAUDIN, J.:—As my brother Martineau has explained the facts it is unnecessary to refer thereto except for the purpose of mentioning that by the writing of September 22 the defendant authorized the plaintiff to purchase the property of Mr. Detonnancour for $15,000, of which $5,000 was to be paid cash at the execution of the deed and the balance at stated periods; that this offer to purchase was accepted on the 25th, communicated to the defendant on the same day, and that in the three weeks which followed he was urged and pressed to complete the transaction repeatedly; that on October 18 the present parties to the suit and Detonnancour met, and the defendant requested a last delay of from 2 to 3 days because, said he, he wished to pay the entire price in cash—but this he never did. On October 23rd Detonnancour wrote to the defendant that if he did not deposit the $5,000 on the 24th the deal would be cancelled.

Plaintiff took the present action on November 15. It was served on the 22nd. On December 2 following the defendant tendered the $5,000 to the vendor, who refused, and in February Detonnancour sold his property to another person by the name

of Gordon at an advance of $600. The plaintiff having found this new purchaser received the ordinary commission. The Court is unanimous in declaring that the fact that the sale was not completed was due to the defendant, who did not follow up and respect the agreement which he had signed on September 22 and he was thereby in default. But the Court is divided on the question of whether a *lien de droit* or privity of contract exists between the parties. My brother Martineau has given his reasons, but I am of opinion that there is privity of contract between the plaintiff and the defendant, and that this results from the writing of September 22.

Without entering for the moment into the legal question as to who, the vendor or the purchaser, should have paid the commission if the parties had completed the transaction, I am of opinion that, by the above mentioned writing, the defendant authorized the plaintiff to conclude an arrangement with Mr. Detonnancour and undertook thereby to follow up this arrangement if the latter should accept. By failing to fulfil his agreement the defendant defaulted in his obligation, and by his default has become responsible for the damages which the plaintiff suffers, to wit, the loss of his commission, and this damage flows directly from the default in failing to conform to his undertaking.

The defendant contends that he has not caused any damage to the plaintiff seeing that the plaintiff obtained his commission on the sale made to the new purchaser; suffice it to say that the plaintiff was obliged to work anew to find this second purchaser and that he is entitled to be paid for this additional work.

As to whether the present action can be considered as an action in damages for inexecution of the obligation undertaken by the defendant on September 27 the parties themselves under their written pleadings have considered it as such. The defendant was not taken by surprise and he made all the evidence that he could have adduced if an ordinary action in damages, purely and simply, had been taken against him. The defendant has viewed the action in this light. In his written argument before this Court he states:—

> The amount herein claimed was first claimed as damages for failure to execute the agreement on the part of appellant, and, secondly, as commission for services rendered to appellant as first arranged.

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Personally I would be of opinion of entering judgment in favour of the plaintiff as agent of the defendant, and would lay it down that the judgment of the Court of Appeal in *Lemieux* v. *Seminary of St. Sulpice*, 3 D.L.R. 639, applies to the present case, but the majority of this Court does not hold it necessary to go so far, and grants the sum claimed as damages caused to the plaintiff by the defendant as a result of the latter's refusal to comply with his undertaking signed on September 22 and accepted by Detonnancour on September 25.

The judgment of the Superior Court is confirmed with costs, Mr. Justice Martineau dissenting.

Appeal dismissed.

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NICHOLS & SHEPHARD v. CUMMING.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. June 26, 1914.

1. BROKERS (§ III B—35)—BUSINESS AND GENERAL BROKERS—COMPENSATION—SUFFICIENCY OF SERVICES—PRINCIPAL STEPPING IN.

Sales agents selling machinery on commission are entitled to their commission, when it was through their efforts that the vendors and purchasers were brought together, even though the vendors stepped in and closed the sale irrespective of the agents.

[*Burchell* v. *Gowrie and Blackhouse Collieries*, [1910] A.C. 614, 80 L.J.P.C. 41, applied.]

Statement

APPEAL from the judgment of His Honour Judge McNeil of the District Court in favour of the defendants allowing them commission on the sale of a separator.

The appeal was dismissed.

A. H. Clarke, K.C., for the plaintiffs, appellants.

J. W. Macdonald, for the defendants, respondents.

Harvey, C.J. Stuart, J.

HARVEY, C.J., and STUART, J., concurred with SIMMONS, J.

Simmons, J.

SIMMONS, J.:—This is an appeal from His Honour Judge McNeil in favour of the defendants for the commission claimed by them on the sale of a separator. The defendants were the sales agents of the plaintiffs under an agreement in writing.

One of the terms of the agreement is:—

in case any machinery is taken from the purchaser for any cause and the notes given for such machinery are surrendered, no commission will be paid on such notes.

Another term is:—

The party of the second part agrees that in selling machinery, he will require the purchaser or purchasers to sign one of the regular orders of the company—the original order so signed by the purchasers to be sent to the company for its approval or rejection before the machinery is delivered.

Another term is:—

That he will not sell or exchange any machinery furnished under this contract for anything except cash or notes either in whole or in part payment thereof, unless specifically authorized to do so in writing.

A syndicate of farmers near Granum, Alberta, owned a Nichols & Shephard separator and in the fall of 1910, the defendants unsuccessfully canvassed them with a view of selling a new Nichols & Shephard separator to them. In March, 1911, the defendants again canvassed them and were accompanied on this occasion by McEwan, the plaintiff's general agent at Calgary. It was then arranged that a representative of the syndicate should come to Calgary Exhibition on the first week in July and see the new Nichols & Shephard separator. The plaintiff's agent in charge at Calgary of the plaintiff's exhibit met two of the syndicate and the defendants at Calgary on exhibition week and shewed the machine to them and informed James Cumming, one of the defendants, that he would send McEwan down to have the papers signed, and the deal completed the following week.

On account of illness and death in his family, James Cumming was absent from his office the following week and he says that for this reason he was unable to see any of the purchasing syndicate for about two weeks. He then learned from one of the syndicate that McEwan had completed the sale and had the documents in connection therewith signed by the purchasers. McEwan had in the meantime made an arrangement with one McMann, the plaintiff's sales agent at Lethbridge, whereby McMann purchased the defendant's old separator at $320. McMann admits that he did not have anything to do with the sale other than to buy the old separator (case, p. 37). He is corro-

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borated in this by Frank Matheson, one of the syndicate purchasers (case, p. 17). Matheson also says that he was introduced to the manager of the Nichols & Shephard Company at the Calgary Exhibition by the defendants as a prospective purchaser. McMann says he bought the old separator at the price the syndicate wanted for it less the commission. The order for the separator executed by the purchasers called for delivery at Granum which is on the Calgary and Edmonton branch of the C.P.R.

The plaintiffs, however, shipped the separator to a more distant point from the purchasers, namely, Monarch, on the Crow's Nest branch of the C.P.R., and the learned trial Judge found that this was done for the purpose of defeating the defendant's claim for commission. I think this inference is quite justified by the evidence. The purchasers refused to take delivery at Monarch and the separator was re-shipped to Granum by the purchasers under an agreement with McEwan that the plaintiffs pay the expense of re-shipment.

Matheson, one of the purchasing syndicate, says Mr. McEwan alleged it was shipped to Monarch as he thought McMann was entitled to the commission. James Cumming, one of the defendants says that he advised the plaintiffs that he could handle the old separator. I conclude that the finding of fact of the trial Judge as to the sale being made through the efforts of the defendants is quite justified as well as the finding that McMann had nothing to do with finding a purchaser.

The plaintiffs set up the terms of the agency agreement above referred to as a bar to the defendant's claim. Where they step in and prevent the agent from completing a sale, the negotiations for which have been brought about by the agent, they are not entitled to set up this defence.

Burchell v. *Gowrie & Blockhouse Collieries*, is a recent Privy Council decision on this question, [1910] A.C. 614, 80 L.J. P.C. 41. In this judgment Lord Atkinson quotes with approval the rule laid down by Willis, J., in *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B. (N.S.) 733:—

> I apprehend that where money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

Applying this rule in the present case, the defendants are entitled to the commission as the plaintiffs stepped in and made a sale after the defendants had brought the plaintiffs and a purchaser together.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

SEIPPEL LUMBER CO. v. HERCHMER.

British Columbia Supreme Court, Hunter, C.J.B.C. February 16, 1914.

1. CROWN (§ II—20)—RIGHTS, POWERS AND LIABILITIES—CROWN-GRANTED LANDS—COMMISSIONER'S POWER, HOW LIMITED—LAND TITLES.

Statutory authority given the Commissioner of a province to administer Crown lands cannot be extended so as to cover lands already Crown-granted, in the absence of clear and positive legislation to that effect.

2. LAND TITLES (§ I—10)—GRANTEE'S PRIVITY WITH PREDECESSOR—SCOPE AND EFFECT.

A grantee of lands is not bound under the doctrine of privity by the action of his predecessor in title when such action is taken later than the conveyance to the grantee.

3. LAND TITLES (§ I—10)—GOVERNMENT SURVEYS CONCLUSIVE, WHEN—B.C. OFFICIAL SURVEYS ACT.

The conclusive effect of Government surveys under sec. 2 of Official Surveys Act, R.S.B.C. 1911, ch. 220, will not be extended to apply to a case in which a land owner selects his own surveyor, although the survey notes are received by the Government officials.

Statement

ACTION for trespass on lands, the plaintiff relying on the terms of the Crown grant.

Judgment was given for the plaintiff.

E. P. Davis, K.C., and *R. B. Kerr*, for the plaintiffs.

J. A. Harvey, K.C., and *R. P. Stockton*, for defendants.

W. S. Deacon, for the Attorney-General.

Hunter, C.J.

HUNTER, C.J.B.C.:—The plaintiffs in this case are bringing an action for trespass against the defendants, resting upon their Crown grant. By the terms of the Crown grant their line is described as "commencing at the intersection of the westerly limit of lot 4589, group 1, Kootenay district, with the centre line of the B.C. Southern Railway, said point being station zero of a traverse of a portion of the said railway made by W. B. Gau-

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vreau, P.L.S., and recorded in the Department of Lands and Works in Victoria on December 15, 1900."

It is beyond dispute that this station zero is a fixed point, as to the situation of which there is no controversy. It is, therefore, apparent that a competent surveyor could at once, having located point zero, run a line due north as required by the terms of the Crown grant and in that way determine the plaintiffs' boundary. It has, however, been strenuously argued that although such a line as that can be accurately located, and although according to all known scientific laws there can be only one line which would satisfy the conditions, at all events until the earth's axis is changed, yet it is within the power of different officials, such as surveyor generals and chief commissioners, to say that the line as established by some negligent or incompetent surveyor, though it is not the true line, shall be deemed to be the true line. It seems to me to be a very startling proposition indeed, that a man who has got a Crown grant and whose boundary can be definitely ascertained beyond any reasonable doubt or controversy may wake up some fine morning to find his property swept away by the decisions of such officials, which decisions may apparently be given behind closed doors without any reason, without any notice and without any appeal to a responsible civil tribunal.

There is no controversy in this action, at all events if there is, then I find that the so-called Swannell survey was absolutely erroneous with the result that it lops off over 400 acres covered by the plaintiffs' Crown grant. On Mr. Harvey being pressed by the Court to say whether or not he would support the accuracy of that survey, he did not see fit to give the Court a definite answer, but notwithstanding that, I think I can safely say that a casual inspection of Mr. Swannell's notes, even to the mind of a lawyer, reveals the fact that they are absolutely and startlingly erroneous. Referring to station 19, the easting is given as 4.49, subtending an angle of 7 degrees and 44 minutes, the side of which is 3 chains 34 links. Now, any school boy can at once see that it is impossible for the line subtending an angle of 7 degrees and 44 minutes in a right-angle triangle to be 4.49 chains when one side bounding the angle is only 3.34, so that any official in the land office, if he had

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taken the trouble to glance at these notes, even in a casual way, could have seen that they were absolutely wrong, and, as a matter of fact, the line should have been .449 instead of 4.49.

Now, this survey of Swannell's was found as early as 1906 to be absolutely wrong by Mr. McLatchie. In the meantime there had been a communication, in 1904, to Mr. Ross representing the defendants to the effect that the Chief Commissioner had decided that the boundary line as established by Mr. Swannell under the authority of the Government was "the true and unalterable boundary," notwithstanding the fact that only certain points on that boundary had been fixed by Mr. Swannell and that the boundary had not been completely run and surveyed by him. That ruling was reversed in October, 1907, as appears by a letter signed by the Deputy Minister of Lands to the effect that he was directed by the Chief Commissioner to state that the line established by Mr. McLatchie had been accepted by the Department as being correct, and the effect of it was to shew that the timber licenses were overlapping the boundaries of lot 4590. So far as that ruling being final and unalterable as one would expect to find it, we find that again in 1910 that ruling is reversed and the original ruling restored in a letter from the same official and the admittedly erroneous line declared to be "the final and unalterable boundary." He says he is directed by the Chief Commissioner to advise that the surveys of those lots, being the plaintiffs' licenses, will be gazetted, and so far from finding the Commissioners' rulings final and unalterable, I find that the only matter that was not final and unalterable were the Commissioners' rulings themselves, and it is not beyond the bounds of possibility on further consideration by some future commissioner that the old decision of 1907 will be restored and so on *ad infinitum*.

It is alleged, however, by the defendants that the fact that the C.P.R. or the B.C. Southern took an appeal from the last decision, that that in some way or other had a binding effect and that the matter had become closed. All I need say about that is, that that was a proceeding taken by their predecessors in title, subsequent to the conveyance to the plaintiffs. The plaintiffs themselves, not being parties to the proceedings, cannot in any way

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be bound as Mr. Harvey suggests by the fact that they were privies of the C.P.R. How privies can be bound by the action of their predecessors subsequent to their grants under which they claim is a matter that passes my comprehension. Then it is sought to support the ruling by reference to sec. 2 of the Surveyors' Act in which it is enacted that all boundary lines surveyed and run under the authority of the Government heretofore or hereafter shall be the true and unalterable boundaries, etc. A casual glance at that section shews that it is dealing with boundaries that are surveyed and run under the authority of the Government. Now, I am unable to accept the proposition that because a land owner selects his own surveyor and his notes are received by the proper officials at the Government buildings, that constitutes a survey carried on under the authority of the Government within the meaning of the Act. Not only that, but the language when carefully looked at, certainly refers only to boundaries which are "surveyed and run" and not to boundaries as in this instance portions only of which are marked out and on which only certain points are located.

Then, referring to the proceedings that were taken before the Commissioner, I am clearly of the opinion that there was no jurisdiction for the Commissioner to entertain a dispute of this character. The very heading of the Act I think shews that. It is an Act purporting to deal with Crown lands, and the Chief Commissioner is the official empowered and required by the Act to administer those lands. How a dispute concerning lands already Crown granted can in any way come under the purview of that Act in the absence of the most positive legislation I am unable to perceive. As I have said, the effect of such a ruling as that, if upheld, would be that people who had land Crown granted to them could have their property swept away by decisions of bureaucratic officials without even the safeguard of publicity or recourse to Courts of law.

In regard to the Act cited by Mr. Davis, I do not think there is much to be gathered from that because that was a private Act and in the nature of a private bargain between the government and the railway, and if they had recognized the other boundary I think Mr. Davis would have been the first to argue that that in

no way would be binding on his clients, and I think he would have been right. The plaintiffs are entitled to the relief prayed. As to the costs, the defendants other than the Attorney-General will have to pay costs, and, were it not for the Crown Costs Act, the Attorney-General would also have had to pay costs as no sufficient reason appears for his intervention in the litigation.

Judgment for plaintiff.

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Manitoba King's Bench, Macdonald, J. May 13, 1914.

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1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT FOR FRAUD.

Where the owner's agent conspiring with the owner induces the defendant to enter into an agreement to purchase a suburban tract of land of a speculative value, by falsely pretending under sham negotiations that he is a co-purchaser taking equal chances with the defendant, the contract as against the defendant is vitiated for fraud and cannot be enforced by the owner.

ACTION for purchase money claimed under an agreement for the sale of land, the defendant Gallagher resisting on the ground among others that the agreement was induced by fraud.

Statement

Judgment was given for the defendant Gallagher.

D. A. Stacpoole and *L. J. Elliott*, for the plaintiff.

E. B. Fisher, for the defendant Gallagher.

W. Hollands, for the defendant Quinn.

MACDONALD, J.:—The plaintiff brings this action claiming $13,387.35, being the second instalment of purchase money with interest thereon payable by the defendants to the plaintiff under an agreement for the sale of lands by the plaintiff to the defendants. The defendant Quinn did not file a statement of defence but suffered interlocutory judgment to be entered against him. The defendant Gallagher admits making the agreement under which the instalment claimed is due and payable, but resists payment on several grounds as stated in his statement of defence, the principal grounds being: (1) that he was induced to enter into the said agreement by fraud and misrepresentation; (2) want of title in the plaintiff.

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The plaintiff was the ostensible purchaser under an agreement of sale of certain property near the village of Watrous in the Province of Saskatchewan. Plats and plans of the subdivision were made and the property advertised and placed on the market. It was advertised by the Merchants Trust Co., of which company the plaintiff was the president, secretary, and to all intents and purposes, the company. The company advertised for a sales agent and the defendant Quinn, attracted by the advertisement, applied for and secured the position. When he made the application he was referred to one McMillan, who occupied a room in the offices of the Merchants Trust Co. and by McMillan he was engaged and there never was any question about the authority to engage him, yet the plaintiff says that McMillan had no connection with the company, but says he was simply his agent and was never even a shareholder of the company. McMillan is not, however, a party to the action and his connection with the company need not enter into our investigation. The plaintiff, as president, secretary, and company, sanctioned and approved of Quinn's appointment, and the latter was supplied with literature extolling the merits of the property, together with forms of offer of purchase. (Ex. 14.) Everything up to this pointed to the Merchants Trust Co. as the owners and not until trouble arose did the company or Emerson, as the company, repudiate its connection with the transaction and Emerson personally assume all the responsibility. The company's business presents a mysterious aspect and possibly it would be an agreeable position to avoid any examination into its history.

Quinn armed with his authority and advertising matter starts out on the road to offer positive profit to the buying public and at the town of Neepawa in Manitoba posts up his alluring advertisements in the lobby of one of the hotels. The defendant Gallagher, who had been a farmer near this town the best part of his life and had just sold his farm and was about to retire from work, was attracted by his co-defendant Quinn's advertisements and having ready money, the result of years of toil and labour, was beguiled into the net that was ready to receive him. He approached Quinn and they became confidential. He wanted

a sure and quick return by way of an investment and Lake Manitou with its "Wonderful curative powers of waters" and "positively the greatest investment ever offered" filled the unsophisticated Gallagher with visions of Monte Cristo proportions. It was such a good thing that Quinn suggested they two should go into partnership and buy the property out and out, join forces and go to work and with their united efforts dispose of the property in a very short time. At the suggestion of Gallagher they went to see the property, but before doing so Quinn had been in communication with the plaintiff, who knew what was going on. After an inspection of the property the result of which, so far as Gallagher was concerned being an estimate of the quality of the soil; Quinn wrote out his cheque (they were both purchasing on an equal basis) and challenged Gallagher to cover it. This the latter did, the amount of each cheque being $2,300. Both cheques were, by arrangement between them, made payable to C. E. Graham, manager of the Home Bank of Canada at Neepawa. Arriving at Neepawa they deposited the two cheques with Mr. Graham on the understanding that he was to hold them subject to the control of the maker of his own cheque until such time as their arrangements were complete. The defendant Quinn then left for Winnipeg and advised the plaintiff and Campbell, who had engaged him, of his dealings with his co-defendant, made the arrangement with the plaintiff and Campbell, to which I shall immediately refer, had the agreement under which he and Gallagher got control of the property in question executed; and then he got the order from Gallagher authorizing the use of his cheque and to accept draft of the Merchants Trust Co. for the amount of it. Quinn then went to Mr. Graham, who held their cheques, secured them both, and then went to the plaintiff.

Now, before Quinn had concluded his agreement with Gallagher he made this arrangement with the plaintiff and Campbell. He had no money; his cheque was worthless, as he says himself, "I went through the form of paying my share of deposit at Neepawa by cheque to Mr. Graham"; but he had made his secret arrangement. Under his agreement with the company in the first instance he was to be paid a commission of 20 per

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cent. on all sales. This he represented to Gallagher as 10 per cent. and he agreed with Gallagher that the partnership was to get the benefit of this as a reduction in purchase price; but he made the secret agreement with the plaintiff and Campbell that an extra 10 per cent. was to go to him and so much of it as would be necessary would be applied on his share of the instalment of purchase price. So that, instead of his paying anything as his share of the purchase price, he was actually participating with the plaintiff, Campbell and the Merchants Trust Co., in the amount paid by his co-partner Gallagher. This seems to me such a breach of good faith as to merit the most severe censure. This extra 10 per cent. could not be treated as a commission. The relationship of principal and agent ceased to exist and that of vendor and purchaser took its place. This extra 10 per cent., therefore, was a reduction of purchase price and the defendant Gallagher was entitled to the benefit of it and, had it not been for the secret agreement referred to Quinn could not have entered into the purchase of the property as he had no money, and I am satisfied the defendant Gallagher would not have entered into such an agreement on his own responsibility.

One of the inducing causes of Gallagher entering into the agreement was the fact that the capable, alert and experienced real estate man Quinn was joining him and putting his money into the venture. He was imposed upon by Quinn and the plaintiff and his company were parties to the imposition. On this alone the defendant is entitled to relief and it is not necessary to deal with the question of title.

I dismiss the claim of the plaintiff with costs and find in favour of the plaintiff by counterclaim, on his counterclaim, rescinding and cancelling the agreement of sale as prayed and judgment in his favour against all the defendants by counterclaim for the sum of $2,362.50 with interest thereon at 5 per cent. per annum from November 14, 1910, to judgment, together with costs.

Judgment for defendant Gallagher.

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Alberta Supreme Court, Harvey, C.J., Simmons and Walsh, JJ. May 30, 1914.

1. Automobiles (§ III C—300)—Responsibility of owner when car used by another.

Under sec. 35 of Motor Vehicles Act, (ch. 6, Alta. statutes 1911-12) the owner of an automobile is liable in damages as well as the driver who is using the car with the owner's sanction or permission, for injuries sustained by a third party in consequence of the driver's negligence.

[*Witsoe* v. *Arnold*, 15 D.L.R. 915, followed; *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, reversed.]

2. Statutes (§ II C—120)—Adopted statutes—Settled interpretation in another province.

Where a statutory provision is adopted from another jurisdiction after having been in force there for a long period, the judicial decisions of that jurisdiction upon its interpretation should be followed unless there are very strong reasons for a contrary view.

[*Ward* v. *Serrell*, 3 A.L.R. 138; *Bennefield* v. *Knox*, 17 D.L.R. 398; *Witsoe* v. *Arnold*, 15 D.L.R. 915, followed; *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579 reversed.]

3. Negligence (§ II F—120)—Last clear chance—Ultimate responsibility

In a negligence action for damages resulting from the collision of two automobiles where it appears that the defendant was guilty of primary negligence and by the exercise of reasonable care could in the circumstances eventually have avoided the result of his own primary negligence as well as that of the plaintiff (assuming the plaintiff to have also been guilty of primary negligence), the ultimate responsibility for the collision rests upon the defendant.

[*B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, reversed.]

Statement

Appeal from the judgment of Stuart, J., *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, dismissing an action by the plaintiff, the owner of an automobile, against the defendants, respectively the owner and the driver of another automobile for damages resulting from the collision of the two cars.

The appeal was allowed and judgment directed for the plaintiff against both defendants for $600.

I. W. McArdle, for plaintiff, appellant.

H. L. O'Rourke for defendant, respondent.

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Harvey, C.J.:—I agree with the result reached by my brother Walsh on this appeal.

I am not satisfied that the plaintiff was guilty of any negligence which contributed to the accident, but, if so, I am clearly of the opinion that the defendant could, even after it, by reasonable care have avoided the accident. Indeed I find it hard to understand how it could have happened without the grossest careless-

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ness on the part of the defendant who was driving the car. I also agree that the interpretation of the section affecting the liability of the owner of the car should be that given to it by the Courts of Ontario before it was adopted by our Legislature upon the first ground specified by this Court in *Ward* v. *Serrell*, 3 A.L.R. 138, and followed in *Bennefield* v. *Knox*, 17 D.L.R. 398, rather than on the ground that it had been a law long in force in Ontario.

Simmons, J.

SIMMONS, J.:—I concur.

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WALSH, J.:—The learned Judge has accepted the defendant's account of the relative positions of the cars immediately prior to and at the time of the collision, and with his findings in this respect, I am in complete accord. Upon this finding, the facts are that the defendant's car reached the southeast corner of the intersecting street and avenue slightly in advance of the plaintiff's car, that whilst the defendant's car was negotiating the turn from the street into the avenue, the plaintiff's car passed it, that the plaintiff's chauffeur then retarded the speed of his car and the defendant's car ran into it, causing the damage complained of. The defendant's car was admittedly running at a greater rate of speed than ten miles an hour in turning this corner and this, under sub-sec. 2 of sec. 20 of the Motor Vehicles Act, is *prima facie* evidence that the defendant James W. McLeod was running it at a greater speed than was reasonable and proper. The damage was undoubtedly done by his car and under sec. 33 of the Act the onus of proof is upon him that this did not arise through his negligence. The contributory negligence, if any, of which the plaintiff was guilty, was the slackening of the speed of his car when it was ahead of but in close proximity to the defendant's car. As I understand the learned Judge's finding of negligence on the plaintiff's part, it rests upon the view that he crossed the street at an unreasonable rate of speed. With respect, I am unable to follow him in this. This was negligence, but it was not negligence contributory to the accident for it was not the high rate of speed at which he was going when the accident occurred which helped to bring it about, but the sudden moderation of that speed. If the plaintiff's chauffeur had kept on at the rate at which he passed the defendant's car, he would have drawn clear of it

entirely and the accident would not have happened. How then can it be said that the plaintiff contributed to the accident by doing the very thing which, if continued, would have drawn him away from it.

I am by no means sure that what the plaintiff's chauffeur did in slowing down his car was, under the circumstances, negligence, although I am inclined to view it as such. The evidence upon the point, is, however, not sufficiently clear to make this absolutely certain. But even if it was, it is quite plain, from the evidence of the defendant James W. McLeod himself, that he could, by the exercise of reasonable care, have avoided the result of the plaintiff's negligence and this being so, the ultimate responsibility for the collision rests on him. The following extract from his evidence shews this conclusively:—

"Q. You saw this car on your right slowing down very rapidly? A. Yes sir. Q. It must have been almost skidding to be stopped from a rate of thirty miles an hour in sixty feet? A. Yes sir. Q. That is stopping a car pretty quickly, isn't it? A. Sixty-six feet. Q. But it was not sixty-six feet as he stopped just before he got to the sidewalk line? A. Yes. Q. And the sidewalk is ten feet? A. Yes. Q. So it would really be about fifty six feet from when you first saw the car until you struck him? A. Yes. Q. Although you saw this car stopping so rapidly you did not stop your car, according to your own story? A. No, I went right on. Q. And you did not intend to stop your car? A. No sir. Q. You thought he was going to get out of your way and you did not intend to stop your car?

THE COURT—What was your idea; did you think he was going to be ahead of you or did you expect to be ahead of him? A. I expected to be ahead of him around into 6th Ave."

Nothing could be clearer from this than that the defendant, with his eyes wide open to the fact that the plaintiff's chauffeur was quickly reducing his speed, did absolutely nothing to prevent the collision which must inevitably result unless he altered his speed or his direction or both. He did not do so, and it was this failure on his part which brought about the result complained of, and entitles the plaintiff to recover at any rate from him his consequent damages.

The learned Judge dismissed the action as against the defendant Hugh S. McLeod, the owner of the car, registered as such under the Act. He was not in his car at the time. It was driven by his son and co-defendant. The son had been driving this car for about three years, taking it out whenever he liked. On the

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day in question he took it out to get the tank filled with gasoline preparatory to the usual Sunday family drive. There is nothing in the evidence to indicate any employment of the son by the father or any agency on his part under which the father could be held liable at common law. His liability, if any, is purely statutory.

Sec. 35 of the Act provides that

> the owner of a motor vehicle for which a certificate of registration has been issued under the provisions of this Act shall be liable for violation of any of the provisions thereof in connection with the operation of such motor vehicle.

At least one of the provisions of the Act was violated in the operation of the defendant's car on the occasion in question, namely, that to be found in sec. 19 which prohibits the operation of a car

> so as to endanger or be likely to endanger the life or limb of any person or the safety of any property.

This imposes upon the defendant Hugh S. McLeod the liability created by sec. 35. The question for decision is whether that liability is a civil one to the person damaged by the particular violation in question, or is simply a liability for the appropriate penalty provided therefor by the following sec. 36. This sec. 35 is patterned after the corresponding section of the Ontario Motor Vehicles Act, which, so far as I can find, was first enacted in 1906 and is in the following words:—

> The owner of a motor vehicle for which a permit is issued under the provisions of this Act, shall be held responsible for any violation of the Act or of any regulation provided by the Lieutenant Governor in Council.

As my brother Stuart says in the judgment under appeal,

> there is little possibility of distinguishing the two statutes by reason of any special terms employed in them.

By authoritative decisions of the Ontario Courts, it has been held that under the Ontario Act the owner of a motor vehicle is civilly liable for the driver's violation of the provisions of the Act in every case in which it has been used, as here, with his sanction or permission.

Mattei v. *Gillis*, 16 O.L.R. 558; *Smith* v. *Brenner*, 12 O.W.R. 9, 1197; *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551, and *Bernstein* v. *Lynch*, 13 D.L.R. 134, 28 O.L.R. 435. The two first

named are judgments of a Divisional Court rendered more than three years before the Alberta statute was passed. The third is a judgment of a Divisional Court rendered two months before that statute was passed and the fourth is a judgment of the Appellate Division rendered last year.

In *Ward* v. *Serrell*, 3 A.L.R. 138, this Court held that where a statutory provision is adopted from another jurisdiction, after having been in force there for a long period of time, the judicial decisions of that jurisdiction upon its interpretation should be followed unless there are very strong reasons for a contrary view. This was followed by this Court in April last in *Bennefield* v. *Knox*, 17 D.L.R. 398. I do not know of any "very strong reasons for a contrary view" of this section to that taken by the Ontario Courts, and I think, therefore, that we should follow them. This is the view which Scott, J., took of the matter in *Witsoe* v. *Arnold*, 15 D.L.R. 915, a case decided under this same section since the judgment appealed from was given and which judgment he declined to follow. Apart entirely from this, the reasoning of the Ontario decisions commends itself to me and I am quite prepared to adopt it. The amount for which the plaintiff is entitled to a judgment can be made out from the evidence only with very great difficulty. The total bill of the Cadillac Company for repairs is $340.20. Of this, however, $12.40 is for repairs prior to the accident which reduces the bill to $327.80. Of this $60 was for repairs to the engine. The evidence does not satisfy me that these were necessitated by the accident. I am inclined to think they were made under the plaintiff's general instructions to overhaul the car when the damage done by the defendant's car was being repaired. This should come off and the Cadillac bill stands at $267.80. I would disallow the account for the new front tires. Buck, the plaintiff's manager, says the front tires that were on the car were ruined by the accident. Tracy, the mechanic, who made the repairs, says that this is not so, and that they were not damaged except to the extent of their ordinary wear and tear. I would disallow this claim. The plaintiff's claim for the loss of the use of the car is most vague and unsatisfactory. It claims $405, being $15 a day for the twenty-seven days from March 17, the day of the accident to April 13, the date of the return of the car. He did not take the car to the garage until March 25, and he can-

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not claim for these eight days. Two of the remaining days are Sundays for which he makes no claim. At the outside, therefore the claim under this head is limited to $255, being for seventeen days' loss of use of the car at $15 per day. No satisfactory evidence is before us though to show the actual loss in this respect, and I think that we will be doing the plaintiff full justice by allowing $150 for this item. The sum of $500 is claimed for general damage to the car. It undoubtedly suffered some damage beyond that which was repaired, but again the plaintiff's evidence is woefully lacking in directness of proof of the amount of this loss. I would add to the two sums of $267.80 and $150 allowed as above a further sum under this head sufficient to bring the total to $600. This certainly does not err on the side of generosity to the plaintiff, but it is alone to blame if the amount of its claim as thus fixed falls short of its actual loss.

I would allow the appeal with costs and direct the entry of judgment for the plaintiff against both defendants for $600 with costs.

Appeal allowed.

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MONADNOCK REALTY CO. v. QUEBEC BANK.

Manitoba King's Bench, Galt, J. May 5, 1914.

1. INJUNCTION (§ I E—46)—INJURY TO REALTY—INTERFERING WITH PARTY WALL.

An application by a realty owner for an injunction against an adjoining owner interfering by additional construction work with a party wall already erected and maintained between the two properties, will be refused where no real danger from such additional work is shewn and where the expense of protecting the applicant without restraining the proposed interference would be trifling compared with the inconvenience, cost and delay which an injunction would occasion, especially where the application is dilatory.

2. INJUNCTION (§ III—137)—PROCEDURE—PARTIES.

Upon a motion by an owner of realty for an injunction to restrain an adjoining owner from interfering by additional work with a party wall already erected and maintained between the two properties, a third party for whose benefit and under whose instructions the additional work is being done as well as the building contractor doing it may properly be joined as co-defendants.

[*Dalton* v. *Angus*, L.R. 6 App. Cas. 740, applied.]

Statement

MOTION by a realty owner for an injunction to restrain the defendants, adjoining owners, from interfering with a party wall by additional construction work.

The injunction was refused.

A. J. Andrews, K.C., and *F. M. Burbidge*, for the plaintiff.
H. Phillipps, and *C. S. A. Rogers*, for the defendants.

GALT, J.:—This is a motion by the plaintiffs to continue an injunction granted by me on April 17 instant, restraining the defendants, their servants and agents from interfering with the party wall erected between the lands owned by the plaintiffs and by the defendants, the Quebec Buildings Ltd. The other defendants are the Quebec Bank, and the Carter-Halls-Aldinger Co. Ltd., building contractors.

Upon the opening of the motion, Mr. Hugh Phillipps, on behalf of the defendants, moved to have the name of the Quebec Bank struck out and the action dismissed as against them on the ground that they were not the owners of any of the lands in question or of the wall in question; and also that the defendants, Carter-Halls-Aldinger Co. Ltd., were entitled to the same relief in as much as they were shewn to be only contractors under the defendants, the Quebec Buildings Ltd.

As regards the Quebec Bank, for whose benefit the building is being erected by the Quebec Buildings Ltd., I find among the material an affidavit by Charles F. Pentland, as manager of the said bank, stating that:—

> 6. The present business of the bank is now being conducted upon leasehold property in the city of Winnipeg and thereby I am required to give three months' notice, which notice I must necessarily give on behalf of the said bank three months prior to the first day of August.

It is apparent that the building in question is being constructed for the benefit of the bank and doubtless under their instructions. So far as the Carter-Halls-Aldinger Co. Ltd. is concerned, I think they are also proper parties to any such action as this upon principles clearly set forth in *Dalton* v. *Angus*, L.R. 6 App. Cas. 740. I, therefore, decline to interfere with the record as regards either of these defendants. The rights of the parties in respect of the party wall in question are largely based upon an agreement made on March 29, 1898, between the Trust & Loan Co. of Canada (predecessors in title to the defendants the Quebec Buildings Ltd.) of the first part, and Frank W. For-

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man (predecessor in title to the plaintiff) of the second part. The agreement recites that the Trust & Loan Co. was the owner of lot No. 8 and that Forman was the owner of lot No. 9, and that the parties intended to erect buildings upon their respective properties and it had been thought advisable to make the party wall between the two buildings. The agreement contains the following, among other provisions:—

3. One-half of the said wall is to stand upon the property of the parties of the first part and the other half upon the property of the party of the second part above described.

10. If the said wall should be at any time damaged by fire or otherwise so as to be capable of repair then each party shall contribute to the repair thereof in equal proportion, and if either party shall neglect on reasonable notice to proceed with the repair, then the other may perform the necessary work and supply the necessary material and charge one-half of the expense thereof to the party so making default as aforesaid, which said amount said party agrees to pay.

11. If either party shall at any time desire to construct a wall higher than that provided for by this agreement, such party shall be at liberty after ninety days' written notice given by him to the other party, to tear down the present wall and erect another in place thereof at his own cost, charge and expense. In doing such work such party shall proceed with all possible diligence and take all proper precautions to protect the occupants and tenants of the other party from inconvenience from such work, and the party prosecuting such work shall indemnify and save harmless the other party and all occupants and tenants from any damage which may be caused by reason of such work.

14. It is hereby mutually agreed between the parties that this agreement shall be performed and at all times construed as a covenant running with the land, but that no part of the fee of the soil upon which the party wall shall stand shall pass to and become vested in either of the parties hereto, their respective heirs and assigns by virtue of these presents.

Under the above-mentioned agreement the party wall was built and both parties utilized it in erecting their adjoining buildings. The wall was about 97 feet long, extending from the south side of Portage Ave. southerly and was about 18 inches thick. Both parties filed caveats claiming an interest in the other party's land for the purposes of the wall. On December 6, 1909, the Trust & Loan Co. conveyed lot 8 to the Manitoba Investment Agency Ltd., who in turn appear to have conveyed to the defendants, the Quebec Buildings Ltd. Frank W. Forman appears to have conveyed lot 9 to the plaintiffs. The owner of lot 9 in erecting the building now owned by the plaintiffs inserted

two steel joists with I-beams at the easterly side of lot 9 into the party wall at a height of about 15 feet and extended these beams with an accompanying steel plate about 11 inches into the 18-inch wall. These joists were supported at the westerly end by a metal pier. A brick wall was then constructed upon these beams for the purposes of the second story of the plaintiffs' building. At the same time, the plaintiffs, or their predecessor, erected a veneer of pressed brick having only a width of one brick on the northerly side of their building and of the party wall, and they utilized this veneer brickwork for the partial support of the steel joists and I-beams aforesaid.

In the summer of 1913, the owners of lot 8 determined to take down the building which had been erected on their lot and to erect a very large building for the purposes of the Quebec Bank at a cost of $250,000. Some correspondence took place between the Quebec Bank and the plaintiffs in reference to some modified use of the party wall, but these negotiations fell through. In October, 1913, the demolition of the building on lot 8 was completed and a portion of the party wall at its northerly end, consisting of the brickwork from the easterly half of the wall was taken out to the extent of several inches, sufficient to expose the ends of the plaintiffs' joists and I-beams. The exposed portions of the wall were protected by sacking during the winter in order to avoid the danger of exposure to the weather in the winter. Things were left in this condition all winter and no inquiry was made by the plaintiffs as to what the intention of the defendants might be in respect of the party wall. On or about April 3 instant, a conversation took place between C. F. Pentland, manager of the Quebec Bank at Winnipeg (in company with the Winnipeg agent for the architects for the bank), and Clarence Day Shepard, a member of the firm of C. H. Enderton & Co., chief agents for the plaintiffs in Manitoba, with a view to obtaining the plaintiffs' consent to the extension of the stone front of the proposed building to the middle line of the north end of the said party wall and the building of a pier overhanging the said party wall extending back from the front of and continued up to the top of the said proposed bank building. Mr. Shepard explained to Mr. Pentland and the agent that

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he would have to consult the plaintiffs with regard to the matter and asked them to let him have a drawing shewing how the work was intended to be done and a letter explaining the same and promised upon receipt of such drawing and letter to at once write to the plaintiffs, whose head office is in Minneapolis. Mr. Shepard says they agreed to let him have the drawing and letter within two or three days, but no such letter or drawing was ever sent to him. On the contrary, about April 7, the defendants and their contractors proceeded to cut away the east half of the end of the party wall for a distance of about 28 inches. The only reason given by Mr. Pentland in his affidavit, for failure to comply with his promise to let Mr. Shepard have the drawings of the proposed new building, is that he considered the conversation to be without prejudice to the defendants' rights. I do not consider this to be a satisfactory reason for, to say the least of it, such discourtesy.

The material adduced before me on the 17th instant when the injunction herein was granted, consisted of an affidavit by the said Clarence Day Shepard verifying a copy of the said original agreement respecting the party wall and an affidavit by William Fingland, architect. Mr. Shepard's affidavit sets forth the ownership of the respective lots and describes the plaintiffs' building. In the first storey there are shop fronts and above the first storey there is said to be a solid 18-inch brick wall.

The said brick wall is supported on iron beams which rest on cast iron columns except at the north-east corner of the plaintiffs' building, where the said beams rest on the north end of the said party wall. Mr. Fingland in his affidavit, describes the plaintiffs' building in exactly the same language. The evidence clearly shews that the north end of the party wall had been interfered with by the defendants to such an extent in October, 1913, that the plaintiffs' steel joists and I-beams were plainly visible to anybody passing up Portage Ave., and it certainly does seem strange that neither Mr. Shepard nor any one connected with the present plaintiff company could have failed to see these beams and to notice that the party wall was being interfered with. No reference to an interference with

the wall by the defendants in October last was mentioned in the material adduced before me, nor was any reference made either by Mr. Shepard or by Mr. Fingland, the architect, to the fact that the joists and I-beams in question rest not only upon the north end of the party wall but also upon the brick veneer 4 inches thick which forms no part of the party wall. The importance of this last feature was clearly shewn by Edward Rogers, building inspector for the city of Winnipeg, who says in his evidence:—

> I would not give a permit for any increase in the height of the Monadnock building not because of what the defendants have done, but because of the fact that the beams rest partly on the veneer of brick at the north end.

Mr. Rogers shews that various contingencies might interfere with the brick veneer support and thereby endanger the plaintiffs' building, wholly irrespective of the condition of the party wall.

Owing to the fact that both parties desire to have this motion speedily disposed of, I permitted a good deal of evidence to be given on both sides orally. Still it must be borne in mind that this is not a trial of the action, there are many features of the case that will bear further elucidation and argument. After listening attentively to all the evidence adduced and the argument of counsel on both sides, I have come to the conclusion that the plaintiffs are not entitled to a continuance of the injunction.

In the first place it is very doubtful whether the defendants are bound at all by the burden imposed on the Trust & Loan Co. under the agreement of March, 1898. The point was only touched upon by counsel in answer to an inquiry I made towards the close of the argument, but it was not satisfactorily cleared up. In *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750 at page 781, Lord Justice Lindley says:—

> But it strikes me, I confess, that there is a still more formidable objection as regards the burden. Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees and they are bound by such covenant as runs with the land. Now we come to face the difficulty; does a covenant to repair all this road run with the land, that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing

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here with a case of landlord and tenant. The authorities which refer to that class of cases have little if any, bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, as some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it.

It will be remembered that the agreement itself expressly provided that no part of the fee of the soil upon which the said party wall should stand should pass or be vested in either of the parties thereto, their respective heirs and assigns. It may be, as Mr. Burbidge argued, on behalf of the plaintiffs, that while the owners of the respective lots retained their ownership of the soil, the wall itself might be construed to belong to them as tenants in common. This is the situation for which Mr. Burbidge contends, but if so the law is that one tenant in common cannot bring trespass against the other tenant in common, but must resort to the remedy of partition.

The next point to be considered is the material upon which the injunction was granted on the 17th inst. If I had known that the wall had been cut into by the defendants in October last, thereby exposing the plaintiffs' beams without any enquiry or objection on the part of the plaintiffs, or if I had known the important bearing which must be attached to the fact that the plaintiffs' beam rests to the extent of several inches upon a brick veneer forming no portion of the party wall, I certainly would not have granted the injunction *ex parte*.

Thirdly, assuming that the defendants committed a wrongful act against the plaintiffs in cutting into the middle of the party wall a depth of 28 inches southward and 8½ inches westerly and that the defendants are liable for any damage thereby occasioned, the question arises to what extent, if any, have the plaintiffs been injured? The defendants are inserting granite blocks of a width of 17 inches into the space formerly occupied by the half of the wall. This leaves 11 inches to the outside edge of the plaintiffs' veneer wall, 4 inches of this consists of the plaintiffs' own veneer, so that it comes down to this, that there are

only 7 inches of space left which the plaintiffs can reasonably complain of. It is quite true that the granite blocks are not to be bonded into the wall, but still they form a complete support to it on the easterly side, excepting the 7 inches above mentioned. The building inspector, Mr. Rogers, appeared to me to be a man of competent skill and judgment. The following extracts from my notes shew the result of a careful inspection by him of the premises:—

In my opinion, there is no weakening whatever of the party wall. If there was any side thrust it would be eliminated by the weight of the beams. The bearing surface is ample. Nothing appears to have been done by the defendants to the injury of the plaintiffs. There is no thrust. It is a dead load. There is no possibility of danger from crushing.

With regard to the 7 inches of space above alluded to, Mr. Phillipps, on behalf of the defendants, points out that any owner would have a right to utilize his half of the wall to run up a chimney flue and any such flue would occupy more space than 7 inches.

Fourthly, if the plaintiffs really feel that there is any danger to their building by reason of the defendants' interference with the wall, they appear to be entitled to repair it themselves by replacing the brick wall as it was to the north of defendants' granite blocks. The cost of doing this is said to be about $50. After hearing all the evidence, including the expert opinion of three witnesses on both sides, I feel satisfied that no real danger exists, and that the expense of fully protecting the plaintiffs to the extent they seem to think necessary would be trifling compared with the inconvenience, cost and delay which the defendants would suffer by reason of any interference with their present building operation. With the exception of the northerly 28 inches aforesaid, the defendants appear to have abandoned the entire party wall to the plaintiffs.

The plaintiffs' motion is accordingly dismissed and the injunction dissolved. With regard to the costs, I am quite prepared to dispose of them now and also to deal with the question of damages sustained by the defendants owing to the injunction, but I think these matters had better stand over to be dealt with at the trial when some of the points above mentioned may

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be amplified or cleared up. If, however, the parties think otherwise I will be happy to deal with them myself upon motion at any time.

Motion dismissed.

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Quebec Court of Review, Archibald, Bruneau and Beaudin, JJ. September 19, 1914.

1. CONTRACTS (§ II D—173*a*)—CONSTRUCTION — REAL PROPERTY — AS TO QUANTITY—EVIDENCE ADMISSIBLE—VENDOR AND PURCHASER.

The interpretation of an agreement of sale of realty ambiguous on its face as to the description of the property sold may be based on the subsequent conduct of the parties to the agreement, and where one of such parties later than the sale makes a notarial declaration in a collateral matter fixing the description such declaration is admissible as against him in construing the contract.

Statement

APPEAL by the defendants from the trial judgment of the Quebec Superior Court in favour of the plaintiffs in an action for specific performance of a contract for the sale of land involving ambiguity as to the quantity of land agreed to be sold.

The appeal was dismissed.

E. Pélissier, K.C., for defendants, appellants.

G. C. Papineau-Couture, for plaintiffs, respondents.

Archibald, J.

ARCHIBALD, J.:—This is a review of a judgment which has condemned the defendant to execute a deed of sale of a certain property on St. Catherine street, in the city of Montreal. The defendants on May 30, 1911, signed the following document:—

"M. Jacobson.

"We, the undersigned, hereby authorise the sale for us of *property* 1350 to 1358 St. Catherine street east, with the extension to St. Alexis street, for the sum of $30,000, on the following conditions:—

"$10,000 cash on date of sale; the buyer shall assume the present existing mortgages of $8,000 at 6 per cent. and $2,000 at 8 per cent. and $10,000 at 6 per cent., the latter payable $500 every six months. Buyer shall take possession from time of signing the deed of sale. The buyer shall grant us a 5-years' lease for our *store* with the extension and the two upper flats, with our own dwellings, for the price of $1,500 per annum for the first two years, payable $125 per month, and for the following 3 years at $1,800 per annum payable $150 per month, it being understood that the *part of the* STORE that has no extension shall not be included in this offer. We will pay you 2½ per cent. commission from the amount of sale. This offer is good until June 10th, 1911."

This is signed by four Tipograph Brothers.

The point at issue between the parties appears really to be whether the clause "it being understood that the part of the *store* that has no extension shall not be included in this offer," applies only to that portion of the offer which concerns the lease, or whether it applies also to that part which concerns the sale of the property. The Court below has found that it has application only to the lease and not to the sale of the property.

It seems that this option had been transferred to Sam. Berlind and Carl Rosenberg, the plaintiffs in this case, and on July 4, 1911, a document was signed in duplicate between Berlind and Rosenberg and Tipograph Bros., represented by Saul Tipograph. The property in that document was described "that certain parcel of land fronting on St. Catherine street in the said city of Montreal, bearing civic numbers 1350 to 1358 inclusive of St. Catherine street east and 3, 5, 7 St. Alexis street," and then it proceeded to say: "the deed of sale will be executed on or before October 15, next, and will be made for the sum of $30,000 and subject to the *conditions and terms* of the option given by the said Tipograph Bros. to Mr. Jacobson on May 30, last." In this, no special mention is made of the reserve of the part of the store which has no extension. It seems that concerning the said property, there was $10,000 due by the Tipograph Bros. to one Morgan, being the last $10,000 mentioned as affecting the property in the offer above recited. In November, there was due upon this, by the Tipograph Bros. to Morgan, an instalment of $500 and $300 in interest, and being short of money they applied to one Ogulnik to get the $800 to pay Morgan, and in the notarial acknowledgment which they gave to Ogulnik, the following occurred:—

> A certain emplacement situated on St. Catherine street, composed of the south-west part of lot No. 1392, a part of lot No. 1399, and the whole of lot No. 1393 on the official plan and book of reference of St. Mary's ward in the said city of Montreal, with stores and dwellings erected on said lot bearing civic numbers 1350, 1352, 1354, 1356 and 1358 St. Catherine street east, Montreal, and another building fronting on St. Alexis street, for the price of $30,000, in deduction and part payment whereof the said Tipograph Bros. acknowledge to have received previous thereto the sum of $3,000, balance to be paid as per terms mentioned in the agreement of sale.

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This was signed by Morris Tipograph for himself and the firm of Tipograph Bros. This was the first document which contained something approaching an official description of the property. One of the Tipograph Bros., by name Carl, was resident in New York and a power of attorney had to be obtained from him. In this power of attorney, the land is described "an emplacement now known as the south-west part of lot No. 1392 on the official plan and book of reference of St. Mary's ward in the said city of Montreal, containing about 64 ft. in width in front by 45 ft. in depth, English measure, more or less, etc." Then follow metes and bounds. "Another emplacement known as part of lot subdivision number one of the official subdivision of lot No. 1399-1 on the official plan and book of reference of said St. Mary's ward, in said city of Montreal, containing 3 ft. 7 in. in depth in the north-easterly end, 4 ft. 2 in. in depth at the south-westerly end by 64 ft. in width." Then follow metes and bounds. "Another lot now known as No. 1393 on the official plan and book of reference of St. Mary's ward (followed by statement of contents and boundaries)." Then the statement follows: "On the said emplacement are erected stores and dwellings known as civic numbers 1350-52-54-56 and 58 of St. Catherine street east, etc."

This was signed by Carl Tipograph. The only remaining Tipograph who has not signed this description is Max Tipograph. This description contained the word "property" without deduction of that part of the property where the extension of the store did not go. The Court has found that it was the intention of the defendants to sell the whole property. I think really there can be no reasonable question that such was their intention. The conclusions of the judgment ordered the defendants to execute a deed of sale of the property and provided that the judgment should stand in place of such deed of sale if the defendant made default in executing the deed. I am of opinion, therefore, that the judgment of the Court of first instance is right and must be maintained.

Bruneau, J.

BRUNEAU, J., concurred.

BEAUDIN, J.:—This is an action taken by Samuel Berlind and Carl Rosenberg to compel Morris, Carl and Saul Tipograph, carrying on business at Montreal under the firm name of Tipograph Brothers, to sign a deed to their property. This suit is based on a writing dated May 30, 1911, reading as follows:—

[Quoted in judgment of ARCHIBALD, J.]

And on another writing of July 4, 1911, which is virtually a confirmation of the first writing, with the acknowledgment on the part of the defendants of their having received the sum of $2,000 from the plaintiffs. The plaintiffs add that, in November, 1911, they formally called upon the defendants to furnish their title deeds to the property; that the defendants refused, and that on March 29, 1912, they protested the defendants to compel them to sign the deed of sale and of lease according to the conditions mentioned in the writing of May 30, and offered the sum of $6,200, the balance of the cash payment of $10,000, payable at the signing of the deed.

On the refusal of the defendants to sign, plaintiffs have brought this action, depositing the sum of $6,200 into Court. The defendants, for plea to the action, admit the writing of May 30, and declare that they have always been ready and are still ready to carry the same into effect, but they contend that this writing is incorrectly interpreted by the plaintiffs, and submit that the last part of the writing means that they did not sell to the plaintiffs that portion of the property that has no extension; they pray *acte* of their declaration that they are ready to sign the contract in this sense, and pray that, in default of the plaintiffs accepting this consent within 15 days, the promise of sale granted by them be declared at an end and the action dismissed.

The Superior Court maintained the plaintiff's action according to the conclusions of the declaration. The defendants complain of this judgment, and submit that it does not properly interpret that part of the writing to which I have just alluded. The defendants raise no complaint about the procedure followed by the plaintiffs, and the only question submitted to this Court at the argument is as to whether the following sentence in the writing of May 30: "It being understood that the part of the store that has no extension shall not be included in this offer," applies to the sale or to the lease stipulated by the parties. Of course,

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the parties admit that the writing contains two distinct stipulations: one concerning the sale of the property of the defendants bearing civic No. 1350-58 St. Catherine St. E., with the extension to St. Alexis St., for the sum of $30,000; the other concerning the five-year lease which the defendants required from the purchaser. The last sentence mentions that the part of the store which has no extension shall not be included in this offer. The plaintiffs say that this portion of the document relates to the lease, whereas the defendants claim that it relates to the sale, and that this part of the property, therefore, was never sold.

In order to properly interpret this writing, which seems to have been drawn on the defendants' own paper and signed by themselves, it is well to examine how these premises were occupied when the writing was signed. This property comprises 1350-58 St. Catherine St. E., No. 1350 being at the western extremity and 1358 at the eastern extremity. From the plans and the evidence it appears that the property is built along its whole front, where it measures 64 ft.; that it has three storeys—to wit, the ground floor, occupied for the greater part by the defendants as a store and by a tenant as a dining-room at the eastern extremity. Part of the property extends back to St. Alexis St. The depth of the store and of the extension at this place is 106 ft. 10 in., whereas on the east thereof, where there is no extension, the front is 28 ft. and the depth 40 ft. 11 in. only. By allowing a width of about 12 ft. for the dining-room at No. 1358, that part of the store which has no extension has a front of about 16 ft. The extension on the ground floor is occupied as a store, whereas on the upper floors it is occupied partly for dwelling purposes by one of the defendants and partly as warehouse by the defendants. The upper part was occupied as a shop and lodging by a tailor and the width of two windows. The other two windows in the centre are occupied by one of the defendants, and the rest, comprising the three east windows, are occupied by an artist.

Now, if we examine the writing, what the defendants wished to lease from the purchaser is apparent. They themselves stipulate that the purchaser will have to grant them a 5-year lease for their store with the extension and the two upper flats, including their dwelling, for the price of $1,500 per year, payable

monthly, and then comes the sentence which has given rise to all this litigation. "It being understood that the part of the store which has no extension shall not be included in this offer." I can come to no other conclusion than that this sentence applies to the lease and not to the sale.

The defendants begin by stating that they sell their property, 1350-58 St. Catherine St. E., with the extension to St. Alexis St., and then they stipulate a lease for their store with the extension, the two upper floors with their dwelling, and add that that part of the store which has no extension is not included in this offer, that is to say, in my opinion, that that part of the store which has no extension and which comprises 16 ft. front by 40 ft. depth shall no longer be occupied as a store by the defendants, but that for the future their store will be comprised between the fire-wall of the western extremity, thus giving them a store 36 ft. in width by 106 ft. 10 in. in depth. It seems to me evident that the purchasers must have insisted on keeping the two small stores on the ground floor, that already occupied as a dining-room, and the other comprising part of the old defendants' store, measuring, as I have stated, 16 ft. in width by 40 ft. in depth. If the contention of the defendants were admitted, it would follow that part of the ground floor was sold including the upper storeys, but that that part of the store which is on the ground floor, comprising 16 ft. by 40 ft., would not have been sold. They must have sold the upper portion since they included it in the lease, and they would not have sold the small store on the ground floor, a state of things which appears to me neither just, nor probable, nor reasonable.

The subsequent conduct of the defendants confirms me in this opinion. Thus on July 4 they signed a writing wherein they declared that they sold all their property. This same declaration they made in a notarial writing of November 25, 1911, when they borrowed a sum of $800 from one Ogulnik to pay a part of their own purchase price. Two of the defendants, Morris and Carl Tipograph, recognized that the contentions of the plaintiffs were well founded in a document which is a power of attorney from Carl to Morris authorizing him to sign the deed of sale. Finally all the parties met at the notary's to sign the deed of sale and the lease, and a statement is prepared shewing

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the amount which the plaintiff will have to pay to the defendants to complete their first payment of $10,000, seeing they had previously paid $3,800. According to this statement a balance of $5,506.50 was payable by the plaintiffs. A disinterested witness declares that the defendants warranted a lump sum of $6,000 on account of the trouble they had to bring the transaction to a conclusion, but it was not contended that the defendants had not sold all of their property; finally the defendants received $3,800 on account, and prayed by their plea that, in the event of the plaintiffs not accepting their proposition within fifteen days from the filing of the plea, the promise of sale of May 30, 1911, be annulled, and yet they keep the $3,800.

Taking all these facts into consideration, I am of opinion that the judgment of the Superior Court is well-founded and that it should be confirmed, and this is the unanimous opinion of the Court.

Appeal dismissed.

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Judicial Committee of the Privy Council, Lord Dunedin, Lord Moulton, Lord Parker of Waddington, Lord Sumner, and Sir George Farwell. June 16, 1914.

1. LIMITATION OF ACTIONS (§ III F—130)—DIFFERING PERIODS OF LIMITATION UNDER PROVINCIAL RAILWAY ACT — LONGER PERIOD UNDER LORD CAMPBELL'S ACT (B.C.) — ACTION AGAINST RAILWAY FOR CAUSING DEATH.

A suit brought under the Families Compensation Act, R.S.B.C. 1911, ch. 82, against a railway company is not barred when begun more than 6 but within 12 months after the accident, the limitation being controlled by that Act and not by B.C. Consolidated Railway Companies Act, 1896, ch. 55, sec. 60.

[*Gentile* v. *B.C. Electric R. Co.*, 15 D.L.R. 384, affirmed.]

2. DEATH (§ II—5)—RIGHT OF ACTION FOR CAUSING—FAMILIES COMPENSATION ACT—TOTALLY NEW ACTION ARISING FROM.

A suit brought under the Families Compensation Act, R.S.B.C. 1911, ch. 82, is not an ordinary action of indemnity for negligence but a totally new action under the Act although conditions precedent are (*a*) that the death was caused by the wrongful act, neglect or default of the defendant and (*b*) that the default was such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof."

3. DEATH (§ II—5)—RIGHT OF ACTION FOR CAUSING—FAMILIES COMPENSATION ACT—ACTION ARISES WHEN—PUNCTUM TEMPORIS.

In determining when the right of action arises under Families Compensation Act, R.S.B.C. 1911, ch. 82, the *punctum temporis* at which

the test is to be taken is at the moment of death, so that if the deceased could, had he survived that moment, have maintained his action, then the action under the Act may arise.

4. Death (§ IV—28)—Families Compensation Act—Release obtained by fraud—Effect.

The raisers of the action under Families Compensation Act, R.S.B.C. 1911, ch. 82, have a title to set aside a release obtained by fraud from the deceased.

Statement

Appeal by the defendant company from the judgment of the British Columbia Court of Appeal, *Gentile* v. *B.C. Electric R. Co.*, 15 D.L.R. 384, affirming the trial judgment in favour of the plaintiff in an action for negligence causing death.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Dunedin.

Lord Dunedin:—The appellants are a company working the tramways in the streets of the city of Vancouver. This they do as assignees of the Consolidated Railway Company incorporated by ch. 55 of the Acts of British Columbia, 1896. The respondent is the administratrix of Vernon Aldrich, deceased, who was struck and killed by one of the appellants' cars on October 7, 1911.

The respondent raised action on behalf of the father and mother of the deceased on June 10, 1912, in virtue of the provisions of the Families Compensation Act, ch. 82, R.S.B.C. 1911. In the statement of claim the plaintiff averred that the death of Vernon Aldrich was caused by the negligence of the servants of the defendants.

The defendants denied negligence and joined issue on the fact. They also pleaded that the action was barred, not having been raised within six months of the death of the deceased. This plea they rested on the terms of sec. 60 of the Consolidated Railway Act, which is in the following terms:—

All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had

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thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

The case came before a jury. The learned Judge repelled the plea founded upon sec. 60 and the jury found a verdict for the plaintiff and assessed damages at $3,000, which sum the Judge then directed should be paid, $2,000 to the father and $1,000 to the mother of the deceased man.

The defendants appealed to the Court of Appeal repeating their plea founded on sec. 60, and further contending that the verdict was contrary to evidence. The Court of Appeal affirmed the judgment of the Court below, but granted leave to appeal to this Board. The question of the verdict being contrary to evidence was not argued before, and would not have been entertained by their Lordships. The whole question is therefore whether the action was barred as being raised too late. To get the benefit of the limitation expressed in sec. 60 the appellants must shew that the present suit is one for "indemnity for damages sustained by reason of the railway or the operations of the company." Indemnity obviously means indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the company. Their Lordships assume without deciding that the words "operations of the company" include negligent driving of a car. The question therefore comes to turn on whether a suit raised in virtue of the provisions of the Families Compensation Act answers to the description above set forth.

The Families Compensation Act is for all practical purposes textually the same as the Act known as Lord Campbell's Act in the United Kingdom, of which Act it is indeed a copy. Now, the character of the right given by Lord Campbell's Act has been the subject of much judicial decision. As early as 1852, in the case of *Blake* v. *The Midland R.W. Co.*, 18 Q.B. 93, Coleridge, J., giving the judgment of the Court said:—

> It is evident that this Act does not transfer this right of action (of the deceased) to his representative, but gives to the representative a totally new right of action on different principles.

Then in the case of *Pym* v. *Great Northern R.W. Co.*, 4 B. & S. 396, Erle, C.J., said:—

The statute gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle.

In his judgment Williams and Willes, JJ., and Bramwell and Channell, B.B., concurred. And, finally, in the case of *The "Vera Cruz,"* 10 App. Cas. 59, Selborne, L.C., says:—

Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim *actio personalis moritur cum personâ*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor.

And Lord Blackburn says:—

I think that when (Lord Campbell's) Act is looked at it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym* v. *The Great Northern Railway Company*, is new in its species, new in its quality, new in its principle, in every way new.

These dicta are, in their Lordships' opinion, directly applicable to the Families Compensation Act. It follows that, in their opinion, a suit brought under the provisions of that Act is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants, and that sec. 60 has no application. They do not agree with the reasoning of and the result arrived at in the case of *Markey* v. *The Tolworth Joint Hospital District Board*, [1900] 2 Q.B. 454, which they consider directly in conflict with the law as laid down in the case of *The "Vera Cruz"* in the House of Lords. This, however, does not end the matter, for although the action under Lord Campbell's Act or the Families Compensation Act is not an action of indemnity for negligence yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof."

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Their Lordships are of opinion that the *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, have maintained, *i.e.*, successfully maintained his action, then the action under the Act does not arise. Therefore when the deceased had already been compensated and discharged all claims (*Read* v. *Great Eastern R. Co.*, L.R. 3 Q.B. 555), or had covenanted away his rights (*Griffiths* v. *Earl of Dudley*, 9 Q.B.D. 357), he was not in a position to "maintain an action." This is the ground on which Lord Blackburn in the former case expressly puts his judgment. Their Lordships feel bound to add that, in their opinion, the remark which follows has been misunderstood. Lord Blackburn, after commenting on sec. 1, goes on to say that sec. 2 does not give a "new right of action." That means in law beyond what is given by sec. 1. But it has been interpreted in a wider sense by Field and Cave, JJ., in *Griffiths'* case. That this is erroneous is best appreciated by remembering that Lord Blackburn himself used the emphatic words quoted above in *The "Vera Cruz"* two years after he pronounced the judgment in *Read's* case and that when the erroneous view of *Read's* case was urged in argument he quoted the words above cited from the older case of *Pym*.

It follows from what their Lordships have said that the dicta in the case of *Green* v. *B.C. Electric R. Co.* (1906), 12 B.C.R. 199, cannot be supported in their entirety. Since that case was decided, however, the case of *B.C. Electric R. Co.* v. *Turner* has been decided by the Supreme Court of Canada, 49 Can. S.C.R. 470, also published vol. 18 D.L.R., and their Lordships have been furnished with a transcript of the judgments. The views of the learned Judges—subject to one point to be presently noticed—seem to their Lordships in accordance with the views now expressed. The learned Chief Justice says specially of the action—

> In one sense it is a new action, but the condition, subject to which that right of action may be exercised, being that the deceased did not receive indemnity or satisfaction during his lifetime to that extent, and in that respect it is a representative or derivative action.

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The other Judges base their opinion on the same view, although they partly also go on the view expressed in *Green's* case.

In the only point of difference between them their Lordships agree with the view expressed by Mr. Justice Anglin. That learned Judge says:—

> I find no satisfactory ground of distinction between the extinguishment of the cause of action by the injured man by an accord and satisfaction, evidenced by a release, and its extinguishment by the recovery of a judgment upon it or the expiry of a period of limitation.

In their Lordships' view this is correct, and the case of *Williams* v. *Mersey Docks, Ltd.*, [1905] 1 K.B. 804, was rightly decided. As to the case of *Turner* v. *B.C. Electric R. Co., supra*, it is scarcely necessary to add that their Lordships are in entire accordance with the view there given effect to, viz., that the raisers of the action under the Families Compensation Act have a title to set aside a release obtained from the deceased man by fraud. Applying these views to the facts of the case the deceased man had at the moment of his death in no way forfeited or parted with the right of action competent to him for the injury done him. His death took place and the action on the part of the respondent sprang into being. It was raised within 12 months after the death and is therefore competent. The result is that, in their Lordships' opinion, the decision of the Court below was correct and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

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Manitoba King's Bench, Curran, J. June 9, 1914.

1. MORTGAGE (§ VI G—121)—SALE UNDER PRIOR MORTGAGE—PURCHASE BY SUBSEQUENT MORTGAGEE—RE-SALE AT PROFIT—EFFECT ON HIS MORTGAGE.

Where a prior mortgagee duly exercises a power of sale, and a subsequent mortgagee becomes the purchaser; such subsequent mortgagee in the absence of anything to impeach the *bona fides* of the transaction, acquires the same irredeemable title as if he were a stranger, nor does such purchase merge his mortgage or even require him to credit thereon the profits of a re-sale.

[*Harron* v. *Yemen*, 3 O.R. 126, and *Shaw* v. *Bunny*, 2 DeG. J. & S. 468, specially referred to.]

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2. BANKS (§ VIII B—172)—LAND MORTGAGE—BUYING IN AS SUBSEQUENT MORTGAGEE—BANK ACT.

Sec. 81 of the Bank Act, R.S.C. 1906, ch. 29, confers on a mortgagee bank the rights of an individual mortgagee as to buying in under a prior mortgage.

Statement

ACTION by a mortgagee bank involving its right to buy in under a prior mortgage without merging its own mortgage and without accounting for the profits of a re-sale.

Judgment was given for the plaintiff.

J. H. Chalmers, for plaintiff.

G. W. Bruce, for defendant.

Curran, J.

CURRAN, J.:—The plaintiff brings this action against the defendant as assignee of the estate of one David W. Kirkpatrick, pursuant to an order made by Mr. Justice Galt on October 30, 1913, under the provisions of the Assignments Act. In obedience to such order the defendant as assignee served notice upon the plaintiff bank that he disputed its right to rank on the estate as a creditor, and requiring the plaintiff to bring an action against him to establish its claim within 30 days after receipt of such notice and thereupon the plaintiff bank brought this action. At the trial I allowed the plaintiff to amend its statement of claim by setting up an alternative claim against the estate upon the covenant contained in a mortgage deed executed by the insolvent David W. Kirkpatrick to the plaintiff, dated August 2, 1910, whereby the said Kirkpatrick covenanted to pay the plaintiff the sum of $2,612.55, as therein mentioned. It appears that the plaintiff filed two claims against the estate, exs. 6 and 7, both in respect of the same debt, but for different amounts. The one first filed, ex. 7, for the sum of $2,226.33 was the subject of some negotiations between the defendant and the plaintiff looking to an allowance of credit on the amount due the plaintiff in respect of the sale by the plaintiff of certain lands of Kirkpatrick which had come into its hands as purchaser at a mortgage sale. These lands originally belonged to Kirkpatrick and had been mortgaged by him first to the Excelsior Life Ins. Co. for $7,000, secondly, to one J. H. Ingram, for $655, and thirdly, to the plaintiff as additional security for Kirkpatrick's indebtedness to it of $2,612.55. Default having been made in payment of the second

mortgage to Ingram the lands were sold by him under the power of sale contained in his mortgage to Henry James Pugh, the plaintiff's manager at Virden, for $975, subject to the prior mortgage to the Excelsior Life Ins. Co. Pugh admittedly purchased for the plaintiff and not for himself.

The result of these negotiations led to the filing by the plaintiff with the defendant of the second claim, ex. 6, in which a credit of $700 was tentatively allowed without prejudice to the plaintiff's rights, thus reducing the amount of its claim to $1,526.33.

The assignee was disposed to agree to this and allow the claim at this amount, upon which Kirkpatrick intervened and notified the defendant that he disputed the plaintiff's claim to rank upon his estate for the sum lastly mentioned or for any sum upon the grounds set out in his notice to the defendant, dated June 13, 1913, part of ex. 8, and requiring him to distribute the estate without regard to the plaintiff's said claim unless the plaintiff established its claim by action as provided by the Assignments Act. This the assignee refused to do by notice to Kirkpatrick dated August 26, 1913, also part of ex. 8, upon which Kirkpatrick moved for and obtained the order from Mr. Justice Galt before referred to, copy of which order is also part of ex. 8.

The facts as to the plaintiff's claim are shortly as follows: In January, 1910, Kirkpatrick borrowed from the plaintiff upon his promissory notes the sum of $2,626.95. These notes, originally two in number, one for $2,200 and one for $420.95, were subsequently consolidated upon renewal and were renewed from time to time. On July 19, 1910, Kirkpatrick owed the plaintiff $2,612.55 in respect of this indebtedness and had given the plaintiff a renewal note for this amount. While such note was current the plaintiff demanded from Kirkpatrick and obtained from him the mortgage before referred to, ex. 2, dated August 2, 1910. This mortgage recites an indebtedness from the mortgagor to the plaintiff of $2,612.55 contracted to the bank in the course of its business, overdue, and that the mortgagor had requested an extension of time for payment, which the plaintiff agreed to upon being given the additional security as provided by such mortgage.

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This mortgage was duly registered and covers the same land as included in the two prior mortgages before referred to. It is conditioned for payment of the said sum of $2,612.55 on October 19, 1910, with interest at 8% per annum to be computed from July 19, 1910, payable quarterly thereafter and is made subject to the Excelsior Life mortgage for $7,000, but not to the mortgage to Ingram for $655. No reference whatever is contained in it to any promissory notes given by the mortgagor or to any renewals of such notes or that it is collateral to any such notes; but it purports to secure a fixed and definite indebtedness then past due and stipulates for payment thereof on a certain prescribed date.

If it was necessary to decide the point I should hold that the liability of Kirkpatrick on his note then held by the plaintiff was merged in the higher security of this mortgage: *Molsons Bank* v. *McDonald*, 2 A.R. (Ont.) 102, at 107. But it seems to me, in view of the amendment allowed, that it is not material to the determination of the question at issue whether the plaintiff's claim is based upon this mortgage or upon the promissory note which the plaintiff kept current by subsequent renewals, notwithstanding the mortgage, as the same debt is represented and secured by each. For convenience sake, however, I think it better to consider the plaintiff's claim as now founded on the mortgage and will so deal with it.

By a subsequent payment of $675.33, made on November 22, 1910, the plaintiff's claim was reduced to, and finally ascertained by, a renewal note, ex. 1, given by Kirkpatrick on November 8, 1910, at $2,001.92. This note was made payable on May 11, 1911, and bore interest at 8%, and this sum represents the balance of principal due by Kirkpatrick to the plaintiff on November 8, 1910, with interest at 8%, subject to a certain claim for interest appearing in exs. 6 and 7, for which the plaintiff is entitled to judgment and to rank upon the estate unless precluded or debarred by the grounds of defence raised in this action. On April 1, 1911, Kirkpatrick assigned to the defendant all his estate and effects for the general benefit of his creditors. The defences raised are matters of law arising on admitted or proved facts. The defence first claims that the plaintiff bid in the mortgaged

lands at the sale under Ingram's second mortgage for the purpose of securing and protecting the mortgage given to it by Kirkpatrick and applied for and obtained title thereto clear of encumbrances, thereby merging its own mortgage and the indebtedness of Kirkpatrick thereby secured in the greater title as absolute owners of the property. Secondly, that having so acquired the property the plaintiff resold it at a profit sufficient to pay all prior encumbrances and costs and the amount of Kirkpatrick's indebtedness; and thirdly, in the alternative that if the plaintiff's debt was not so merged and extinguished, that the land was held merely as a collateral security to the debt and the plaintiff is liable to account to the defendant for all profit realized from the resale of the lands, which profit it is alleged was more than sufficient to satisfy the indebtedness of Kirkpatrick, if not extinguished.

Upon consideration and a review of the various authorities cited to me by counsel for the defendant and for the plaintiff, I am unable to accede to any of these contentions as being well founded in law. It may be quite true that the plaintiffs bid in the property to protect themselves, but they, though subsequent mortgagees, had a legal right to do this and acquire thereby an indefeasible title as purchaser against the mortgagor or those claiming through him. In *Harron* v. *Yemen*, 3 O.R. 126, Armour, J., says, at 133:—

> He [the defendant] although a second mortgagee, was entitled to become the absolute purchaser of the land under the power of sale contained in the first mortgage, and to hold the same irredeemable by the mortgagor, and his afterwards receiving the interest which fell due to him upon the second mortgage would not have the effect of making him a mere mortgagee in respect of his absolute purchase of the land under the power of sale contained in the first mortgage, because he was entitled, notwithstanding such purchase, to collect, by virtue of the covenant contained in the second mortgage, the principal and interest which fell due to him thereunder, no part of which was covered by the purchase money of the land.

See also *Watkins* v. *McKellar*, 7 Gr. at 585 and 586; also *Shaw* v. *Bunny*, 3 DeG. J. & S. 468; the head-note of which latter case is as follows:—

> Where a first mortgagee duly exercises a power of sale, and a subsequent mortgagee becomes the purchaser, such subsequent mortgagee, in the ab-

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sence of any thing to impeach the *bona fides* of the transaction, acquires the same irredeemable title as if he were a stranger.

See also *Brown* v. *Woodhouse*, 14 Gr. 682, to the same effect.

The mortgage debt of the subsequent encumbrancer who buys the estate under a power of sale in a prior mortgage would, I take it, in the light of these decisions, only be extinguished if the purchase price paid at the sale was sufficient for that purpose after satisfying all prior encumbrances: in other words, if there was a sufficient surplus of purchase money for such purpose. Here such was not the case. There was no surplus at all. There was no evidence that the Ingram sale was not a *bonâ fide* sale and I do not see that the fact of the sale being held under a second instead of a first mortgage makes any difference in the result to the mortgagor. He is cut out, I think, just as effectually in the one case as in the other. Here the plaintiff bought subject to the first mortgage and thereafter paid off such mortgage in full and having received a conveyance under power of sale from Ingram obtained an irredeemable title to the land free from any trust to account to the mortgagor for its subsequent dealings with the property.

It is not contended that the plaintiff's mortgage was defective or open to attack. Sec. 80 of the Bank Act enabled the plaintiff to take this mortgage from Kirkpatrick and sec. 81 of the same Act permitted the plaintiff to purchase the land offered for sale by a mortgagee or other encumbrancer having priority over a mortgage or other encumbrance held by the bank. This section, as Maclaren on Banking, at p. 236, puts it, simply places a bank in the same position as an individual creditor with reference to purchasing real property belonging to its debtor, or on which it has a mortgage or other encumbrance. I hold that the mortgage sale in question did not extinguish or affect the debt secured by the plaintiff's mortgage which Kirkpatrick covenanted to pay and has not paid, although the land itself as part of the security was unquestionably lost through such sale.

The plaintiff is, therefore, entitled to hold Kirkpatrick liable for any sum still owing under such covenant, and to prove against his estate for such amount as is now owing and to rank with the other creditors in the ratable distribution of the assets of the

estate whilst still retaining any profit it may have made on the resale of the lands so purchased. The plaintiff will, therefore, be entitled to judgment against the defendant as such assignee for the sum of $2,001.92, together with interest at 8% from November 8, 1910, less the sum of $129.66, claimed for interest on the sum of $1,457.10 whilst in the plaintiff's hands. This sum is the proceeds of a sale under chattel mortgage held by the plaintiff against Kirkpatrick in April, 1910, and which money was adjudged to belong to the estate and not to the plaintiff. The amount due will, therefore, be $2,001.92 for principal; interest for 3 years and 6 months at 8%, $560.56, together with $2,562.48, less interest on $1,457.10, as admitted by plaintiff, $129.66, leaving a balance due the plaintiff of $2,432.82, for which judgment against the estate will be entered.

I was asked at the trial by counsel for both parties that costs should be made a preferential claim. In the present event, as neither the creditors nor the assignee were voluntary parties to the contestation of the plaintiff's claim, or asked for it, I do not think I should penalize them by thus diminishing the assets. The contestation is brought about solely by Kirkpatrick, and he is the one who ought to bear the penalty of costs, if any one, and not the estate. The bank has made a good profit on the re-sale of the land and is thus placed in a much more favourable position financially than any of the other creditors. I think no costs of this contestation should be allowed the plaintiff against the estate, and the plaintiff's judgment will, therefore, be without costs.

Judgment for plaintiff.

REX v. FONTAINE.

Ontario Supreme Court (Appellate Division), Sir William R. Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Latchford, J. June 5, 1914.

WITNESSES (§ III—58)—CORROBORATION—CRIMINAL CHARGE—INDECENT ASSAULT.

Statement

CROWN case reserved by the police magistrate of Cobalt on a conviction upon summary trial for indecent assault on a female.

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Statement

The evidence accompanied the stated case, and the questions submitted were:—

1. Whether, upon the evidence summarized in the stated case, there was sufficient corroboration to satisfy section 1003 sub-sec. 2 of the Criminal Code.

2. Whether the matters related in the evidence of Ida McC. disclose an offence under sec. 292 of the Criminal Code.

3. Whether there is sufficient competent evidence to sustain the conviction.

W. J. Tremeear, for the prisoner.

J. R. Cartwright, K.C., Deputy Attorney-General, for the Crown.

THE COURT delivered an oral judgment at the conclusion of the argument, holding that there was sufficient corroboration without considering the objection raised that the testimony not under oath of one child could not be corroboration under Cr. Code sec. 1002 of the testimony of another child similarly taken without oath under sec. 1003. The accused having given evidence on his own behalf, his evidence could be looked at for the statutory corroboration, and such corroboration might consist of a circumstance admitted by the accused to which he offered an explanation of an exculpatory character but which was of an implicating character, were the testimony of the prosecutrix believed, where the Court was of opinion that the explanation offered by the accused was an unreasonable one.

An indecent assault, although not of a serious kind, was disclosed on the evidence and all questions must be answered in the affirmative, and the conviction affirmed. Sentence had been deferred and there would be a recommendation to the Attorney-General and the magistrate to consider whether the imprisonment pending the trial and the appeal (the accused not having been able to furnish bail) was not a sufficient punishment.

Conviction affirmed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. WILLS (§ III F—115)—PARTIAL INTESTACY — AFTER ACQUIRED PROPERTY.

Land purchased by a testator with money on hand at the time of making his will cannot on his death be treated as a "security for money," in which he directed his executors to invest in order to create a fund for the payment of an annuity.

[*Re Mackenzie*, 11 D.L.R. 818, 4 O.W.N. 1392, affirmed.]

2. ANNUITIES (§ I—4)—PAYMENT OF DEFICIENCY—FROM GENERAL ESTATE —WHAT AVAILABLE FOR.

On a deficiency of income from a fund from which an annuity is payable, if recourse cannot be had to the *corpus* thereof, the deficit is payable only from the portion of the testator's general estate which is not specifically devised.

[*Gee* v. *Mahood*, 11 Ch.D. 891, *sub nom. Carmichael* v. *Gee*, 5 App. Cas. 588, and *Re Plaetzer Estate*, 2 O.W.N. 1143, referred to.]

Statement

APPEAL by the nephews and nieces of Donald Macleod Mackenzie, deceased, from the judgment of MIDDLETON, J., 11 D.L.R. 818, 4 O.W.N. 1392, declaring the construction of the will of the deceased.

The appeal was dismissed.

George Bell, K.C., for the appellants.

E. P. Clement, K.C., for the executors of the testator's widow.

J. W. Elliott, K.C., for the testator's executor.

Riddell, J.

December 23. RIDDELL, J.:—The testator died in 1889, having made his last will and testament, of which the important parts are as follows:—

"First, I will and direct that my executors hereinafter named shall so soon after my decease as possible pay all my just debts funeral and testamentary expenses out of my personal estate.

"Second, I give and bequeath unto my beloved wife Frances Mackenzie all my household furniture, beds, bedding, stoves, cooking utensils, crockery and other household effects.

"Third, I give and devise to my said wife Frances Mackenzie the house and lot I now own in the said town of Milton, being composed of lot number twenty-five in block number three in Martin survey in the said town of Milton, being on the north

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side of Mill street, to have and to hold the same to and for her own use and benefit during the term of her natural life.

"Fourth, I also give and bequeath unto my said wife an annuity or yearly sum of $200 payable half-yearly during the term of her natural life, and also the assurance upon my life which was insured for her benefit.

"Fifth, I will and direct that my executors shall invest and keep invested during the lives of my wife and my sister Mary Ruddy and of the survivor of them all the moneys or securities for money of which I shall be possessed at the time of my death, and out of the interest or profits derived therefrom to pay the said annuity to my wife, and to pay the residue (if any) to my said sister, and in case my said sister should survive my wife then my executors are to pay the whole of the interest upon the moneys invested during the term of her natural life to my said sister.

"Sixth, I give, devise, limit and appoint unto Hugh Husband, John Marshall and John Fletcher, my executors hereinafter named, their heirs and assigns, subject to the life estate hereinbefore devised to my said wife, all and singular the said lot in the said town of Milton hereinbefore mentioned and described, to have and to hold the same from and after the death of my said wife unto and to the use of the said Hugh Husband, John Marshall and John Fletcher (hereinafter called the trustees or trustee) their heirs and assigns forever upon trust, should my said sister survive my wife, to lease the said land and premises and pay the rent thereof to my said sister during her natural life, and upon trust that the said trustees or the survivors or survivor of them, or the executors of such survivor, shall as soon after the death of my said wife and sister as to them may seem advisable sell the same either by public auction or private contract and may buy in and rescind any contract of sale and resell without being responsible for any loss occasioned thereby, and also upon trust from time to time to make, do and execute all proper acts, contracts, deeds and assurances for carrying such sale or sales, lease or leases into complete effect as they or he shall think fit. And I do hereby declare that the said trustee or trustees or the executors or the survivor of them shall stand

possessed of the moneys which shall arise from the sale hereinbefore directed to be made of my said real estate, and from the leasing thereof after the death of my said wife and sister, upon trust in the first place to deduct and retain all costs, charges and expenses which they or he shall have disbursed or incurred in the performance of the aforesaid trusts or in relation thereto. And upon trust in the second place to divide the residue equally amongst all my nephews and nieces.

"Seventh. I give and bequeath unto my said nephews and nieces all the moneys and securities for money to be equally divided amongst them after the death of my said wife and sister. The children of any of my said nephews or nieces who may have died leaving children, to be entitled to and receive the share which their parents, if living, would have received.

"I appoint Hugh Husband, John Marshall, and John Fletcher, all of the township of Nassagaweya, in the said county of Halton, farmers, executors of this my will.

"In testimony whereof, I, the testator, have hereunto set my hand and seal this twenty-third day of June, in the year of our Lord one thousand eight hundred and eighty-four."

There was no residuary clause.

In June, 1866, the testator had withdrawn some $1,200 of his money and bought therewith the equity of redemption in some real estate called the Gallery property.

The sister survived the testator but predeceased the widow, and the widow died in June, 1912. During her lifetime, the interest and the profits of the money left by the testator at his death were not sufficient to pay the sum of $200 annually to the widow.

A motion was made for interpretation of the will, and Mr. Justice Middleton made an order thereon which is now appealed from by the nephews and nieces on two points only:—

1. It is claimed that the Gallery property, into which the testator converted some of his money, comes within the words "securities for money" in the 5th and 7th paragraphs, and that accordingly the appellants are under the 7th paragraph entitled to it.

The meaning of "securities for money" has been considered

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both here and in England; the English cases may be found by reference to Stroud's Judicial Dictionary *sub voce*: some of our own in *Re J. H.* (1911), 25 O.L.R. 132. A security for money, unless something is found to modify the meaning, means "something which makes the payment of money more secure:" *Re J. H.*, 25 O.L.R. 132; *Worts* v. *Worts* (1889), 18 O.R. 332.

There may be something in the case, as in the will under discussion in *Re J. H.*, which shews that the testator used the expression in a peculiar sense, a sense different from that which is usual and ordinary; but, in the absence of anything of the kind, the words must be given their ordinary sense. The appeal must fail on this point.

2. Mr. Justice Middleton has held that "the widow is entitled to receive the balance of her annuity; and, if it is material, resort should first be had to the proceeds of the land descended." The widow having elected, under the Devolution of Estates Act, to take the half of the land descended in lieu of her dower, the other half is undisposed of and descends as on an intestacy. The appellants represent the class entitled to this half, and claim that their land should be exonerated.

That recourse can in no event be had to the corpus of the fund invested under clause 5 is clear. That corpus is, specifically and not by way of residuary gift, bequeathed to the appellants: *Foster* v. *Smith* (1845), 1 Ph. 629; *Earle* v. *Bellingham* (1857), 24 Beav. 445; *Addecott* v. *Addecott* (1861), 29 Beav. 460; *Sheppard* v. *Sheppard* (1863), 32 Beav. 194; *In re Matthews Estate* (1881), 7 L.R. Ir. 269.

There is here "a gift . . . importing the specific bequest of a sum . . . accompanied by an expression of his intention that that sum should pass intact to the legatee:" *per* Lord Watson in *Carmichael* v. *Gee*, 5 App. Cas. 588, at p. 598.

But full effect must be given to the express and specific bequest of an annuity contained in the fourth clause, so far as that is possible.

Where an amount is given in general terms, followed by the creation of a fund out of the income of which the amount is to be paid, it is a matter of interpretation of the wording of the particular will whether the annuitant is confined to that income.

It may be that the will is so worded that the Court interprets it as meaning that the annuitant is entitled for life to the income of a fund and nothing else. Such was *Baker* v. *Baker*, 6 H.L.C. 616, and there are many such cases.

But the more usual case is the gift of an amount with a direction to form a fund wherewith to pay it, without any indication that the annuitant is so to be limited. In that case the amount becomes payable out of the estate not specifically bequeathed (including the corpus of the fund, if that be not bequeathed specifically, but as a residue): *Gee* v. *Mahood* (1879), 11 Ch. D. 891; *S. C., sub nom. Carmichael* v. *Gee*, 5 App. Cas. 588.

There are many such cases in England and Ireland mentioned in Theobald on Wills, Can. ed., p. 508, and in Ontario, pp. 512*b*, 512*c*. To these I add *Re Plaetzer Estate* (1911), 2 O.W.N. 1143.

The deficiency, therefore, should be paid out of the estate not specifically disposed of and out of that only.

I understand that the Gallery property, which is not specifically disposed of, is sufficient to pay all the deficit; if so, the order appealed from is wholly right.

The appeal should be dismissed with costs to be paid by the appellants.

LEITCH, J.:—I agree. Leitch, J.

SUTHERLAND, J.:—An appeal from the judgment of Middleton, J., dated 5th June, 1913, on a motion for the determination of certain questions arising in the administration of this estate. It being admitted on all hands that the Gallery property is sufficient in value to enable the arrears of the annuity in question to be paid, the important questions on the original motion were, and upon this appeal are, as to whether there was an intestacy as to this property, and as to whether it can be resorted to for the purpose of paying the said arrears. It is, I think, clear that, the property having been purchased by the testator subsequent to the date of the will, no clause therein providing for its disposition otherwise, and there being no residuary clause therein, there was an intestacy as to the property, as determined by Middleton, J. Sutherland, J.

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The fourth clause of the will is as follows: "I also give and bequeath unto my said wife an annuity or yearly sum of $200 payable half-yearly during the term of her natural life." It is plain under this language that the annuity is a charge upon the whole estate, unless restricted in its payment by some other clause in the will.

The fifth clause of the will is as follows: "I will and direct that my executors shall invest and keep invested during the lives of my wife and my sister Mary Ruddy and of the survivor of them all the moneys or securities for money of which I shall be possessed at the time of my death, and out of the interest or profits derived therefrom to pay the said annuity to my wife, and to pay the residue (if any) to my said sister, and in case my said sister should survive my wife then my executors are to pay the whole of the interest upon the moneys invested during the term of her natural life to my said sister."

There is not in this clause, or elsewhere, any statement that, unless the interest or profits derived from the investment of the moneys or securities for money is insufficient to pay the annuity, it will in part abate. There is, however, in paragraph 7 of the will, which is as follows—"I give and bequeath unto my said nephews and nieces all the moneys and securities for money to be equally divided amongst them after the death of my said wife and sister"—a clear expression of intention on the part of the testator that the "moneys and securities for money" are not to be impaired, but kept intact until the death of the wife and sister so as to be available for equal division thereafter amongst the nephews and nieces.

The annuity deficiency cannot, therefore, properly be made payable out of the "moneys and securities for money." It can, however, be made payable out of the Gallery property, as already determined.

Middleton, J., has rightly decided that the widow is "entitled to receive the balance of her annuity." He does not expressly say that resort could be had for the payment of such balance to the portion of the estate comprised in the term "moneys and securities for money." He does say, however, that, "if it is material, resort should first be had to the proceeds of the land descended," namely, the Gallery property.

As, apart from the question whether there was an intestacy as to this property or not, the main question was whether resort could be had to it for the payment of the arrears of the annuity, and he has expressly found that it could, and that indeed it should be first resorted to for that purpose, I think the appeal should be dismissed with costs.

If necessary, or of importance, the judgment can be amended so as to make it clear that the arrears of annuity are not to be payable out of the moneys and securities for money.

Mulock, C.J. (dissenting in part)

MULOCK, C.J.EX. (dissenting in part):—Appeal from the judgment of Middleton, J., construing the testator's will.

The testator bequeathed an annuity of $200 to his widow for the term of her natural life; and the questions involved in this appeal arise in respect of a yearly deficiency in the amounts paid to her by the testator's executors on account of such annuity.

The will was made on the 23rd June, 1884, and the testator died on the 13th October, 1889. The following are extracts from such portions of his will as concern the annuity:—

"Fourth, I also give and bequeath unto my said wife an annuity or yearly sum of $200 payable half-yearly during the term of her natural life, and also the assurance upon my life which was insured for her benefit.

"Fifth, I will and direct that my executors shall invest and keep invested during the lives of my wife and my sister Mary Ruddy and of the survivor of them all the moneys or securities for money of which I shall be possessed at the time of my death, and out of the interest or profits derived therefrom to pay the said annuity to my wife, and to pay the residue (if any) to my said sister, and in case my said sister should survive my wife then my executors are to pay the whole of the interest upon the moneys invested during the term of her natural life to my said sister."

Then, after devising certain real estate, the will proceeds: "Seventh, I give and bequeath unto my said nephews and nieces all the moneys and securities for money to be equally divided amongst them after the death of my said wife and sister."

The will contained no residuary clause.

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After making his will, the testator purchased, at the price of $2,200, certain real estate known as the Gallery property, which at the time of the purchase was incumbered to the extent of $1,000. The difference between that amount and the purchase-price the testator paid in cash, and the mortgage remained unpaid up to the time of his death, and was paid off by his executors out of the moneys of the testator which had come to their hands. These two sums withdrawn from his moneys so reduce the amount thereof that the balance of his "moneys or securities for money," remaining in his executors' hands, proved insufficient to meet the widow's annuity of $200, and we are asked to say whether the widow's estate (she having since died) is entitled to look to the corpus, if any, and, if so, what portion of his estate, in respect of the deficiency.

The testator died intestate as regards the Gallery property, and the executors sold it. The widow electing, under the Devolution of Estates Act, to take one half of the purchase-money in lieu of dower, that amount was paid to her, and the other half was retained by the executors to be dealt with as undisposed of assets.

The first point to determine is, what was bequeathed to the widow; was it the income derivable from a certain fund during her lifetime limited to $200, or was it a definite annual sum of $200 for the term of her life? The language of clause 4, in my mind, admits of no doubt. The testator says: "I also give and bequeath unto my said wife an annuity or yearly sum of $200 payable half-yearly during the term of her natural life." Standing alone this is a gift of a definite annual sum, and not a sum to be taken through the medium of an investment, and, unless controlled by other provisions of the will, would be payable out of any assets not otherwise disposed of.

Then follow the provisions of clause 5, which direct the executors to invest and keep invested during the lives of his widow and sister and the survivor of them, not a portion, but "all the moneys or securities for money" of which the testator should be possessed at the time of his death, and out of the interest or profits derived therefrom to pay the said annuity. The language of this clause is equally plain. All the testator's moneys and

securities for money are to be kept invested throughout the whole lifetime of the widow and sister and of the survivor, and the annuity is to be a first charge on such income or profits. But the income or profits are not declared to be the only source of payment, and nowhere does the testator indicate an intention to limit the half-yearly payments to the widow to the then income or profits of the fund.

Thus, it seems to me, that the bequest to the widow was the fixed sum of $200 a year, and not merely income or profits derivable from a certain fund limited always to $200 a year.

As to the deficiency, I am of opinion that resort cannot be had to any of the "moneys or securities for money" mentioned in the testator's will, for the reason that the will discloses the testator's intention that all of his "moneys or securities for money" shall ultimately go in their integrity to his nephews and nieces. The whole of these "moneys or securities for money" are to be invested and kept invested during the lifetime of the widow and sister and the survivor, and on her death the whole fund, unimpaired by any deductions, is given to the testator's nephews and nieces.

Where a will shews an intention that a fund, the income of which is charged with payment of a fixed annual sum, shall be maintained in its integrity during the currency of the annuity, and then is to go over in its integrity to others, the annuitant is not entitled to resort to the corpus in respect of any deficiency: *Wright* v. *Callender* (1852), 2 DeG. M. & G. 652.

The next question is, whether the money in the hands of the executors, derived from the sale of the Gallery property, may be resorted to, and the appellants rely on *Baker* v. *Baker*, 6 H.L. C. 616, as an answer to such claim. The facts, however, of that case make it inapplicable. There the testator gave the whole of his estate to his trustees in trust to convert the same into money and invest, and out of the dividends or interest arising from such investments to pay to his widow a fixed annual sum, and on her death the trustees were to stand possessed of the whole of such investments in trust for others. Thus the whole fund, subject to the charge on the dividends or interest, was given to others, indicating the testator's intention that the annuitant should not

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have the right to resort to any of the corpus of that fund in respect of her annuity.

But in the present case there is a fund in the executors' hands which the testator has not disposed of; and, therefore, *Baker* v. *Baker, supra*, is inapplicable in regard to the claims now made on that fund, though it is authority for excluding the claim on the "moneys or securities for money" fund. That an undisposed of fund may be resorted to for the purpose of paying an annuity, which, as here, is charged generally on the testator's estate not otherwise disposed of, admits of no doubt: *May* v. *Bennett* (1826), 1 Russ. 370; *Wright* v. *Callander, supra*, *Carmichael* v. *Gee*, 5 App. Cas. 588, at p. 597.

In the present case, whilst payment of the annuity is specially charged on the income of a certain fund, it remains also a general charge on the whole of the testator's undisposed of estate; and, the testator having died intestate as to the Gallery property, the balance of the purchase-money remaining, after payment to the widow of her share and after recouping the fund its proper proportion of the amount advanced in payment of the mortgage, is chargeable with the deficiency in respect of the annuity. That balance must be dealt with as realty. The source from which it came was realty at the time of the testator's death, and therefore did not pass as part of his "moneys or securities for money."

The primary meaning of "securities for money" is money secured on property: *Murphy* v. *Doyle* (1892), 29 L.R. Ir. 333; and there is nothing to shew that the testator used those words in any other sense.

For these reasons, I think the appeal should be allowed as to that portion of the order which authorises payment of the deficiency out of the corpus of the testator's "moneys or securities for money," but in other respects should be dismissed.

The executors are entitled to the costs of the appeal; no costs to the other parties.

Appeal dismissed: MULOCK, C.J.Ex., *dissenting in part.*

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. CONTRACTS (§ I C—12)—CONSIDERATION — OPTION GIVEN TENANT TO PURCHASE DEMISED LANDS—REVOCATION.

An option given in a lease to a tenant to purchase the demised premises at any time during the term, is based on a sufficient consideration, *i.e.*, the creation of the tenancy, and is not revocable at the will of the lessor, although not under seal.

[*Matthewson* v. *Burns*, 12 D.L.R. 236, 4 O.W.N. 1477, reversed on other grounds.]

2. CONTRACTS (§ V A—381)—OPTION OF TENANT TO PURCHASE DEMISED PREMISES—WAIVER OF.

An option in a lease permitting a tenant to purchase the demised premises during his term is rendered inoperative before the expiry of the term by the tenant accepting a new lease for a further period to commence immediately after the expiry of the original term where the new lease contains terms and conditions inconsistent with the right to exercise such option.

[*Matthewson* v. *Burns*, 12 D.L.R. 236, 4 O.W.N. 1477, reversed.]

Statement

APPEAL by the defendant from the judgment of BOYD, C., 12 D.L.R. 236, 4 O.W.N. 1477, establishing an alleged contract (by way of option in a lease) for the sale by the defendant's testator to the plaintiff of a house and lot in the city of Ottawa, and directing specific performance.

The appeal was allowed.

W. C. McCarthy, for the defendant, appellant.

G. F. Henderson, K.C., for the plaintiff, respondent.

Mulock, C.J.

December 23. MULOCK, C.J.EX.:—This action is for specific performance, and was tried by the learned Chancellor, who found for the plaintiff, and the defendant appeals from the judgment.

It appears that Thomas A. Burns (since deceased) owned a certain house property in the city of Ottawa, being premises No. 134 Stewart street, and, by agreement in writing, not under seal, bearing date the 30th April, 1910, leased the same for a term of thirty-five months, expiring on the 30th April, 1913, at a certain rental. This agreement also contained the following provision: "The said Mary A. Matthewson to have the option of purchase at any time on or before the expiration of this lease for the sum of $2,800."

Thomas A. Burns died on the 28th January, 1911, having

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first made his will, whereby he devised and bequeathed his whole estate to his brother, the defendant, William A. Burns, whom he appointed sole executor. On the 1st May, 1911, William A. Burns sent to the plaintiff by registered letter the following notice:—

"To Mary A. Matthewson, or Mrs. Hugh Matthewson,
134 Stewart street, Ottawa.

"Take notice that I, the undersigned, executor of the estate of the late Thomas A. Burns, hereby give notice of the withdrawal of the option of purchase for $2,800 contained in a certain lease dated April 30th, 1910, of the premises 134 Stewart street, Ottawa.

"Yours truly,
"W. A. Burns,
"For estate late T. A. Burns."

The plaintiff entered and continued in possession under the lease throughout the whole term. In February, 1913, Mr. Champagne, who was acting on behalf of the defendant, wrote to her a letter bearing date the 2nd February, 1913, which was not produced nor was evidence of its contents given; but on the 5th February, 1913, the plaintiff sent to Mr. Champagne the following answer:——

"Ottawa, Feby. 5th, 1913.

"Mr. Champagne,

"Dear Sir:—In reply to your letter of the 2nd inst., I will take the house of Mr. Burns, 134 Stewart street, for another year at $30 a month, providing he does the necessary repairing." (The letter then proceeds to point out certain needed repairs).

To this letter Mr. Champagne answered by a letter of the 17th February, 1913, as follows:—

"Dear Madam:—In answer to your letter regarding house No. 134 Stewart street, Mr. Burns has decided to let you have the house at $30 without the repairs you ask for. Owing to the large amount he has already spent on that house during your tenancy, etc., Mr. Burns does not intend spending any more money on this property. I want to again mention to you that the fence between the house 138 and 134 must be put in the same position

as it was when you took the house, otherwise proceedings will be taken to compel you to do so. I must have an answer by the 20th inst.

"Yours truly,
"Nap. Champagne."

On receipt of this letter, Mrs. Matthewson sent the following letter to the defendant:—

"Ottawa, February 17th, 1913.

"Mr. Burns,

"Dear Sir:—I enclose cheque for $25, being rent for February, also receipt for interest. I am very glad to have the house for another year on my mother's account. I will see the fence is put back.

"Yours sincerely,
"M. Matthewson."

And on the 18th February, 1913, she wrote to Mr. Champagne as follows:—

"Mr. Champagne:—I will take the house 134 Stewart street, at $30 a month. Will agree that before leaving will see that the fence is put back as it was when I rented the house. The only money ever spent was $30 last fall for plumbing, etc.

"Yours truly,
"M. A. Matthewson."

To this letter Mr. Champagne sent the following reply on the 24th February, 1913:—

"Dear Madam:—I have submitted your letter to Mr. Burns, and in order to avoid further annoyance in this matter Mr. Burns has instructed me to tell you that the fence has to be replaced in its former position by the 1st of May next. This whether you keep the house or not. In case you would not keep the house on account of rebuilding the fence, please let me know at once. Mr. Burns wants his property perfectly enclosed, as it was when you became tenant."

On the 10th March, 1913, a written lease was entered into between the parties, whereby the defendant leased to the plaintiff the premises in question for a term of twelve months from the 1st May, 1913, at the rate of $30 a month; the first month's rent to be due and paid on the 1st day of May, 1913. This lease

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contains agreements on the part of the lessee to pay the rent; not to assign or sublet without leave, nor to make changes without the lessor's consent; also agreement to keep in repair and other appropriate stipulations including the following: "The lessor to have the right, at any time within three months before the expiration of the said term, to affix 'Notice to Let' on said premises, and will permit all persons having written authority therefor to view the said premises at all reasonable hours." It also provides for the lessor being entitled to enter and view state of repair, and for the lease becoming void upon non-payment of rent or non-performance of conditions, and that the lessor shall pay the taxes and assessments.

It also contains the following provision: "It is also understood that the fence formerly dividing the property between W. G. Hurdman and that of the lessor W. A. Burns is to be replaced in its former position on or before the 1st of May, 1913; otherwise this lease shall be null and void."

Mrs. Matthewson says that, before entering into the second lease, she consulted her brother, Mr. Pennock, and also had conversation with the defendant and Mr. Champagne. In her evidence she says: "I received letters from Mr. Champagne at the time urging me to sign the lease at once; that it must be signed that day or a certain day; and I was afraid I would lose the house and would not have it for a home; and I thought in meantime I would sign that; and, after my sister returned, I decided I would exercise my option."

The following are extracts from her evidence:—

"Q. Did you have a conversation with W. A. Burns himself in connection with the signing of this new lease? A. I did.

"Q. Before it was signed; A. Yes.

* * * * * * *

"Q. Who was present besides you and him? A. My brother, W. H. Pennock.

"Q. Was there anything said on that occasion about the option? A. Yes; I said I wanted to exercise the option, and he refused to consider it at all at that time.

"Q. But you told him then you intended to exercise your option notwithstanding the signing of the lease? A. Yes.

"Q. That was before signing it? A. Yes.

* * * * * * *

"Q. You told him you had up to the end of April; you knew you had up to the end of April to exercise the option? A. Yes.

"Q. You still had to the end of April to exercise your option? A. Yes.

"Q. And you told him you were going to exercise the option? A. Yes.

"Q. But were willing to sign the lease in the meantime? A. Yes.

"Q. What did you do beyond that? Nothing beyond signing? A. No; I signed the lease.

"Q. Did you do nothing about the option? A. No.

* * * * * * *

"Q. But you knew, of course, that he was taking the position that you had no right to the option? A. Yes.

"Q. And you said you had? A. Yes."

The following are extracts from her cross-examination:—

"Q. You had quite a bit of correspondence with Mr. Champagne, Mr. Burns's solicitor, in connection with the renting of the house under this lease? The negotiations evidently culminated in this lease of the 10th March, 1913? A. Yes.

"Q. How is it that in this lease you never made any mention of an intention to exercise any option? A. At that time I did not know that I could. I wanted to secure the house. If I could not on the option, I had the lease. I wanted to have it for a home in the meantime; and after, when my sister's husband died and she said she was coming home to live with me, then I wanted the house. I wanted to exercise my option.

* * * * * * *

"Q. You never told Mr. Champagne at any time during your negotiations for the new lease that you intended to exercise the option? A. I did. I said I wanted to exercise my option, and he said there was no consideration paid and laughed about it.

"Q. Where did that take place? A. In Mr. Champagne's office.

"Q. Do you know when it took place? A. The time I went to sign the last lease in March.

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"Q. Was that before or after you had signed the lease? A. It was the day I signed the lease. I told Mr. Champagne I wanted to exercise my option at that time, and he said, because there was no consideration paid, the option was of no use."

From her re-examination:—

"Q. You say Mr. Champagne told you the option was not binding because there was no consideration? A. Yes.

"Q. Did you take any advice on that question at the time? A. No, not at the time.

"Q. Not until after? A. No; I thought what he said was so, and I paid no more attention to it just for that time."

The plaintiff's brother, Mr. Pennock, was examined on her behalf, and the following are extracts from his examination:—

"Q. Do you remember when this new lease was under discussion Mrs. Matthewson and Mr. Burns meeting somewhere in the post-office building? A. Yes.

"Q. In your presence? A. Yes.

"Q. Just at that time were you familiar with her rights or liabilities at all? A. No; I was not familiar with the option at all.

"Q. How did you come to be there? A. Well, my sister discussed with me the advisability of leasing the house for another year, and I strongly advised her to lease it. I did not know anything about the option; she might not want it for more than another year, and I advised her to lease it.

"Q. What was said that might be of interest here between her and Mr. Burns in your presence? A. Well, my sister mentioned to Mr. Burns that she had an option on the property. I do not think it was discussed. My sister told him she had this option."

On cross-examination:—

"Q. Do you say that, in a conversation that took place between W. A. Burns and Mrs. Matthewson in your presence, Mrs. Matthewson ever said she intended to exercise any option? A. I do not think so. I remember her saying she had an option; that was the extent of it.

"Q. But she never expressed an intention in your presence of wanting to exercise that option? A. No, not to my knowledge."

The defendant from the 1st May, 1911, when he caused the notice of that date to be sent to the plaintiff withdrawing the option, never receded from his attitude that the option had been revoked by that notice. Assuming, however, that it was in full force when the lease of the 10th March, 1913, was entered into, what effect had that lease upon the option? That instrument, entered into by the plaintiff, is, I think, an admission by her that on the 10th March, 1913, the defendant had such an estate in the land as entitled him to lease it to her for one year, commencing after the expiry of the time allowed her for accepting the option. It empowered the defendant to exercise during such year the various rights of a landlord, including the right to enter upon the premises within three months of the expiry of the term, and to affix upon the premises "Notice to Let," and it also entitled prospective tenants, when authorised by the defendant, to enter upon and examine the premises.

Accepting as correct the plaintiff's evidence as to the attitude of the two parties when the second lease was entered into, it was this: the plaintiff was contending that the option was in force, and the defendant was negativing that contention. The plaintiff was not deceived or misled, but deliberately entered into the new arrangement, being anxious to secure the premises by lease or purchase, thinking, as it is put in the evidence, she would have "two strings to her bow;" a lease certain for a year and the chance of acquiring the fee in the event of the option being held binding.

It, therefore, cannot be said that she was the victim of any fraud or overreaching.

Further, her letters shortly before the second lease warrant the conclusion that she considered the option at an end. Otherwise, why should she ask the defendant to make extensive repairs for the purpose of the new lease, if the property was to become hers on the 30th April?

Her acceptance of the new lease was an abandonment by her of any interest in the land which would be inconsistent with the relationship created by it of landlord and tenant respectively for one year after the date fixed for the exercise of the option; otherwise, by exercising the option, she would have destroyed the new

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contract of landlord and tenant, which both parties stipulated was to continue for one year.

When, therefore, she accepted a lease commencing on the 1st May, that instrument must be interpreted as a surrender by her of the option.

Where a person is entitled to an option, and leads the grantor to believe that he does not intend to exercise it, if the grantor acts on that belief, and is thereby induced to alter his position, the person who formerly held the option will be precluded from subsequently exercising it, and will be held to have waived it: *Nova Scotia Steel Co. Limited* v. *Sutherland Steam Shipping Co. Limited* (1899), 5 Com. Cas. 106; *Re Tyrer & Co. and Hessler & Co.* (1901), 84 L.T.R. 653.

In the latter case Phillimore, J., says: "I think here the charterer did alter his position, and he altered his position upon the faith that the forfeiture would not be enforced, and he was allowed to do so by reason of the delay in giving notice of the forfeiture."

In the present case the plaintiff, by signing the lease of the 10th March, induced the defendant to alter his position, whereby he acquired new rights, and the plaintiff cannot now be allowed to assert a claim that would destroy those rights.

I, therefore, think this appeal should be allowed with costs. It appears to me unnecessary to express any opinion on the question whether there was any consideration to support the option.

Riddell, J.

RIDDELL, J.:—An appeal by the defendant from the judgment of the Chancellor of the 20th June, 1913. The main facts sufficiently appear in the Chancellor's reasons for judgment.

The first objection is, that the agent Hurdman had no power to give to the plaintiff an option to purchase, under the power of attorney. This objection is wholly untenable, when the fact appears that the agent discussed the whole matter with his principal, and the principal approved of the whole transaction.

The next and chief objection is, that the option given was revocable, and it was revoked. This depends upon what, I venture to think, is a misunderstanding of the decisions; and, therefore, I shall examine these.

The case of *Davis* v. *Shaw*, 21 O.L.R. 474, was much relied upon by the defendant—but the facts of that case must be considered. There the plaintiff made an offer to purchase a certain piece of property for a certain sum—the defendant accepted this offer: "I, James Shaw, agree to sell the above property for the above stated sum." And added on the same piece of paper: "I also promise to give the purchaser an option of purchasing" another lot "for the sum of $1,000 . . ." In the Divisional Court, it was held that there were two distinct agreements: (1) to sell the first lot at the sum named; and (2) an option for the other lot. Falconbridge, C.J., says, p. 480: "It is contended that the offer is an integral part of the agreement for the sale of the land . . referred to in the first part of the memorandum, so as to supply a consideration sufficient to support the 'promise' made in the latter part. I am unable to accede to this view. The transaction relating to the" (first-named property) "was a matter by itself. It was carried out by the payment of the purchase-money and delivery and registration of the conveyance." Britton, J., p. 481: "If one agreement, although evidenced by two separate writings, in reference to what is really one transaction, I see no reason why one may not supply the consideration for the other;" but he comes to the conclusion that "this one paper, in two parts, is to be considered as if relating to two distinct matters, having no connection one with the other." I agreed in the result. The whole *ratio decidendi* of the case was that the sale and the option were "two distinct matters having no relation one with the other." The Chief Justice points out, p. 481, that the cases on options contained in leases have no application to the case then under consideration—it is true that he adds, "I think these are all cases of covenants under seal," without which remark it is probable this branch of the defence would not have been heard of, but he says at once thereafter: "At any rate they have no application to the point now under consideration."

The decision in a case in which the "option was an independent promise . . . that happened to be upon the same paper as another distinct agreement, in reference to another property" (21 O.L.R. at p. 483), does not carry with it the idea that an

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option to purchase in the same paper with a lease, part of the same transaction and referring to the same property, is not enforceable without seal or consideration specifically referable to it.

In *Maltezos* v. *Brouse*, 2 O.W.N. 990, 19 O.W.R. 6, the case of *Davis* v. *Shaw* was applied to the following state of facts. The defendants agreed by a written document to lease No. 71 to the plaintiff at $50 per month, and added: "We also agree to give said" plaintiff "the first privilege of leasing" No. 73. A written lease was made of No. 71, which contained no reference to No. 73. The Divisional Court held that the option was entirely without consideration (19 O.W.R. at p. 8), and that it could be revoked. This case is no authority for the proposition contended for by the defendant.

In *Miller* v. *Allen*, 7 D.L.R. 438, 4 O.W.N. 346, in a lease not under seal was an option to the lessee to purchase. Mr. Justice Middleton dismissed the tenant's action on other grounds, but added: "I have considered myself bound by the decisions in *Davis* v. *Shaw*, 21 O.L.R. 474, and in *Maltezos* v. *Brouse*, 2 O.W.N. 990, 19 O.W.R. 6, to regard the clause in question as a mere offer or option, quite distinct from the lease, and not founded upon any consideration;" and intimates that, were it not for these cases, he would hold that the option was enforceable.

As a member of the Court which decided *Davis* v. *Shaw*, I can say that nothing was further from the minds of the Court than that they were rendering such a decision as is suggested—the Chief Justice expressly stating that the case of an option contained in a lease was different.

The remark (purely *obiter*) of the Chief Justice, "I think these are all cases of covenants under seal," has rendered it advisable to examine the American cases.

While in most of the cases the lease was under seal, in none was that made a ground for the decision; and there is at least one case where the lease was not under seal.

In *Gustin* v. *Union School District of Bay City* (1893), 94 Mich. 502, 34 Am. St. Rep. 361, both parties signed the lease—it does not seem to have been under seal. The Court says (p. 363): "The rent was a sufficient consideration for the offer, which was therefore irrevocable."

In *Haveralty* v. *Warren* (1866), 18 N.J. Eq. 124, 90 Am. 613, a lease was made by the defendant to the plaintiff; and, by a written agreement, not sealed but endorsed on the lease, an option to purchase the land at the end of the term for $4,000 was given, both parties signing the agreement. The Chancellor held: "The contract is not under seal . . . The agreement was executed at the same time with the lease, and was part of the same transaction. . . . In taking a lease, a tenant may be willing to pay a high rent for a number of years, provided the landlord will give him an optional right to purchase at a fixed price. And it is to be presumed that the landlord would not agree to such a boon, unless he had consideration in the lease." The option was held binding and not revocable, but for other reasons the plaintiff was left to his remedy at law.

In *Souffrain* v. *McDonald* (1886), 27 Ind. 269, the defendants leased to the plaintiff certain land for two years, with an option to purchase—apparently the lease was under seal, but that forms no part of the reasons for judgment. The Court held, pp. 274, 275: "The stipulations, on the one side to lease the lot for a period of two years, with the right of the lessees, within that time, to purchase the same at the price and on the terms stated in the agreement, and, on the other, to pay the rent agreed upon and to erect the fence, must be considered as constituting one entire agreement, each particular stipulation forming an inducement thereto. The agreement to pay the rent and build the fence must be deemed to have been made in consideration, as well for the privilege of becoming the purchasers of the lot, as for its use."

In *Stansbury* v. *Fringer* (1840), 11 Gill & Johns. (Md.) 149, a contract under seal was entered into whereby the plaintiff (Fringer) was allowed to enter upon certain land of the defendant (Stansbury) and enjoy the same for twelve years, for the consideration that he was to build a house thereon and pay the taxes "during the said term of rent"—the defendant agreed to sell the land to him at a fixed price "any time within the said term of rent." On demurrer the plaintiff's bill in equity was sustained by the County Court, and the defendant appealed to the Court of Appeals of Maryland. The fact that the document

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was under seal plays no part in the judgment (p. 152): "Where a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation . . . and this will be the case, whether the consideration be a sum of money to be paid in gross or . . . several payments of money. . . . It is impossible to say in this case, from the face of the contract, that the (defendant) would have agreed either to occupy the land, or to pay the taxes or to erect a house, except for this very privilege of purchasing . ."

In *Hayes* v. *O'Brien* (1894), 149 Ill. 403, there was a lease for ten years, with an option to purchase—it seems to have been under seal, but that fact is not considered important. The Court says (p. 412): "The contract here is under seal and imports consideration, but if it was not, it is manifest that the privilege of becoming a purchaser of the premises formed at least a part of the inducement and consideration for the acceptance of the lease by the lessee."

Schroeder v. *Gemeinder* (1875), 10 Nev. 355, was also the case of a lease with an option to purchase—it apparently was under seal, but that fact (if a fact) does not enter into the judgment. The Court (p. 364) asks: "What was the consideration for this covenant giving the first privilege to purchase?" And answers the question: "The covenant to pay the rent must be deemed to have been made in consideration, as well for the privilege of becoming the purchaser of the property, as for its use."

House v. *Jackson* (1893), 24 Or. 89, is the same kind of a case, and the result is the same: "It has repeatedly been held that in a lease of real property, containing an option to purchase the same, the contract to pay the rent was a sufficient consideration to support the option" (p. 95).

Maughlin v. *Perry* (1871), 35 Md. 352, is also in point.

De Rutte v. *Muldrow* (1860), 16 Cal. 505, was a similar case—the lease apparently was under seal, but that did not enter into the judgment: see p. 513. This case contains a discussion of the power of an agent to give a lease with a clause of option—but, for the reason already given, it is not necessary to quote the judgment on that point.

Hall v. *Conter* (1870), 40 Cal. 63, also makes no point of the lease being under seal, if it was.

In Hilliard on Vendors, 2nd ed., p. 296, it is said: "In case of such a covenant, allowing a lessee to purchase the fee at a specified sum, the law intends that the rent was fixed at the amount reserved, as an inducement to the purchase."

No authority has been cited to us and I can find none which supports the contention of the defendant that the option to purchase was a distinct and separate offer without consideration, and therefore, revocable; and the argument is wholly without foundation on principle. I am of opinion that the law intends the rent, &c., "as fixed at the amount reserved," as consideration as well for the option as any other agreement by the landlord, and I would adopt the passage quoted from Hilliard, changing the word "covenant" into "agreement," thereby extending the rule to leases, &c., not under seal.

The next point has given me more difficulty.

On or about the 1st May, 1911, during the existence of the term created by the lease, the defendant, for the estate of his deceased brother, gave to the plaintiff a written notice of withdrawal of the option to purchase. For the reasons already given, I think that this was wholly inoperative; but there is no room to think that it was not in good faith and under full conviction that this was his legal right. The plaintiff knew that the defendant "was taking the position" thereafter that she "had no right to the option" (p. 27). In the fall of 1912, some negotiations took place concerning a mortgage the plaintiff had, and it was represented (I do not make the expression more definite) that the plaintiff would accept payment of her mortgage if the defendant gave a new lease (p. 41). Afterwards some negotiations took place in regard to leasing the premises for another year, and the defendant's solicitor, preparing a lease, wrote the plaintiff that she must execute the lease at once, if at all, whereupon she, on the 10th March, 1913, executed a lease for one year, beginning on the 1st May, 1913; the defendant also executed the lease, which was not under seal. She had, on the 5th February, written to the defendant's solicitor: "I will take the house . . . for another year at $30 per month, provided he does the

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necessary repairs; the cellar is wet all the year, and a few boards are rotted—there are only two bedrooms fit for use, the back room . . isn't heated. The . . drawing and dining-rooms need papering badly, the paper is torn in several places . . ." On the 17th February, this is answered: "Mr. Burns has decided to let you have the house at $30 without the repairs you asked for . . he . . does not intend spending any more money on this property. I want to mention to you that the fence between the house 138 and 134 must be put in the same position as it was when you took the house, otherwise proceedings will be taken to compel you to do so." She writes the same day: "I am glad to have the house for another year . . . I will see the fence is put back." The following day she writes: "I will take the house . . . at $30 a month; will agree that before leaving will see that the fence is put back as it was when I rented the house"—and goes on to complain of the slight amount of repairs done by the deceased. On the 24th February, the defendant's solicitor writes: "The fence has to be replaced in its former position by the 1st of May next, this whether you keep the house or not. In case you would not keep the house on account of rebuilding the fence please let me know at once. Mr. Burns wants his property perfectly enclosed, as it was when you became tenant." It was after this correspondence that the lease was drawn up, already referred to. This is not under seal: it purports to lease the premises for 12 months from the 1st May, 1913, at $30 per month, the plaintiff agreeing to pay rent, keep up the premises, &c.; "the lessor to have the right, at any time within three months before the expiration of the said term, to affix 'Notice to Let' on said premises, and will permit all persons having written authority therefore (*sic*) to view the said premises at all reasonable hours." "The lessee agrees to allow the said lessor or his agent to enter the said premises from time to time and to view the state of repair of same, and to make repairs if he thinks proper . ." The contract generally does not mention any parties but lessor and lessee, and does not extend to assigns, &c., &c. There is inserted a clause intended to compel the plaintiff to replace the fence, which had been a matter of controversy:

"It is also understood that the fence formerly dividing the property between W. G. Hurdman and that of the lessor W. A. Burns is to be replaced in its former position on or before the 1st of May, 1913; otherwise this lease shall be null and void." It was stated by both parties before us that this fence had not been replaced; but the plaintiff cannot take advantage of that fact to avoid the lease. "In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms, however clear and explicit, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors:" *Davenport* v. *The Queen* (1877), 3 App. Cas. 115, at p. 128. Some of the cases referred to in this decision of the Judicial Committee are *Roberts* v. *Davey* (1833), 4 B. & Ad. 664; *Pennington* v. *Cardale* (1858), 3 H. & N. 656; *Hughes* v. *Palmer* (1865), 19 C.B.N.S. 393, 407. The lessor here is not desirous of avoiding the lease, but affirms it.

I think it must be obvious that the plaintiff has in this new lease agreed that the defendant, as against her, has, and after the 1st May shall have, rights wholly inconsistent with the exercise by her of her right to buy. Knowing and appreciating that the defendant contended that she had no right to exercise the option originally given, she changes her position and becomes possessed of an *interesse termini* wholly inconsistent with having a right to become owner. All rights of the owner of the premises in the first lease are, of course, subject to her right to purchase; but not so in the later lease.

The law is fully discussed in the *locus classicus*, the note on p. 425 to *Gretton* v. *Haward*, 1 Swanst. 409. The maxim *allegans contraria non est audiendus* applies.

I think the appeal should be allowed with costs and the action dismissed with costs.

Sutherland, J.

SUTHERLAND, J.:—An appeal from the judgment of the Chancellor delivered on the 20th June, 1913, decreeing specific performance of a written option dated the 30th April, 1910.

Thomas A. Burns was in his lifetime the owner of a residential property in the city of Ottawa. On the 4th September, 1899, he executed a power of attorney under seal in favour of William

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George Hurdman, sufficient in form, as the Chancellor held and I agree, to enable him to lease the said property inclusive of the option to purchase. On the 30th April, 1910, Hurdman executed a short written lease to the plaintiff, to run from the 1st June, 1910, "to the last day of April, 1913," at a monthly rental, in advance, of $25. The lease contains the following clause: "The said Mary A. Matthewson to have the option of purchasing at any time on or before the expiration of this lease for the sum of ($2,800) twenty-eight hundred dollars," which option is the subject of the controversy herein.

On the 28th January, 1911, Burns, who had been ailing for some time, died, leaving a will dated the 7th May, 1910, under which he devised the property in question to his brother, the defendant herein, and of which he appointed him sole executor. Letters probate were duly issued to the defendant under date the 27th March, 1911. Early in May following, the defendant gave the plaintiff written "notice of withdrawal of the option to purchase." To this notice the plaintiff made no response, but, as she says in her evidence, ignored it at the time. In this action, upon her examination for discovery she had apparently forgotten all about it, and denied receiving it. Later, the notice was found among her papers, and its receipt admitted by her at the trial.

It has been said that admissions may sometimes be implied from the acquiescence of a party, as for example: "If a tenant, on *personally* receiving notice to quit on a particular day, makes no objection, his conduct would amount to *primâ facie* evidence that his tenancy expires on the day stated in the notice:" Taylor on Evidence, 10th ed. (1906), vol. 1, p. 570; *Doe dem Leicester* v. *Biggs* (1809), 2 Taunt. 109; *Thomas dem. Jones* v. *Thomas* (1811), 2 Camp. 647; *Doe dem. Clarges* v. *Forster* (1811), 13 East 405; *Oakapple dem. Green* v. *Copous* (1791), 4 T.R. 361; *Doe dem. Baker* v. *Woombwell* (1811), 2 Camp. 559; *Walker* v. *Godé* (1861), 30 L.J. Ex. 172.

In the early part of 1913, the landlord, anxious apparently to learn definitely whether his tenant would enter into a new lease for a further term, or he should look for another, notified her, through his solicitor, that, if she wished to continue as tenant at the close of the current term, she must sign a new lease on

different terms. She, too, it would appear from the evidence, was anxious, for personal reasons, to continue to live on the property, and to have a definite assurance from the landlord that she could. Negotiations and a correspondence then began, and it is reasonable to think that, if the defendant then looked upon the option as something still existing, and which she intended to exercise during its currency, she would have said something about it in the correspondence. She, however, wrote letters on the 3rd, 17th, and 18th February, about the new lease and its terms, without mentioning it. She also intimates in her evidence that at this very time she went to the defendant with the idea of exercising the option, but does not pretend that she so stated to him. What she does say is, that, before the new lease was signed by her, she told him she had the option, and, notwithstanding her execution of the lease, proposed to exercise it. She speaks of having told this to the defendant and his solicitor, Mr. Champagne. Both gave evidence at the trial and contradicted her as to this. Her brother, whom she called to corroborate her in so far as the alleged conversation with the defendant was concerned, says that at the interview she mentioned that she had an option, but he also says she never expressed, to his knowledge, an intention of exercising it.

Finally, on the 10th March, 1913, a new lease in writing was entered into between the parties to run for a term of 12 months from the 1st May, 1913, at the increased rental of $30 a month in advance.

The plaintiff in her statement of claim says that on the 29th April, 1913, she notified the defendant that she intended to exercise the option, and also that on that day she tendered a conveyance and the purchase-money, and this tender is admitted by the defendant in his statement of defence.

The defendant at the trial claimed that the authority of the agent, under the power of attorney, was insufficient to enable him to make the lease in question, and contended that, in any event, the authority given was revoked.

It is clear, however, from the evidence, that the deceased was aware that the plaintiff was occupying the premises subsequent to the date of any alleged cancellation of the authority,

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and that she was paying rent. It must be assumed, therefore, I think, that he knew that a lease of some kind was in existence.

According to the plaintiff's own evidence (at p. 23), it would, however, almost appear that, at the time the first lease was made, the deceased himself was unwilling to include in a lease an option such as the one in question. She says he was unwilling to sell at that time, yet, as expressed in the lease, the option was such that there was nothing to prevent the plaintiff notifying the deceased the next day of her desire to exercise it, and thus compelling him to sell.

It seems to me, however, that the case may well be determined on the point whether the plaintiff waived the option by her conduct and by taking a new lease. Knowing that the owner had notified her long before that he had withdrawn the option, and that he was refusing to discuss a new lease on the basis of its existence, she nevertheless negotiated for one and obtained it. The demised term in it was to run for a year beyond the date when she would be required to relinquish possession under the existing lease and at a higher rental. Her course of conduct, as it seems to me, amounts to a waiver of the option and an election to treat it as at an end.

On this ground, I would allow the appeal and dismiss the plaintiff's action with costs here and below.

The lease containing the alleged option has been registered, and such registration should be vacated.

The defendant is said to have remained in possession of the property without paying rent. There is no counterclaim, but the defendant's rights as to subsequent rent or damages will, of course, be reserved.

LEITCH, J.:—I agree.

Appeal allowed.

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Judicial Committee of the Privy Council, Lord Moulton, Lord Parker of Waddington and Lord Sumner. June 23, 1914.

1. WATERS (§ II C—86)—USE OF WATER—TAKING FOR PUBLIC WATER SUPPLY—STATUTORY AUTHORITY.

The British Columbia Water Privileges Act, 1892, as summed up in the recital of the Water Clauses Consolidation Act, 1897, relating to the control of water and water rights, operates in limitation of the common law right of user of waters of a stream by the riparian owners, and their riparian right at common law to the continuance of the flow undiminished is taken away by this legislation.

[*Cook* v. *City of Vancouver*, 10 D.L.R. 529, affirmed.]

2. WATERS (§ II C—83)—USE OF WATERS—DIVERSION GENERALLY—NOTICE OF DIVERSION, REQUIREMENTS—RIPARIAN RIGHTS.

Where the defendant, not a riparian owner, proposes to divert the waters of a stream from flowing past the lands of the plaintiff, a riparian owner, the notice of the point of diversion need merely contain an approximate description sufficient for practical purposes of identification the notice having been actually posted at the point of diversion and knowledge brought home to the plaintiff.

[*Cook* v. *City of Vancouver*, 10 D.L.R. 529, affirmed.]

Statement.

APPEAL by the plaintiff from the judgment of the British Columbia Court of Appeal, *Cook* v. *City of Vancouver*, 10 D.L.R. 529, dismissing an appeal from the judgment of Murphy, J., in favour of the defendant, in an action to restrain it from obstructing or diverting the waters of Seymour Creek from flowing past the plaintiff's lands.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Moulton.

LORD MOULTON:—In this case the appellant (the plaintiff in the action) claims an injunction against the defendants, who are the corporation of the city of Vancouver, restraining them from diverting water from a stream flowing through certain lands of which he is the owner. The defence is that the defendants are entitled to do the acts complained of by reason of their being the proprietors of a certain water record granted to them, dated September 28, 1906, under and pursuant to the Water Clauses Consolidation Act, 1897, and the Acts amending the same. The plaintiff replies by putting in issue the facts stated in the defence, and the validity and effect of the alleged water grant. In the first instance he also alleged that the Acts under which the alleged water record was granted were *ultra vires* of

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the Provincial Legislature, but this issue has not been persevered in.

The facts of the case are very simple, and are not in controversy. The plaintiff derives his unquestioned title to the lands through which the stream flows, under and by virtue of a Crown grant dated December 9, 1892. The stream passes through the land in a deep canyon which is from 250 to 300 feet below the general level of the ground, but although this may have a substantial effect on the utility of the stream to the lands of the plaintiff, it does not alter the fact that he is a riparian proprietor, and therefore possessor of such riparian rights as exist in British Columbia under present legislation.

The defendants are the holders of a grant of water right, dated September 28, 1906, permitting 1,400 inches of water to be diverted from Seymour Creek above the plaintiff's lands for the use of the water works supplying the city of Vancouver with water and other purposes. This grant was made in respect of an application dated December 12, 1905, of which notice was given on November 10, 1905. At the hearing of the enquiry in respect of that application the plaintiff appeared and opposed the grant, but was unsuccessful. He did not appeal against the decision of the commissioner nor did he take any steps by way of *certiorari* or otherwise to set aside the grant. In the present proceedings he has however taken objection to the validity of the grant on the ground that it was not in accordance with the notice inasmuch as in the grant the diversion is described to be: "At a point eleven miles or thereabouts from Burrard Inlet," whereas in the notice it is described as being: "about ten miles from 'Burrard Inlet.'"

This objection is, in their Lordships' opinion, frivolous. In the first place neither of the descriptions is intended to be anything more than an approximate description of the point of diversion sufficient for practical purposes of notice, and viewed in this light there is no ground for supposing that there is any inconsistency between the two descriptions. In the next place the notice must have been posted at the point of the proposed diversion so that all difficulty of identification would disappear. And thirdly, sec. 15 of the Water Clauses Consolidation Act,

1897, which deals with the record to be granted upon such an application, indicates clearly that the commissioner may modify the particulars of the grant—a practical provision very necessary in such a case inasmuch as the inquiry might shew that public and private convenience would be better cared for by modification of the details of the application preserving, of course, substantial identity.

There exists therefore in this case a valid water record in favour of the defendants, and it is not suggested that they have done anything which is not covered by this record. Whatever rights the plaintiff may have as riparian proprietor are not of record, and the sole question in the case is, whether as riparian owner the plaintiff has, under existing legislation in British Columbia any rights superior to or over-riding the defendants' rights of record. The learned Judge at the trial decided that he has not, and dismissed his action with costs. On appeal to the Court of Appeal of British Columbia that decision was supported. In their Lordships' opinion, the decisions of the Supreme Court of British Columbia and the Court of Appeal of British Columbia were right. The grant under which the plaintiff holds his land is subsequent in date to the coming into force of the Water Privileges Act, 1892, so that it unquestionably must be read as subject to the provisions of that Act. The effect of that Act is for all the purposes of this case accurately summed up in the recital of the Water Clauses Consolidation Act, 1897, which reads as follows:—

> Whereas by the "Water Privileges Act, 1892," all water and water-power in the province, not under the exclusive jurisdiction of the Parliament of Canada, remaining unrecorded and unappropriated on the 23rd day of April, 1892, were declared to be vested in the Crown in right of the province, and it was by the said Act enacted that no right to the permanent diversion or exclusive use of any water or water-power so vested in the Crown should after the said date be acquired or conferred save under privilege or power in that behalf granted or conferred by Act of the Legislative Assembly theretofore passed, or thereafter to be passed.

It is beyond dispute that the water of Seymour Creek as it passes through the plaintiff's lands was at the date of the Water Clauses Consolidation Act, 1897, "unrecorded water." It was therefore vested in the Crown, and no right to the permanent diversion or to the exclusive use of it could be acquired by any

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riparian owner by length of use or otherwise than as the same might be acquired or conferred under Act of Parliament. It follows that water rights can only be acquired either by obtaining a record under the Acts which provide for the grant of such rights by the Crown or by a special statutory title. There is no exception in favour of proprietors of lands, and they cannot acquire such rights in any other way. The defendants' rights are of record. They are therefore valid legal rights, and the fact that the plaintiff is a riparian owner lower down the stream who is affected thereby gives him no right to object to the exercise of those rights.

Their Lordships pronounce no opinion as to the right of a riparian proprietor to make use of the water flowing by his land in a way which does not interfere with recorded water rights of other parties. Riparian rights under English law are of two kinds. First, there is the right to make use in certain specified ways of the water flowing by the land, and, secondly, there is the right to the continuance of that flow undiminished. The second of these classes of rights is clearly taken away by the legislation of British Columbia, but this case does not raise the question whether rights of the first class still remain, and their Lordships do not desire to express any opinion thereon.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

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MACDONALD v. MACDONALD.

British Columbia Supreme Court, Hunter, C.J.B.C. June 15, 1914.

1. EVIDENCE (§ XII F—954*f*)—WEIGHT, EFFECT AND SUFFICIENCY — HUSBAND AND WIFE—DIVORCE RULES—EVIDENCE OF ADULTERY BY AFFIDAVIT.

Leave may be given upon due cause shewn for the petitioner to adduce evidence of adultery by affidavit under sec. 21 of the Divorce rules of British Columbia.

Statement

MOTION for leave to adduce affidavit-evidence to establish a charge of adultery.

The motion was granted.

C. B. S. Phelan, for the petitioner.

No one contra.

HUNTER, C.J.B.C.:—Upon an affidavit by the solicitor for the petitioner stating that she is unable to give personal evidence of the acts of adultery complained of and that she relies upon the evidence of certain persons in Seattle to prove the said acts and that she has not sufficient means to pay the expenses of the said witnesses in bringing them to the Court from Seattle, an order is made giving the petitioner leave to adduce evidence of the acts of adultery complained of by affidavit.

Motion granted.

STORY v. STRATFORD MILL BUILDING CO.

Ontario Supreme Court (Appellate Division), Maclaren, J.A., Riddell, Sutherland, and Leitch, JJ. December 27, 1913.

1. CONFLICT OF LAWS (§ I E 1—106)—TORTS—PERSONAL INJURIES RECEIVED ABROAD—WHEN ACTIONABLE IN ONTARIO—LEX FORI.

Redress may be obtained in the Courts of Ontario for a tort committed abroad if actionable under either the common or statute law of Ontario, and not justifiable in the foreign law district.

2. CONFLICT OF LAWS (§ I E 1—108)—INJURY TO EMPLOYEE RECEIVED IN QUEBEC—EFFECT OF CONTRACT OF EMPLOYMENT IN DETERMINING REMEDY—ACTION IN ONTARIO.

A person entering the employ of another does not thereby contract that the laws of his domiciliary province shall in all respects govern in relation to an action for an injury received by the employee while working in another province.

[*Dupont* v. *Quebec Steamship Co.*, Q.R. 11 S.C. 188; *The M. Moxham*, 1 P.D. 107, and *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, referred to.]

3. CONFLICT OF LAWS (§ I E 1—106)—TORTS—PERSONAL INJURY OCCURRING ABROAD—WHEN ACTIONABLE IN ONTARIO.

To give the Courts of Ontario jurisdiction to entertain an action for a tort committed abroad, the act must be such as is not justifiable in the place where it was committed.

[*Story* v. *Stratford Mill Building Co.*, 11 D.L.R. 49, 4 O.W.N. 1212, affirmed.]

4. NEW TRIAL (§ III B—17)—EXCESSIVE VERDICT—DAMAGES—TEST.

An appeal by the defendant for a new trial on the ground of excessive damages will be dismissed by an appellate Court although the damages are "larger perhaps than a Judge or another jury might give," but yet are not so large as to be considered excessive or such as twelve reasonable men could not honestly award to the plaintiff.

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5. CONFLICT OF LAWS (§ II—159)—REMEDIES—INJURY SUSTAINED IN QUEBEC—ACTION IN ONTARIO—MEASURE OF DAMAGES—LEX FORI.

Where the Courts of Ontario have jurisdiction to entertain an action for a tort committed abroad (the wrong being actionable under Ontario law and not justifiable in the foreign law district) the domestic Courts act according to their own rules in the damages to be awarded.

Statement

APPEAL from the judgment of KELLY, J., in favour of the plaintiff, *Story* v. *Stratford Mill Building Co.*, 11 D.L.R. 49. The action was for damages for injuries sustained by the plaintiff, while working for the defendants, an Ontario company, in the Province of Quebec, by reason of the alleged negligence of the defendants.

The appeal was dismissed.

I. Hilliard, K.C., and *W. B. Lawson*, K.C., for the plaintiff, respondent.

R. S. Robertson, for the defendants, appellants.

Riddell, J.

December 27. RIDDELL, J.:—The defendants are an Ontario corporation, whose head office is in Stratford, Ontario; the plaintiff is a millwright formerly in their employ. In August, 1911, the plaintiff was working for the defendants in building a mill in Wakefield, in the Province of Quebec, when an accident happened occasioning him injury. An action was brought in the High Court of Justice for Ontario, which was tried at Cornwall, in April, 1913, before Mr. Justice Kelly and a jury; resulting in a verdict for the plaintiff for $1,500. After reserving judgment, the learned trial Judge directed judgment to be entered for that sum, with costs.

The law respecting wrongs committed in another country, remedy for which is sought in England, has been more than once authoritatively laid down.

In *Phillips* v. *Eyre*, L.R. 6 Q.B. 1, at p. 28, Willes, J., giving the judgment of the Court of Exchequer Chamber, says: "In order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act

must not have been justifiable by the law of the place where it was done."

Similar language was used in the House of Lords in *Carr* v. *Fracis, Times & Co.*, [1912] A.C. 176, at p. 182, by Lord Macnaghten.

Westlake, Private International Law, 5th ed., ch. 11, discusses the general question and says (p. 282): "The conclusion . . . has been adopted in England, that the *lex fori* and *lex loci delicti commissi* must concur in order that an act or an omission may be deemed tortious." Many cases are referred to by the learned author, which it is unnecessary to cite, as they all agree in the law above laid down.

It was argued very strenuously that when the law of England is spoken of—the *lex fori*—this must be interpreted as meaning the common law of England. I can find no authority for this contention, and it is wholly baseless on principle. There is no difference in the effect of a statute and that of the common law, and they are both equally part of the law of England. The lawyer's division into common law and statutory law is for convenience only; and the rights of the subject are as secure under one as the other. This is not an extension of a statute to a foreign country, any more than the action of the Courts in giving effect to what are common law rights in both countries is an extension of the common law of England to a foreign country.

It is pointed out in *Machado* v. *Fontes*, [1897] 2 Q.B. 231, by Rigby, L.J., that the words used by Willes, J., in *Phillips* v. *Eyre* are "actionable," as applied to the English law, and "justifiable" as applied to the foreign law. Each word has its own significance; and, so far as the law of England is concerned, a delict is "actionable," whether the action be given by statute or the common law.

The conclusion of the Lords Justices in the *Machado* case is vigorously dissented from in the Supreme Court of Victoria (Australia) in *Varawa* v. *Howard Smith Co. Ltd.*, [1910] Vict. L.R. 509; but no doubt is cast upon the propriety of observing the difference between the words employed, nor is there any limit suggested to the ambit of the word "actionable."

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Authority is not wanting. In "*The Halley*" (1868), L.R. 2 P.C. 193, Selwyn, L.J., giving the judgment of the Judicial Committee, says (p. 202): "Assuming . . . the truth of the facts stated in the pleadings, and applying the principles of the common law and statute law of England to those facts, it appears," etc. That was a case in which, ship-owners having been compelled by foreign law to take a pilot on board, an accident occurred in the foreign waters through his negligence. By the foreign law they would be liable for the pilot's default, but the Act of 1854, 17 & 18 Vict. ch. 104, sec. 388, expressly exempted ship-owners from liability in a case of a "compulsory pilot." The Judicial Committee, reversing the Court below, held that there was a perfect defence. It is true that it was also held that the statute was in affirmance of the common law, but it was not the less laid down that "the principles of the common law and statute law" must be applied. We cannot suppose that the addition of the words "and statute law" was either *per incuriam* or through a misunderstanding of the law.

There being no authority for the proposition, and it being opposed to both principle and authority, we cannot give effect to the contention that only the common law of the Province can be looked at in determining whether a delict is "actionable."

It is contended that at all events the Workmen's Compensation for Injuries Act cannot be appealed to. This argument is based upon two cases: *Tomalin* v. *S. Pearson & Son Limited*, [1909] 2 K.B. 61 (C.A.), and *Schwartz* v. *India Rubber, etc., Co.*, [1912] 2 K.B. 299.

In the former case, one Tomalin, an Englishman, had been employed by the defendants, who were contractors for public works. The defendants sent him out to Malta, and he worked there for over a year, when "he was killed by an accident arising out of and in the course of his employment" (p. 62). His widow sued under the Workmen's Compensation Act, 1906; the County Court Judge held that the claim was valid, and the defendants appealed. The Court of Appeal allowed the appeal. In that case there was no allegation of wrongdoing on the part of the defendants; the accident was a mere accident such as is "justifiable" at the common law and by the law of Malta. The

whole right of the plaintiff was a creature of the statute, and this statute had no extra-territorial force. Assuming that the occurrence would have been "actionable" in England, the second prerequisite was wanting, it was "justifiable" by the *lex loci*.

In the *Schwartz* case, the deceased had been employed as an electrical engineer by the defendants, and sent by them in a British ship to Teneriffe; the ship was lost with all hands in the Bay of Biscay in a gale. Here again there was no negligence, no delict. It is true that it cannot be said that the law of the place where the act was committed was different from the law of England, for the "high sea is the common ground of all countries:" *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, *per* Brett, L.J., at p. 537; but the Court decided nothing except that the deceased was not one of those for whose death upon the high seas compensation must be paid, that being confined to seamen and apprentices.

We cannot give effect to the argument for the respondent that the Legislature of the Province of Ontario had intended to give their Act an extra-territorial effect: British North America Act, sec. 92 (13); *Macleod* v. *Attorney-General for New South Wales*, [1891] A.C. 455; *In re Criminal Code Sections relating to Bigamy* (1897), 27 S.C.R. 461; *Attorney-General for Canada* v. *Cain*, [1906] A.C. 542.

Nor can we agree to the proposition of the plaintiff that the parties must be held to have contracted that the law of the country of their domicile should govern them in all respects. This is based upon a Quebec case, *Dupont* v. *Quebec Steamship Co.*, Q.R. 11 S.C. 188. There, the deceased, a native of and resident in the Province of Quebec, in that Province entered the employ of the defendants, a Quebec corporation; being sent out to the West Indies, he was killed by the fall of a derrick on the defendants' ship, then being loaded off the Port o' Spain, Trinidad, the accident occurring through the insufficiency of the apparatus supplied by the defendants. In the law of Trinidad, as in the common law of England, no action could be brought. "*Actio personalis moritur cum personâ.*" Routhier, J., in the Superior Court, held that, by the rules of international law,

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actions arising *ex delicto* and *quasi ex delicto* should be determined according to the *lex loci delicti commissi*. (I translate). In appeal, the Court of Review (Caron, Cimon and Andrews, JJ.) reversed this decision. They held (1) that the ship was not in Trinidad, but, as it was an English ship, it was a part of England; and, as an action lay by the law of England under Lord Campbell's Act, the delict was not justifiable by the local law. That, however, was not sufficient to dispose of the case, as the defence of common employment would be open to the defendants under the law of England; and, consequently, the Court proceeded to determine the applicability of the law of the Province of Quebec. They held that the rights between employer and employee must be determined by the law of Quebec. "To say otherwise would be to say that they intended their contract, their acts, their rights, their liabilities to be a chaos of confusion, to be governed at one time by the law of Quebec, when Mr. Dupont did something in the Province of Quebec; by the law of Trinidad when he did something or suffered something on the Island of Trinidad; by Spanish law when in Cuba or Porto Rico; by Danish law when in St. Thomas; by French law when in Martinique; by Haytien law when at Port-au-Prince or Gonaives; by English law when on the 'Muriel' registered in England; and finally by Quebec law when . . . in this Province:" *per* Andrews, J., at pp. 206, 207.

The real ground of decision is, that the "doctrine of exemption from liability by reason of the common employment of the victim of the accident with him who caused it as the agent of the master of both, rests on a supposed contract implied by the law. In other words, the law supposes that it was the unexpressed, but nevertheless real, intention of the parties that such a stipulation should be read into their contract of hiring" (p. 203). Contracts must be construed upon the intention of those who make them, and, when the parties made this contract of hiring, they must have intended it to be governed by the law of Quebec (p. 206); therefore, "we cannot justly and reasonably read into the deceased's contract of hiring, the rule of English law that he was to take the risks of the negligence of his co-employees" (p. 208).

As at present advised, I cannot agree with the doctrine of this case. (We need not say anything as to the first point, viz., that the law of England, and not that of Trinidad, was the law of the *locus delicti commissi*.)

"It is settled that if by the law of the foreign country the act is lawful, or is excusable, or even if it has been legitimised by a subsequent Act of the Legislature, then this Court will take into consideration that state of the law; that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here:" *per* James, L.J., in *The M. Moxham*, 1 P.D. 107, at p. 111. The same learned Lord Justice says (p. 110): "The liability of one man to answer for the acts of another in matters of tort seems a thing which cannot be carried by the agents into a foreign country. If I take my coachman to France, and he in driving my carriage injures a carriage in France, I do not take with me the law of *respondeat superior* so as to make me liable. It seems to me that the law of the country in which we are trying the question does not apply, but it is the law of the place where the act is done that does apply. Now, it is the law of Spain . . . that where the wrongful act is done by a servant of this particular kind, the owner of the ship has not that wrong imputed to him, and that the rule of *respondeat superior* does not apply so as to make him answerable for that which was in fact the wrongdoing of his servants. . . . Though we may speak of the thing as doing wrong, it is the man who does the wrong, and if he is not a wrongdoer according to the law of the country where the wrong was done, that is to say, if he is not answerable for the wrong of his servant, he is not answerable to Spanish law for the wrong done, and it is our duty to give him the benefit of the Spanish law in this case." Mellish, L.J. (p. 113): "The rule that a particular person is not to be liable, although somebody else possibly may be liable, is a part of the substantive law of the country where the act is committed; and therefore if by the substantive law of the country where the act is committed a defendant is not liable, then he would be discharged altogether."

The Quebec Steamship Company does not then, according to

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the English law, carry with the fellow-servants of Dupont to Trinidad the law of *respondeat superior* so as to make the company liable to Dupont for the negligence of such fellow-servants. It needed the conclusion that the deceased had in his contract of service impliedly stipulated for such responsibility on the part of his master, and further that the widow and children—plaintiffs in the action—could take advantage of this implied stipulation. The latter proposition is answered by *Tomalin* v. *S. Pearson & Son Limited*, [1909] 2 K.B. 61. "The right alleged by the widow cannot be a contractual right, because she was no party to the contract:" *per* Fletcher Moulton, L.J., at p. 65. As to the former, however it may be in the case of a citizen of Quebec, governed by a peculiar law differing in many respects from that of the other peoples of the continent, it would be difficult, and in my view impossible, for a Court in Ontario, in which the law is the same in essence as that of most of the rest of the continent, to imply in an agreement of service a term that the master shall be liable in a foreign country for the acts of others for which he would not be liable by the law of that country.

The law is, that where an act or omission would be actionable had it taken place in Ontario, it is actionable in our Courts when it took place in a foreign country, if by the law of that country, whether common law or statute, it was not justifiable. That an employer is not justified or excused in Quebec if his servant by negligence does injury to a fellow-servant is quite clear—that is admitted—and, although the Quebec Act of 1909, 9 Edw. VII. ch. 66, enables an employee to recover compensation for an accident which is not the result of negligence, it does not at all justify or excuse any act of negligence. Whether what is complained of is actionable in our Courts depends upon the facts, which now fall to be considered.

The defendants employed a foreman, Cox, under whom the plaintiff worked. On the day of the accident, he was working on the second floor, when he was called by Cox to the third floor to assist in raising "dust-collectors." Two small ones were put in place near the roof, and the plaintiff was then called upon to assist in raising the third, which weighed some 300 or 500 pounds.

A board had been nailed below the rafters; to this were attached a block and tackle to raise the dust-collector. Cox and one Muller were pulling on the rope, while the plaintiff and one Lorne (all four were skilled mechanics) were steadying the collector. The board—which was "a little temporary strip of wood nailed up for that particular purpose," pulled off the rafters, the apparatus fell, and the plaintiff was injured.

It was made to appear at the trial that Cox had given Muller (who had worked for the company for some time and was a man of experience) instruction "to go up and put a piece and raise that dust-collector;" when he (Cox) was notified that the piece was ready, he went upstairs, taking Story along, and, without taking any notice of the board ("I suppose I saw it, but I didn't pay any attention to it," he says), went to work raising the dust-collector. He says that he had often lifted that much with a board nailed to the rafters, and cannot say that Muller made any mistake.

The jury have found the following in answer to questions:—

1. Q. Was the casualty caused by negligence or was it a mere accident? A. Caused by negligence.

2. Q. If it was caused by negligence whose negligence caused it? A. By foreman, Mr. Cox.

3. Q. If there was such negligence, set out fully and clearly the various acts of negligence which caused or assisted in bringing about the accident. (Answer fully). A. We find that nailing the board under the rafters with nails was not sufficient to sustain the weight.

4. Q. Was there any negligence on the part of the plaintiff which caused or helped to cause the acident? A. No.

5. Q. Could the plaintiff, by the exercise of ordinary care, have avoided the accident? A. No.

(Q. 6 is immaterial.)

The damages were assessed at $1,500.

It is plain from what was said before us on argument, as well as from the cross-examination of Cox and the expert evidence of Wickwire, that the charge of negligence against Cox was not that he had nailed up the board to the rafters, but that he had not examined the board to see that it was safe before

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putting the plaintiff to work under it. The jury have not found this specifically, although it is more than likely that they intended so to find. If it had been necessary in order to support this verdict to interpret the answers of the jury in that way, I should require further consideration before so doing; it is probable that the true solution would be to order a new trial.

I think the answers of the jury were put in the shape in which they are in consequence of the direction in the charge, the only direction in reference to answering these questions:—

"Q. 1. Was the casualty caused by negligence, or was it a mere accident? Q. 2. If it was caused by negligence, whose negligence caused it? I will have to ask you not only to find whose negligence it was—if there was negligence—but to say what were the specific acts of negligence. The evidence is quite fresh in your minds. Whatever you do find about the putting up of the board from which the machine was suspended, whether it was done this, that, or the other way, you are to find whether there was negligence and state what that negligence consisted of."

The answer to question 3 seems to me to be in obedience to the direction contained in the last sentence; and the jury have in effect found that the manner of nailing the board was negligent, and there was "a defect in the condition . . . of the plant . . . used in the business of the employer" in that respect: Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, clause 1.

Markle v. *Donaldson*, 7 O.L.R. 376, 8 O.L.R. 682, as I understand it, decides that any person who is directed by the employer to get ready for workmen an appliance necessary for their safety, is a "person intrusted by him with the duty of seeing that the condition . . . of the plant . . . is proper," under sec. 6 (1) of the Act. No sound distinction can be drawn between that case and this. In each case the board or cleat was to have weight put upon it in the work of the plaintiff, and it would be dangerous unless properly nailed.

The jury having found that the board was negligently nailed

it was not at all necessary to find who was the negligent person: *Markle* v. *Donaldson*. The action then lies in Ontario.

The quantum of damages is attacked. The Quebec Act of 9 Edw. VII. ch. 66 provides, by sec. 2, for compensation to be paid (*a*) in case of absolute and permanent incapacity, (*b*) in case of permanent and partial incapacity, and (*c*) in case of temporary incapacity. The injury in question could only come under (*b*) or (*c*), and the compensation awarded thereunder would be much less than $1,500. Section 14 provides that "the person injured . . . shall continue to have, in addition to the recourse given by this Act, the right to claim compensation under the common law from the person responsible for the accident other than the employer, his servants or agents . . ."; and (sec. 15) "the employer shall be liable to the person injured . . . for injuries resulting from accidents caused by or in the course of the work of such person in the cases to which the Act applies only for the compensation prescribed by this Act." It follows that in Quebec no damages could be recovered in excess of the amount of compensation given by the Act; and no action could be brought against the employer under the common law.

Were the matter *res integra*, it might not unreasonably be held that the plaintiff, by suing in another jurisdiction, cannot put himself in a better position than if he had sued in the country *delicti commissi*.

Speaking for myself, I should have hesitated to hold that a man injured in Quebec could put himself in better position by coming to Ontario, and suing in our Courts, than if he had sued where he received his injury. But authority binding upon us has decided otherwise in cases not dissimilar.

In *Scott* v. *Lord Seymour* (1862), 1 H. & C. 219, an action for an assault committed in Naples, a plea (in substance) that, according to the law of Naples, the defendant was not liable in damages except in certain proceedings already taken in Naples, was held bad. Wightman, J., in Cam. Scacc., said that, even if by the law of Naples no damages are recoverable in any form there, an action lies by one British subject against another for an assault committed there. Williams, J., was not prepared to

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assent, and Blackburn, J., was rather of the opposite view; while Pollock, C.B., and Wilde, B., in the Court of Exchequer, and Compton and Willes, JJ., in Cam. Scacc., were silent. Nowhere is it suggested that, if the law of Naples did give a remedy, in an action in England an English Court would limit its remedy to the remedy afforded by the Courts at Naples.

In *Hart* v. *Gumpach* (1872), L.R. 4 P.C. 439, an action for defamation in China, the Judicial Committee gave no decision as to whether a defamation which, by the law of China, was absolutely privileged, could be made the subject of an action.

Finally, in *Machado* v. *Fontes*, [1897] 2 Q.B. 231, the matter came up squarely for decision under these facts. The plaintiff brought an action for libel contained in a pamphlet published in Brazil. The defendant desired to plead that, by the law of Brazil, the publication of the pamphlet could not be ground of legal proceedings in Brazil in which damages could be recovered. A motion to permit this plea to be pleaded was allowed by Kennedy, J., in Chambers, and the plaintiff appealed. Lopes and Rigby, L.JJ., both assumed that the plea meant that the alleged libel could not be made the subject of any civil proceedings in Brazil, and both held that this was no defence. Lopes, L.J., at p. 234, says: "It . . . follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue . . . In my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country." Rigby, L.J., says (pp. 235-236): "The act in question is *primâ facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act . . . is authorised, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give."

As I have already said, the decision in this case did not meet approval in the Supreme Court of Victoria in *Varawa* v. *Howard Smith Co. Ltd.*, [1910] Vict. L.R. 509; but, by the course of our practice, we consider ourselves bound by the English Court

of Appeal if we have no decision in our own Courts to the contrary: *Trimble* v. *Hill* (1879), 5 App. Cas. 342. There is no such complication in this case by reason of conflicting decisions as in *Scott* v. *Reikie* (1865), 15 U.C.C.P. 200; *Moore* v. *Bank of British North America* (1868), 15 Gr. 308; *Macdonald* v. *McDonald* (1886), 11 O.R. 187; and *McDonald* v. *Elliott* (1886), 12 O.R. 98.

It follows then that, the action being properly maintainable in our Courts, "we must act according to our own rules in the damages which we may choose to give."

I do not find that the damages, large as they are, larger perhaps than a Judge or another jury might give, are so large as to be considered excessive, and such as twelve reasonable men could not honestly award to the plaintiff.

There remains but the question as to a new trial. First, on the ground of improper admission of evidence: this is the evidence given by Wickwire of his opinion of the duty of a foreman. This was improper. Evidence of what a foreman usually did was admissible, but not the witness's opinion of what a foreman should do.

In my view of the case, however, this is wholly immaterial, and is, accordingly, no ground for a new trial. If the judgment were to rest upon negligence on the part of Cox, it would be quite a different matter.

The only objection taken to the charge was that the learned trial Judge told the jury they might allow three years' wages: what he did say was wholly unexceptionable. After giving at sufficient length and in sufficient detail the elements to be considered, the learned Judge said: "Reference was made by one of the counsel in his address that in this Province, in cases coming under what is known as the Workmen's Compensation Act, the person injured can be given as high as three years' wages of a person in his class of employment. Whether that Act applies here or not is not for you to say. I mention that because of counsel's reference to what can be allowed in cases which fall within the purview of that Act."

The objection and what followed are thus reported:—

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"Mr. Robertson: In respect of the matter of damages, my Lord, I submit your Lordship should not have said to the jury that the three years' wages was an amount that can be allowed, but that your Lordship should have told the jury that was the limit within which damages must in any case be found.

"His Lordship: I think I was specific as to the limit under the Workmen's Compensation Act.

"Mr. Robertson: One way you put it, my Lord, I submit, is almost that in this case they should allow——

"His Lordship: I told them I did not know whether the Workmen's Compensation Act applies here.

"Mr. Robertson. Even suppose this were a case under that Act, that would not be the proper charge.

"His Lordship: The amount the jury may give—I think I said the maximum amount they may give—is three years' wages; that is, under the Workmen's Compensation Act. I would not have mentioned that fact at all, but for the allusion made to it by the counsel in addressing the jury."

All this took place in the presence of the jury, and I cannot see anything improper or objectionable.

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

NOTE.—An interesting discussion of the general question is to be found in Story's Conflict of Laws, 8th ed., para. 625, and notes thereto. The conclusions of the distinguished author must be read with caution, however, as he does not always agree with Courts by whose decisions we are bound.

Maclaren, J. Sutherland, J.

MACLAREN, J.A., and SUTHERLAND, J., agreed in the result.

Leitch, J.

LEITCH, J., agreed with RIDDELL, J.

Appeal dismissed.

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Quebec King's Bench (Crown Side), Gervais, J. July 6, 1914.

1. RAILWAYS (§ II B—23)—OBSTRUCTION OF STREET CROSSING—STANDING CARS—OPERATION OF GATES.

To justify conviction of a railway company under sec. 394 of the Railway Act (Can.) for obstructing a street crossing by allowing cars to stand across the street, it must be shewn by the prosecution that the obstruction was wilful, and where the crossing was protected by gates and the only evidence was of the times when the gates remained closed against street traffic for periods in excess of five minutes, a conviction should be quashed where it was not shewn that any one train or car caused the obstruction, nor was it shewn that the delay was not attributable to the gateman rather than to the trainmen; sec. 394 of the Railway Act does not apply to obstruction caused by the gateman's neglect at a street crossing.

Statement

APPEALS from seven summary convictions of the railway company for obstructing street crossings by standing trains.

The appeals were allowed and the convictions quashed.

A. E. Beckett, K.C., for appellant company.

J. L. Butler, for the Crown.

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GERVAIS, J.:—By consent, the parties have joined the seven present appeals from summary convictions rendered on the 19th November, 1913, against the appellant for having wilfully obstructed St. Ferdinand Street in St. Henry Ward in the City of Montreal, by allowing a car or engine to stand across said street for more than five minutes at a time, on the following dates:—three times on the 12th May, 1913; twice on the 13th May, 1913; and twice on the 5th June, 1913.

The judgments appealed from were rendered by the Police Magistrates' Court for the District of Montreal, which imposed two fines of ten dollars, four fines of five dollars, and one of twenty-five dollars, with costs in each case.

The parties, at the hearing of the appeals, agreed to submit the same upon the evidence adduced by them in the Court below, presided over by Mr. Magistrate Ulric Lafontaine; the said evidence consisting of the depositions of the witnesses on both sides taken by stenography, and some plans shewing the locality where the shunting yard of the company is situate, in St. Henry ward.

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From what was said before us, it looked as if these cases had been made out by the City of Montreal, at the suggestion of the Montreal Street Railway Company, which had to complain for a long time that its tram cars were delayed at the St. Ferdinand Street crossing, on account of obstruction of the same by the railway company's cars.

Mr. Beckett, for the Grand Trunk, submitted that there was no proof that any such obstruction by his company had ever been made, as alleged in the complaint; and that, at any rate, no such wilful obstruction had been proven on behalf of the appellant. The appellant's attorney also urged that it was one of its rules towards its employees that they were liable to suspension or dismissal from its service for any obstruction by them of any public highway, and especially for the blocking of such a street as St. Ferdinand Street.

Mr. Butler, on behalf of the Crown, while admitting such instructions to its employees on behalf of the company, contended that the complainant was not bound to prove any wilful obstruction; that the same was proved; that such proof as a rule was impracticable.

Two questions have to be decided in this case: (1) Was there evidence that the appellant was guilty of allowance of one of its cars to stand on said street for more than five minutes at a time?

(2) Was such allowance wilful?

I do not rely much on the official shunting records of the appellant on the dates in question, as the keeper of these records was not there on the spot, that is, at St. Ferdinand Street crossing, to substantiate his data, and as the same were made under telephonic instructions from Turcot village shunting office.

Curiously enough, the complainants' witnesses, while spying upon the management of the railway company's cars by the employees of the appellant, at St. Ferdinand Street crossing, kept away from the gatekeeper there, as well as from the employees of the appellant.

The witnesses of the complainant did not shew themselves to the said gatekeeper or to the enginemen, trainmen, or conductor in charge of the trains passing at the crossing.

In a word, the constables sent by the city to make out the cases against the Grand Trunk Railway Company of Canada

kept themselves out of sight from the Grand Trunk Railway Company's employees; they never said a word of complaint to any of them, more especially to require from them the cutting of the train so as to give free access to vehicles and passers-by on St. Ferdinand Street.

They seem to rely on the old Railway Act which did not provide for "wilful" obstruction in order to constitute a violation of Article 394.

To sum up, the company which is being sued without any one of its employees being made party to the cases, has never been put *en demeure* to shew whether or not they did wish to obstruct the said street, as it is charged in the complaint.

It was proved, and it is well known, that on both sides of the railway of the appellant crossing St. Ferdinand Street, there is a gate under the guidance of an employee of the Grand Trunk, whose duty it is to lower the same when a train is approaching the crossing, and raise it as soon as the train has passed. No proof was adduced that the gatekeeper had been delinquent in his duty.

Did the witnesses for the prosecution prove the charge against the appellant? Three or four witnesses were heard on behalf of the Crown. They all swore that there had been a closing of the gates for more than nine, twelve, eighteen, twenty or thirty-two minutes. None of them proved that any special car or engine of the appellant was allowed to stand across St. Ferdinand Street more than five minutes at a time. On being cross-examined by Mr. Beckett for the appellant, all the witnesses admitted that they had based their calculations of the five minutes from the time of the lowering of the gates up to their being raised.

There is no evidence to show that during the period of the closure of the gates there was any car at a standstill across the road; that there was not a continuously passing train, or that the gatekeeper was not too negligent to raise up the gates promptly after the passage of each train, but was waiting to raise the same until some following train had passed; or, in a word, that the gatekeeper had not taken upon himself to do his duty in a leisurely way.

There is an offence under Article 394 of the Railway Act of Canada for wilful allowance of a car on a street during more than five minutes at a time, but there is no offence under the present

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law for obstructing a public street crossing a highway, by means of gates not properly handled.

After having read carefully the evidence I have come to the conclusion that there may have been in the cases presumption to some extent, of violation by the appellant of the Railway Act, but that there is no clear conclusive evidence of the same.

Now, have the company, if they have allowed any of their cars to stand across St. Ferdinand Street on the dates in question more than five minutes at a time, done it "wilfully"? This is a very important question which the Court has also to decide.

As we have said, the would-be guilty of violating the law, that is, the enginemen and conductors, and the trainmen in charge of the Grand Trunk trains on the dates in question, could have been prosecuted with the appellant, but they are not before the Court The company alone has been prosecuted, but the company has had promulgated a rule subjecting to suspension and dismissal from service any employee blocking St. Ferdinand Street crossing with its cars.

The enginemen and conductors in question could have been made very easily wilful transgressors of the law, by being called upon to cut up their train so as to clear the street, and by their refusal to do so, but we have no such proof.

It was up to the prosecution to bring evidence of "wilful" obstruction. What does the word "wilful" mean? It means "designed," "intentional" or "malicious," even when it is used in a penal statute; it conveys always the idea that the person acting wilfully does so, through an act of his volition, knowing what he wants to do is against the law, but doing it just the same, without excuse, acting as a free agent.

Such is the definition that I find in most of the legal dictionaries, especially in those of Bouvier, Stroud and Black. But if this is the definition of the word "wilful" which was not added by the Act, 3 Edward VII, chapter 58, as it was contended, there is surely no proof of a violation of the amended article 394 of the Railway Act of Canada on behalf of the appellant, as the Crown alleges.

Upon the whole I am of the opinion that the charges as brought against the appellant have not been proven and I do maintain the appeals and quash the convictions.

Convictions quashed.

TYRRELL v. MURPHY.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. BILLS AND NOTES (§ III D—79)—TRANSFER WITHOUT INDORSEMENT—BY SEPARATE INSTRUMENT—ORDER FOR PAYMENT—VALIDITY.

A written order from the payee directing the maker of a promissory note to pay the amount due thereon to a third person, operates as an assignment, and not merely as an order which is revoked by the death of the signer.

[*Harding* v. *Harding*, 17 Q.B.D. 442, *Farquhar* v. *City of Toronto*, 12 Gr. 187, and *Bank of British North America* v. *Gibson*, 21 O.R. 613, referred to.]

2. BILLS AND NOTES (§ V A 1—112*a*)—RIGHTS AND LIABILITIES OF TRANSFEREE—TRANSFER WITHOUT INDORSEMENT—ACTION BY TRANSFEREE.

If the payee of a promissory note in writing directs the maker to pay the amount due thereon to a third person, the latter, although not an endorsee of the note, becomes the beneficial owner of the money due thereon, and is entitled to hold the note against all the world; and the absence of an endorsement is no bar to his right to recover the consideration; since he is in a position to deliver the note to the maker on payment.

3. BILLS AND NOTES (§ IV C—167)—DEFENCES—WANT OR FAILURE OF CONSIDERATION FOR TRANSFER OF NOTE—RIGHT OF MAKER TO QUESTION.

The maker of a promissory note cannot set up the want of consideration for the assignment of a note to the person seeking to enforce it, since the former is a stranger to the transaction.

[*Walker* v. *Bradford Old Bank*, 12 Q.B.D. 511, referred to.]

Statement

APPEAL by the defendant from the judgment of WINCHESTER, Co.C.J., in favour of the plaintiff, in an action in the County Court of the County of York, brought to recover the amount due upon three promissory notes made by the defendant, each payable to the order of Catherine Murphy. The notes were not endorsed by the payee in the usual way; and the plaintiff claimed title to the notes and the moneys payable thereon by virtue of certain documents set out below, and the delivery of the documents and notes to her.

The appeal was dismissed.

J. M. Ferguson, for the defendant, appellant.

R. U. McPherson, for the plaintiff, respondent.

Mulock, C.J.

December 23. MULOCK, C.J.EX.:—This action is brought to recover from the defendant certain moneys owing by the defendant and represented by three promissory notes made by him, payable each to the order of Catherine Murphy.

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The learned Judge found in favour of the plaintiff, and from such judgment the defendant appeals.

The plaintiff claims title to the moneys and notes by virtue of three written documents, the first two signed by Catherine Murphy, and the last one by Maria Christie, and worded as follows:—

First:

"$575.00. "Croyden, March 13, 1906.

"James Murphy.

"Sir:—Will you kindly pay to my sister Maria Christie the amount of your notes made the 27th January, 1906, nineteen hundred and six, and oblige

"Catherine Murphy."

Second:

"Camden, May 2, 1908.

"James and Thomas Murphy please pay to my sister Maria Christie the full amount of all notes and accounts you owe me, and oblige

"Catherine Murphy."

Third:

"Toronto, June 17th, 1912.

"Will my brothers James, Patrick, and Thomas Murphy please pay to my niece Cassie Tyrrell the full amount of all their notes in my possession, and oblige

"Maria Christie."

Catherine Murphy died in 1910, having first made her will, whereby she appointed Maria Christie her sole executrix, and the plaintiff relies on this will, if necessary, as vesting in Maria Christie the right to the notes and moneys represented by them and formerly owing to Catherine Murphy. Maria Christie died in December, 1912, and about ten days before her death delivered to the plaintiff the three documents above set forth, and also the three notes sued on, and at the same time informed her to the effect that the notes and moneys in question were given to her for her own use absolutely. Mrs. Christie was childless, and the plaintiff, who was her niece, had lived with her from early childhood.

At the trial, the defendant's counsel, in writing, admitted, "for the purpose of this action, that each of the said notes was made by the defendant for good consideration, and that nothing had been paid on the said notes or any of them. The above is not be taken as an admission or acknowledgment of liability to the plaintiff or to any other party or person whomsoever."

For the defendant it was contended that these documents were not assignments of the moneys owing on the notes, but merely orders, and that each was revoked by the death of its signer. Numerous authorities shew that such documents are interpreted as assignments; for example, in *Harding* v. *Harding*, 17 Q.B.D. 442, the trustees under a will rendered to a legatee a statement shewing the balance owing to him, and the legatee sent it to his daughter, accompanied by a written document signed by him, in the following words: "I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shewn in the above statement." It was held that this document was a valid assignment of the amount admitted as owing to him, and that the daughter, in the action brought by her against the trustees, was entitled to recover the amount.

In *Farquhar* v. *City of Toronto*, 12 Gr. 186, the defendants being indebted to one Storey in a sum exceeding $200, the latter gave to the plaintiff a written order in the following words:—

"$178.05. "Toronto, August 5, 1864.

"To Mr. McCord, Chamberlain of the Corporation of the City of Toronto:—

"Pay Mr. James Farquhar the sum of one hundred and seventy-eight dollars and five cents, due from me to him, on account of work done at registrar's office, on Court street.

"Richard Storey."

The defendants refused to accept the order. It was held by Spragge, V.-C., that this document was an equitable assignment *pro tanto* of the debt due by the defendants to Storey.

In *Bank of British North America* v. *Gibson*, 21 O.R. 613, the contractor for building a church, being indebted to J. C. Dodd & Son, gave them an order on the defendants in the

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following words: "Pay to the order of J. C. Dodd & Son the sum of $306 out of certificate of money due me on the first of June, for material furnished to above church. Wm. Scott & Son." Held, that this was a good equitable assignment.

It is unnecessary to multiply authorities in support of the plaintiff's contention that, under the documents in question, the plaintiff became the beneficial owner of the moneys owing by James Murphy and represented by the said three notes, and as such owner is entitled to maintain this action to recover the same.

The defendant's counsel having admitted that the notes were given for good consideration, the plaintiff, although, not being an endorsee of the notes and being a volunteer, unable to compel endorsement, is yet entitled to hold them as against all the world, and, therefore, is in a position to deliver them to the maker. Thus, the absence of endorsement is no bar to her right to recover the consideration.

The defendant pleads want of consideration from the plaintiff, but he is a stranger to the assignment, and cannot set up want of consideration: *Walker* v. *Bradford Old Bank*, 12 Q.B.D. 511.

For the foregoing reasons, I am of opinion that, by reason of the assignments in question, the plaintiff is entitled to maintain this action and to retain the judgment given her in the Court below, she delivering up the notes to the defendant. Such a provision should be inserted in the order; and, subject to that modification, the appeal should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—The defendant, James Murphy, had three sisters, Bridget Tyrrell, Catherine Murphy, and Maria Christie; on the 26th January, 1906, he made three notes, payable to Catherine Murphy or order, twelve months after date: one for $200 and interest at six per cent.; a second for $200 and interest at six per cent. till paid; and the third for $175 and interest at six per cent.: all made for good consideration; and nothing has been paid on any of them. Catherine Murphy on the 13th March, 1906, gave the following to her sister Mrs. Christie:—

"Croyden, March 13, 1906.

"James Murphy.

"Sir:—Will you kindly pay my sister Maria Christie the amount of your notes made the 27th January, 1906, nineteen hundred and six, and oblige

"Catherine Murphy."

So far as appears, this was not communicated to the defendant. On the 30th August, 1898, Catherine Murphy made a will whereby she made Mrs. Christie executrix and directed her to collect all the notes and book-accounts she had against her brother, the defendant, and others named, and "pay all my funeral expenses and lawful debts which amounts to five hundred dollars I owe herself Maria Christie and divide the remainder equally between herself and my sister Bridget, wife of John Tyrrell . . ."

It is plain that Mrs. Christie in December, 1910, after the death of Catherine Murphy, had the right to receive the amount of these notes *quâcumque viâ*: and (subject to a possible right of her sister Bridget) to possess the proceeds absolutely. With Mrs. Christie lived, practically all the time from the age of three years, Cassie Tyrrell, a teacher, daughter of Bridget Tyrrell, and now Cassie Henwood, the plaintiff. All Mrs. Christie's children died in infancy, and she treated her niece always as a daughter. The elder lady had been ailing from about Easter, 1912, and on the 17th June she told the plaintiff to get some papers she had in her trunk. The following took place, according to the plaintiff (and she is not contradicted):—

"I got them for her, and she instructed me to write out that order, that she wished me to have the notes and orders that she had. I wrote that order out and she signed it and gave me that order and the other orders and the notes.

"Q. What notes are you referring to now? A. Notes from James Murphy, from Patrick Murphy, and from Thomas Murphy.

"Q. Were they the notes that are put in here? A. Yes, sir.

"Q. These three notes you are referring to, exhibit 2, these are the notes of James Murphy you refer to, and you say Maria Christie gave you these and this order, exhibit 3? A. Yes."

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(Order dated the 17th June, 1912, put in, marked exhibit 3. The order reads thus: "Will my brothers James, Patrick, and Thomas Murphy please pay to my niece Cassie Tyrrell the full amount of all their notes in my possession, and oblige" (signed) "Maria Christie.")

The witness continues:—

"She told me she wanted me to have them for myself, and she wanted me to have every cent of it myself, and she said she knew I would not let any one belonging to me need for anything if I had it.

"Q. You say that the notes, exhibit 2, and this order, exhibit 3, were given to you and other orders. What other orders do you mean? A. An order from Catherine Murphy."

This is the order already set out, signed by Catherine Murphy in March, 1906.

Mrs. Christie, at the same time, gave the plaintiff another order signed by Catherine Murphy, as follows:—

"Camden, May 2, 1908.

"James and Thomas Murphy please pay to my sister Maria Christie the full amount of all notes and accounts you owe me, and oblige

"Catherine Murphy."

"She told me it was mine after she had given it to me. She says, 'Now this is yours; be careful of it.'"

Mrs. Christie died a few days afterward, on the 26th June, 1912.

There is no dispute that, after the death, the plaintiff gave proper notice of the assignments.

An action was brought in the County Court of the County of York, resulting in a judgment for the plaintiff for the full amount of the notes, with interest and costs.

The defendant now appeals.

The main defence is based upon the proposition that the documents under which the plaintiff claims are not assignments, but simply orders to collect the money for her who gave the order, and that they were revoked by death.

This, in my view, is untenable—that documents worded as these are, are assignments is, I think, well-established. The

general proposition is that "no particular form of assignment is required (except where a special form is required by statute). A direction or order by the creditor to the debtor to pay the assignee is sufficient:" Halsbury's Laws of England, vol. 4, p. 371, sec. 788. In no small number of cases, such a form as these has been held an assignment:—

Bank of British North America v. *Gibson*, 21 O.R. 613: "Pay to the order of D. the sum of $306 out of certificate of money due me . . ." *Ex p. South* (1818), 3 Swanst. 392: "Please pay Messrs. G. & F. Alderson or order £417.6 as part of the amount due to me for plumbers' work." *Jones* v. *Farrell* (1857), 1 DeG. & J. 208: "We desire you to accept this order upon you for the sum of £1,000, and pay J. B. & Co. that sum or any less sum which may from time to time be owing by you to us." *In re Sheward*, [1893] 3 Ch. 502: "Please pay the income arising from the investments . . . to Mr. H. V. L. . . . whose receipt, together with this authority, shall be your discharge for the same." *Brice* v. *Bannister* (1878), 3 Q.B.D. 569: "I do hereby order, authorise and request you to pay to Mr. W. B., solicitor, Bridgewater, the sum of £100 out of moneys due or to become due from you to me . . ."

In *Buck* v. *Robson* (1878), 3 Q.B.D. 686, 689, 690, it was said that *Brice* v. *Bannister* was a decision that such a document was not an order, but "an absolute assignment of the accruing debt," and this was added (p. 691): "The importance of the judgment arises from its appearing that an order from a creditor to his debtor to pay to a third party was treated by the Court of Appeal as an assignment, and not as an order for the payment of money." *Ex p. Shellard* (1873), L.R. 17 Eq. 109, was considered overruled by *Brice* v. *Bannister*.

Jessel, M.R., also points out the effect of *Brice* v. *Bannister* in *Fisher* v. *Calvert* (1879), 27 W.R. 301.

A comparatively late case is *Harding* v. *Harding* (1886), 17 Q.B.D. 442, in which the wording was: "I hereby instruct the trustees . . . to pay to my daughter, L. H., the balance shewn in the above statement . . . ;" and this was held a valid assignment.

The documents being assignments, it is of no consequence

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that notice was not given till after the death of the assignor. Malins, V.-C., in *In re Russell's Policy Trusts* (1872), L.R. 15 Eq. 26, at p. 29, says: "The principle is, that notice is sufficient if it is given to the party having the fund whilst it remains in his possession." He is, however, speaking of a different set of facts. But *Walker* v. *Bradford Old Bank*, 12 Q.B.D. 511, seems in point. That was the case of an assignment of a chose in action under the Judicature Act: it was said to be voluntary, and notice was not given until after the death of the assignor. It was held by a Divisional Court that (1) the debtor, being a third party, could not set up that the assignment was voluntary, and (2) notice after the death of the assignor was sufficient. That decision seems to me to dispose of the case.

I think the appeal should be dismissed with costs.

I have not attempted to draw a distinction (wholly immaterial in the present case) between equitable assignments and assignments under the Judicature Act — and I have paid no attention to such cases as *Farquhar* v. *City of Toronto*, 12 Gr. 186, in which the amount assigned was intended to pay a debt due from assignor to assignee.

Sutherland, J.

SUTHERLAND, J.:—I agree that, upon the authorities cited and applicable, the documents in question must be construed as assigning the moneys which are the matter of controversy to the plaintiff, and that, therefore, she is entitled to maintain this action.

I agree that the appeal should be dismissed with costs.

Leitch, J.

LEITCH, J., agreed with RIDDELL, J.

Appeal dismissed.

MYERS v. TORONTO R. CO.

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S. C.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 24, 1913.

1. STREET RAILWAYS (§ III C—47)—PERSON CROSSING TRACK—RELIANCE ON RULES—PROPER SPEED AND OPERATION.

Where the plaintiff, about to cross a street railway track, sees the car moving at such a distance away that he thinks it safe to venture across the short distance he has to go, he has the right to assume such safety and that the car is being operated properly and not at an excessive rate of speed.

[*Myers* v. *Toronto R. Co.*, 10 D.L.R. 754, reversed.]

2. STREET RAILWAYS (§ III C—47)—PERSON CROSSING TRACK—SCOPE OF "STOP, LOOK AND LISTEN" DOCTRINE.

Where a person on foot is about to cross a street railway track having taken the precaution to look once and having reasonably formed the opinion that it is safe to cross the track because an approaching car is at such a distance that, if operated in a usual and proper manner, the pedestrian can safely cross; the trial Judge is in error, if he states the law as imposing a duty to look again, or continue looking and keeping the car in sight, as a condition precedent to any right of recovery.

[*Myers* v. *Toronto R. Co.*, 10 D.L.R. 754, reversed.]

3. NEW TRIAL (§ II—9)—FOR ERRORS OF COURT—INSUFFICIENCY OF ISSUES SUBMITTED—NEGLIGENCE.

In an action for damages for injuries sustained by the plaintiff by being struck by the defendant's street car while the plaintiff on foot was crossing the track, if upon the facts (*a*) the plaintiff's conduct may not have been negligent, and (*b*) the defendant may have been guilty of negligence which occasioned the accident, the omission at the trial to pass in a satisfactory way upon these issues is ground for a new trial.

[*Myers* v. *Toronto R. Co.*, 10 D.L.R. 754, reversed.]

Statement

APPEAL by the plaintiff from the judgment of MIDDLETON, J., 10 D.L.R. 754, 4 O.W.N. 1120, dismissing the action, which was tried before him without a jury, and was brought to recover damages for injuries sustained by the plaintiff by being struck by a car of the defendants, while she was attempting to cross Queen street, in the city of Toronto, on foot, by reason, as she alleged, of the negligence of the defendants' motorman.

The appeal was allowed and new trial granted.

W. E. Raney, K.C., for the appellant.

D. L. McCarthy, K.C., for the defendants, the respondents.

Sutherland, J.

SUTHERLAND, J.:—Appeal from the judgment of Middleton, J., who tried the case without a jury, and found the plaintiff

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guilty of negligence which was the proximate cause of the accident, and dismissed her action, wherein she had claimed damages in consequence of injuries sustained, as she alleged, owing to the negligence of the defendants.

The facts are set out in the judgment with sufficient fulness for reference purposes. I quote from the judgment: "When one ventures to cross in front of a moving car, rapidly approaching as this was, I think it is incumbent on the person to keep the car in sight, and not to trust blindly to the opinion formed on leaving the sidewalk that there is ample time to cross. If the plaintiff had exercised any kind of care, she could readily have escaped the disaster which overtook her."

In view of the definite finding of contributory negligence, and that it was the proximate cause of the accident, one is disposed at first blush to think the appeal a difficult one for the appellant to maintain. A careful perusal, however, of the portion of the learned trial Judge's opinion just quoted leads one to ask one's self the question—has he not too broadly and generally stated the law as to the duty of a pedestrian under circumstances such as are disclosed in the evidence in this case?

The appellant complains also that the learned Judge, in coming to his conclusions as to the facts, misconceived, and hence inadvertently misstated, in part, the evidence, and in consequence deduced therefrom an unwarranted conclusion.

The plaintiff's evidence, in so far as it affects the finding of fact about to be referred to, is as follows:—

"Q. You looked west, and what did you see? A. There was a car about Duncan street, west of Duncan street.

"Q. Could you see whether it was moving or standing still? A. I knew it was moving because I saw the lights between . . .

"Q. You looked west, and then you say you went across? A. I walked across; the car being a block and a half away, I was not anxious. I was standing on the track to look, and there was two tracks, and I walked to go across. . . .

"Q. You did see some things, did you, when you had looked to the west and you had seen the car west of Duncan street? A. Yes, for the lights were between those . . .

"Q. Then you said you thought you had plenty of time? A.

I never hesitated at all; I went right across; I didn't rush, I didn't think it was necessary. I walked carefully across the street so far.

"Q. Do you recall where you were when you saw the car at Duncan street; whether you had stepped off the sidewalk at that time? A. I was on the track on the side, the north side of the track when I looked.

"Q. On the street? A. On the car track.

"Q. On the north car track? A. Yes, on the north car track. . . .

"Q. From the time you looked and saw the car coming until the time you were struck, did you ever look around you? A. No.

"Q. If you had looked, you could, of course, have seen the car getting closer? A. Surely.

"Q. You took it you had time to cross, and you proceeded to cross without looking again? A. Certainly.

"Q. There is no doubt that if, when you were on the pair of tracks, not the pair you were struck on, but the pair of tracks north of that, if you had looked you could have seen the car coming? A. I looked when I was starting to go across.

"Q. If you had looked again? A. I didn't look the second time."

This evidence the trial Judge quotes or paraphrases as follows: "She says that she realised that the car was getting close, yet she thought it was far enough away to enable her to cross safely. Before she succeeded in getting across, the car had struck her. She did not hurry, because she thought the car was so far away that she would be safe. She did not look a second time, as she did not think that there was any occasion to do so."

There is no statement by her that she realised that the car was getting close. All she says is that "she saw the car about Duncan street, and it was moving." Duncan street is about 500 feet west of Simcoe street, and the accident occurred a little to the east of the latter street, on Queen street. The proper inference, as it seems to me, to be drawn from her evidence is, not that she realised that the car was getting close and took the chance of crossing safely, but that, seeing the car moving

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at such a distance away, she thought it safe to venture across the short distance she had to go, namely, from the north track or north side of the north track across a portion of that track, then across the devil-strip and across the south track to the point at which the accident occurred. Would this be an unreasonable assumption to make, if, in addition, she had the right to assume, as I think she had, that the car was being operated properly and not at an excessive rate of speed?

I am of opinion that the appellant has ground to complain of the way in which the plaintiff's evidence has been stated by the learned Judge and the deductions he has drawn therefrom.

But was the trial Judge warranted in stating the law to be as he has indicated? Is it the law that it is incumbent upon a person, who has taken the precaution to look once and has reasonably formed the opinion that it is safe to cross the track, because an approaching car is at such a distance that, if operated in a usual and proper manner, she can do so, to look again or continue looking and keep the car in sight, or otherwise she can in no case recover?

If that is what is meant by the learned Judge, and his decision is based on that view, I am unable to agree with him. We have had occasion to consider the law applicable in such cases recently in *Ramsay* v. *Toronto R.W. Co.*, 17 D.L.R. 220, 30 O. L.R. 127, in which we were referred by counsel to *Grand Trunk R.W. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838, 29 Times L.R. 679, at p. 680, as laying down the law that a person was bound to look before crossing a railway track, and that failure to do so was *per se* negligence. The case, however, when closely read, does not so decide, and what was said therein which might lend colour to the contention was said for an entirely different purpose. What we in the *Ramsay* case considered to be the rule is stated therein as follows: "The duty of a person about to cross a railway track is not to be guilty of negligence, which is another way of saying that he must exercise reasonable care. In each case what is reasonable care is a question of fact to be decided by the jury, according to the facts of the case."

The case of *Toronto R.W. Co.* v. *Gosnell*, 24 S.C.R. 582, de-

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cides that "the driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross."

In the present case, the plaintiff did look, and concluded from the distance the car appeared to be from her that she could cross in safety. She had a right to assume that the car was being operated at a proper and moderate rate of speed, and prudently. There is no finding as to this, nor as to the defendants' negligence.

Upon the facts, her conduct may not have been negligent, and the defendants may have been guilty of negligence which occasioned the accident. These issues do not appear to me to have been passed upon in a satisfactory way.

I think that the plaintiff has reasonable grounds for seeking, and is entitled to, a new trial. The costs of the former trial and of this appeal may well abide the event.

MULOCK, C.J.Ex., and LEITCH, J., agreed. Mulock, C.J. Leitch, J.

RIDDELL, J.:—This case has given me a great deal of trouble; while I cannot say that I am entirely satisfied with the conclusion arrived at by the other members of the Court, I have not such strong conviction the other way that I should dissent—especially when the relief granted is a new trial. Riddell, J.

If the learned trial Judge intended to lay it down as a general rule of law that "when one ventures to cross in front of a moving car, rapidly approaching . . . it is incumbent on the person to keep the car in sight . . .", I am clear that he would be wrong, and that no finding based upon that view of the law could be allowed to stand. But is this statement any more than an answer of a jury would be to a question, "What should the plaintiff have done which she didn't do? The answer being, "She should have kept the car in sight." And, if a jury should find an omission to do so, contributory negli-

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gence, would the Court set it aside? I think not. The matter has, however, been left in some doubt, and I give a grudging assent to an order for a new trial, with costs of the former trial and appeal to abide the event.

Order for a new trial.

REX v. MINCHIN.

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Supreme Court of Canada, Sir Charles Fitzpatrick, Idington, Duff, Anglin, and Brodeur, JJ. March 23, 1914.

1. APPEAL (§ VII M—550)—WHAT ERRORS WARRANT REVERSAL—FACTS OTHERWISE PROVED—NO SUBSTANTIAL WRONG.

Upon a criminal appeal by way of appeal upon a case reserved setting up misdirection and improper reception of evidence, the provision of sec. 1019 of the Code is applied and the conviction stands where (*a*) the clearly competent evidence of the case strongly supported the finding of guilt, and (*b*) the appellate court is unable to say that "something not according to law was done at the trial or some misdirection given" whereby "some substantial wrong or miscarriage was occasioned on the trial."

[*Rex* v. *Minchin*, 15 D.L.R. 792, affirmed.]

2. EVIDENCE (§ XI T—885)—CRIMINAL CASES—RELEVANCY—INCIDENTALLY PROVING ANOTHER CRIME—EFFECT ON ADMISSIBILITY.

In a criminal trial where evidence of certain facts is directly relevant to the issue joined, the circumstance that such facts incidentally shew that the accused has been guilty of another crime does not render such evidence inadmissible.

[*Rex* v. *Minchin*, 15 D.L.R. 792, affirmed.]

Statement.

APPEAL from the judgment of Alberta Supreme Court, *Rex* v. *Minchin*, 15 D.L.R. 792, affirming the conviction, Beck, J., dissenting.

The appeal was dismissed.

Jas. Short, K.C., and *L. F. Clarry*, K.C., Deputy Attorney-General, for the Crown.

R. B. Bennett, K.C., for defendant, appellant.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I would dismiss this appeal.

Idington, J.

IDINGTON, J.:—The appellant is a prisoner convicted of having stolen $5,000 from the city of Calgary whilst acting as assistant treasurer of the city. The appeal comes before us by way of appeal upon a case reserved for the decision of the Ap-

pellate Court of Alberta. One of the learned Judges of that Court dissented from the conclusion reached by that Court to dismiss the appeal. He dissented upon the ground that the prisoner's bank-book should not have been admitted in evidence, or, after its admission, that the prisoner's counsel having elicited from the bank's officers, and the prisoner in giving evidence relative to an item of the deposit by the prisoner of $5,000, an explanation which shewed, if accepted, that the said item could have no connection with the sum alleged to have been stolen, and no explanation having been insisted upon by the Crown officer during the trial relative to the remaining items of deposit in the bank-book, it ought not to have been used further as evidence against the prisoner; especially in view of a circumstance which took place in the course of the bank officer's examination by the prisoner's counsel. The circumstance so relied upon was that having elicited the explanation in question, prisoner's counsel had dropped the remark, as follows: "This is the only item, I take it, in this sheet that we are interested in at all."

There is nothing in the case to indicate that this remark was addressed to the Court, or so as to call the attention of the Crown officer or the Court to the purpose of insisting that, unless an intimation to the contrary came from the Court or Crown officer, both would be expected to be bound by such excuse and to treat the remaining part of the account as if not in evidence. No further examination took place relative to the rest of prisoner's bank account then in evidence.

The learned trial Judge, during his charge to the jury, adverted to this bank account and pointed out that the item of $5,000 had been satisfactorily explained. He then proceeded to tell the jury that, excluding the $5,000 item and items of discount, there remained on the deposit side of the account, extending over a period of five months and a half, items which in the aggregate formed a total sum of $3,297.57, and if the prisoner's salary during the time over which the account extended was deducted, the balance would only be the sum of $2,239.57.

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He then pointed out to the jury that there was no evidence of that having any relation to the inquiry. He used the following language in dismissing that subject from his further consideration:—

It is suggested to you by the Crown that these apparently large deposits afford some evidence of the fact that Minchin was getting money elsewhere than from his salary and, of course, that is so.

He did not get all this money from his salary. We have no explanation of any of these items except the five thousand dollars. We have no evidence to shew that any of these deposits which form the total that I have given you came from the city. We have the bald fact, unexplained, and therefore not to be dealt with in the light of evidence, that this considerable sum was deposited to his credit in the bank between these dates.

He had previously, in emphatic language, told the jury that the question of who made the alteration in the books and documents was the turning point of the case, and spoke as follows:—

Then the Crown goes further and claims that the alterations made in the voucher for this sum, exhibit 4, the alteration in the petty cash book, and the general cash book, were made by Minchin, and, to my mind, that is the turning point in the case. In my judgment, at any rate, of course you gentlemen may think differently, the hand that made those alterations was the hand of the man that stole the money. The alterations were undoubtedly made either for the purpose of concealing a crime, or of making possible the commission of one, and no person but him who contemplated the crime or had committed it, would have the slightest interest in making these alterations, so that, if you can see from all the evidence that has been given that these alterations were made by Minchin, in my judgment at any rate, you have gone a very long distance towards establishing his guilt for the crime with which the Crown charges him. This fact has been appreciated by counsel for the Crown, as well as by counsel for the prisoner, and a great deal of time and attention has been devoted, and very properly too, to the question of these alterations.

I cannot conceive how the bank-book could have been excluded from being put in evidence. Indeed, the Crown officer would have failed to discharge his duty had he omitted to investigate the prisoner's bank account and to endeavour to shew therefrom some trace of the stolen money. And if it had come to his knowledge that there had been a deposit of $5,000, the exact amount in question, his omission to produce it might have led to disagreeable reflections. I, therefore, see no ground of complaint in the admission of the bank-book. I can conceive

of a Crown officer making the mistake of using unfairly the results of such an investigation, but we have no evidence of such having transpired in this case. I can hardly imagine any counsel for prisoner, if there had been such unfair use of the evidence in question, sitting in silence and not using his privilege and discharging his duty to his client by proper objection, and remonstrance if persisted in. We have nothing of the kind in this case, and the only fair conclusion is that nothing improper or unfair took place. Nay, more. We have the learned trial Judge's charge in full and no indication therein that improper use had been made of the evidence.

And his charge certainly makes it clear that there was no evidence of what these items might rest upon or whence the money came. There is no intimation that the prisoner was to explain or that his failure to explain furnished any evidence against him. It could, I respectfully submit, only be in such case that the reasons assigned by the learned Judge in the support of his dissenting opinion could have any force. The case he relies upon does not carry the law further. The bare fact that the prisoner had money in the bank during the period in question, in itself was quite admissible, just as much as if he had put it in his pocket, but it would carry no substantial weight with the jury unless connected in some way with the abstraction of money alleged to have been stolen. Such, I take it, is all that can fairly be said of the charge in this regard. There was no objection made to it, which I certainly think would have been made had the remarks of the learned trial Judge been felt by counsel to have borne unfairly on his client.

Indeed, to my mind, it was obviously impossible for a prudent Crown officer to have relied upon such an account in way of putting any stress thereupon. His doing so, or even without his doing so, the situation was such as to have enabled prisoner's counsel to have suggested with most telling effect the fact that the Crown had been driven to investigate the bank account of a man previously of good character and presumably innocent, and had utterly failed to find the half of $5,000.

It was the theft of $5,000, and nothing more or less, that was being investigated. The whole burden of the proof to sup-

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port the charge rested upon the prisoner's having made the alterations in the cash-book and other books and documents, which demonstrated the case for the Crown. Without that there was no case and no possible chance of the prisoner's conviction. I venture to think that everyone engaged for days in the trial must have been deeply impressed with this view of what they were about. If the jury had found the evidence given for the Crown on that feature of the case to be reliable, it was, under the very remarkable circumstances of quite undisputed facts, as complete and crushing as one can conceive of.

As so well pointed out by the learned trial Judge in his charge, which I may say was eminently fair, it is not conceivable that anyone else who alone or in conjunction with others by any possibility could have stolen the money should have thought of making these alterations, much less of simulating the handwriting of the prisoner.

Our jurisdiction may, as I have intimated in the case of *Eberts* v. *The King*, 7 D.L.R. 538, 47 Can. S.C.R. 1, be confined to the ground taken by a dissenting Judge or minority in the appellate Court hearing an appeal on a reserved case. We have never acted upon this, but have given every reasonable latitude to the counsel for a man convicted to go fully into all that he conceives is possible ground of complaint. It enables the ground taken, if properly so confined, to be illuminated by the whole conduct of the trial. It is at least fair, and, perhaps, essentially necessary in many cases, to adopt that course in order that we may correctly appreciate and apply sec. 1019 of the Criminal Code, which limits our jurisdiction to set aside a conviction, by enacting, as follows:—

> 1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial:

save in regard to improper disallowance of any challenge.

There was no substantial wrong or miscarriage occasioned on this trial by anything now complained of. There was no conviction sought or got by merely comparing the balance at one

end of the account with that at the other demonstrating a deficiency. There was no conviction of one offence upon or by evidence which, in truth and substance, constituted another offence. There was a conviction got by tracing the conduct of the accused in his endeavour to hide or escape from the detection of his crime as alleged. In his devious path for that purpose, including his evidence in denial of his alteration of the books and documents, he may have committed other crimes which, possibly, in the minds of the jurors were given that weight they were entitled to attach to such circumstances on their view of the case against him. I see no reason for disturbing the verdict or setting aside the conviction and, therefore, think the appeal must be dismissed.

DUFF, J., agreed that the appeal should be dismissed. Duff, J.

ANGLIN, J.:—There was abundant evidence upon which the jury might find the accused guilty of the offence charged against him. But for the falsification of a debit entry to the extent of $5,000, the books of the municipal corporation, including one in which the entries were made by the defendant personally, would have shewn that there should have been $5,000 more money in the hands of the municipal treasurer in November, 1911, than he actually had. A balancing of the cash in hand with the amount shewn by the books, which took place in the month of June, when the defendant was leaving for a holiday, and again in the month of November, when he resigned his office, made it abundantly clear that the defalcation had taken place in the interval, the alterations in the books and in a voucher having been made before the latter date. The evidence established that the moneys taken in by the assistants of the accused were, each evening, accounted for and handed over to him. Although the method in which this was done was certainly loose, there was sufficient to justify a conclusion by the jury that the moneys which were taken had come to the hands of the accused. When it was established to their satisfaction that the falsification of the books, which was obviously done for the purpose of concealing the defalcation which had taken place, was the act of the accused, they Anglin, J.

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had evidence of almost irresistible cogency that he had committed the defalcation.

Evidence that during a defined period of less than six months a deficiency had occurred equal to the amount by which the accused had falsified an entry in his employer's books at or about the date at which he is charged with having embezzled this sum, accompanied, as it was, by evidence warranting the inference that the money stolen had reached his hands and had been misappropriated by him suffices to sustain a conviction for theft of the entire sum (although it may have been taken in numerous small amounts at different times during the period covered by the evidence) without proving the taking of each or any of such several amounts. The case may be treated as one continuous act of theft, although there were a number of distinct takings: *Regina* v. *Henwood*, 22 L.T.R. 486, 11 Cox C.C. 526; *Reg.* v. *Bleasdale*, 2 Car. & K. 765; *Regina* v. *Slack*, L.R. 7 Q.B. 408; *Regina* v. *Balls*, L.R. 1 C.C. 328, 40 L.J.M.C. 148.

Much attention was devoted by counsel for the appellant to the circumstance that falsification of books of account is in itself a crime, and he very strongly contended that evidence of one crime is not admissible to establish that the accused has committed another. Where evidence of certain facts is directly relevant to the issue joined, the circumstance that such facts incidentally shew that the accused has been guilty of another crime cannot render such evidence inadmissible. Moreover, I do not find any question of the admissibility of this evidence reserved in the case stated.

Another objection taken on behalf of the appellant caused me some misgiving. In the course of the Crown case a part of the prisoner's bank account was put in evidence. The admission of this evidence was not objected to. It could not have been excluded for two reasons; first, because it shewed a deposit to the defendant's credit of a sum of $5,000 about the time when the defalcation was charged; and secondly, because it might have been followed by evidence shewing that the defendant had no other legitimate source of revenue except his salary, and he would have then been called upon to explain any excess in his monthly deposits over the amount of his salary. Upon his fail-

ure to offer such an explanation under these circumstances, the deposits unaccounted for would be evidence against the accused which a jury might very properly consider.

But the deposit of $5,000 was shewn to represent moneys which came into the hands of the defendant from an entirely independent source; and the Crown did not adduce any evidence to shew that he had no other source of income or revenue beyond his salary, the amount of which was proved, from which other deposits in his bank account, in excess of his salary, might have come. From what transpired at the trial, it would seem reasonably clear that counsel for the accused proceeded on the assumption that the bank account was put in solely to shew the $5,000 deposit. On cross-examination of the Molson's Bank accountant, who produced the bank account, it was shewn that the $5,000 deposit on October 3rd was a loan which the accused had procured from the Union Bank by discounting the note of his wife and himself. In the course of his examination of this witness, counsel for the accused made this observation, which in the shorthand notes appears in the form of a question:—

This is the only item, I take it, in this sheet that we are interested in at all?

to which no reply was made. When the accused was called as a witness, he gave a similar explanation of the $5,000 deposit, and neither in chief nor in cross-examination was his attention drawn to any other item in the account. Indeed, no further attention appears to have been paid to this bank account until some reference was made to it by counsel for the Crown in addressing the jury and by the learned trial Judge in his charge. After telling the jury that they would have the defendant's bank account before them, the learned Judge proceeded to state that the $5,000 item had been fully cleared up. He then called their attention to the amount of the accused's salary and informed them that, in addition to the $5,000 item and his salary deposits, the account shewed that there had been placed to his credit during the six months' period in question a sum of $2,239.57, and he significantly added:—

It is suggested to you by the Crown that these apparently large deposits offer some evidence of the fact that Minchin was getting money

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elsewhere than from his salary, and, of course, that is so. He did not get all this money from his salary. We have no explanation of any of those items except the $5,000.

Had nothing more been said, I incline to think that I should have felt obliged to conclude that an unfair and improper use prejudicial to the accused had been made of his bank account. In the absence of evidence that he had no other source of income or revenue than his salary, the deposits in his bank account were entirely irrelevant to the issue and afforded no evidence whatever which a jury should consider in determining his guilt or innocence. But the trial Judge continued:—

> We have no evidence to shew that any of these deposits, which form the total that I have given you, came from the city. We have the bald fact, unexplained, and therefore not to be dealt with in the light of evidence, that this considerable sum was deposited in the bank between these dates.

These observations concluded the learned Judge's reference to the bank account. While the charge would, no doubt, have been very much more satisfactory had the learned Judge distinctly told the jury that, without evidence that the defendant had not means or sources of income other than his salary, his bank account was not relevant evidence—that no inference could properly be drawn from it that he had taken any moneys belonging to the city—that it afforded no corroboration of the Crown case—and that, for these reasons, they should not take it into consideration at all, I rather think that this was what the learned Judge intended to convey by the sentence:—

> We have no evidence to shew that any of these deposits, which formed the total that I have given you, came from the city.

Assuming the jury to have been composed of men of fair intelligence, it is unlikely that they were affected adversely to the accused by the evidence of the amount of deposits in his bank account. At all events, in view of the saving sentence which I have quoted, I find myself unable to say that "something not according to law was done at the trial, or some misdirection given" whereby "some substantial wrong or miscarriage was occasioned, on the trial," and I am, therefore, unable to reach the conclusion that the conviction should be set aside or a new trial directed: Criminal Code, sec. 1019.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed for the reasons given by my brother Anglin.

Appeal dismissed.

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Alberta Supreme Court, Scott, Stuart, and Simmons, JJ. October 23, 1914.

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1. CONTRACTS (§ I E—80)—FORMAL REQUISITES—REALTY—REAL ESTATE AGENT'S COMMISSION—ALBERTA STATUTE, 1906.

Upon a claim for a real estate agency commission an oral agreement to pay a fixed sum of money into a bank pending the adjustment of the claim in dispute is not admissible to establish a previous oral agreement to pay commission, in the face of the provision of Alberta Statute of 1906, ch. 27, sec. 1, precluding any action by way of commission for services rendered in connection with a realty sale unless evidenced by writing.

APPEAL from the judgment of Beck, J., in plaintiff's favour on his claim for $5,000 commission on a realty sale. Statement

The appeal was allowed.

C. C. McCaul, K.C., for plaintiff, respondent.

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

The judgment of the Court was delivered by

SIMMONS, J.:—This is an appeal from Mr. Justice Beck awarding the plaintiff $5,000 for services rendered in connection with a real estate sale. Simmons, J.

The Imperial Bank of Canada interpleaded as between the claims of the parties to this issue to the sum of $5,000 in the possession of the bank and an issue was directed in which the plaintiff Sanders alleged and the defendant Anderson denied that the plaintiff was entitled to a part of the purchase paid, or to be paid, to the defendant Peter Anderson under an agreement for sale between Anderson as vendor and Dunlop and Simons purchasers, and secondly whether the plaintiff Sanders is entitled to some portion of the moneys in the hands of the Imperial Bank of Canada (prior to the payment of $5,000 into Court in the matter of the said application). In the order directing the interpleader issue the defendant Anderson was to be at liberty on the trial of the issue to raise any grounds of de-

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fence that would or might have been open to him on the trial of an action by way of statement of defence to a statement of claim.

In December, 1911, the defendant Anderson left Edmonton on a visit to California and appointed W. H. Adams, an employee, Mr. Williams, a solicitor, and Mr. Kirkpatrick, manager at Edmonton of the Imperial Bank of Canada, a committee to look after his business affairs, Mr. Adams having a general power of attorney in writing. On January 6, 1912, Adams, as attorney for Anderson, with the consent of Williams and Kirkpatrick, gave the plaintiff Sanders an option in writing to purchase a subdivision in Edmonton known as Connaught Heights, for the sum of $100,000. The consideration was $500 and the purchase price was payable: $25,000 on January 20, 1912, $37,500 on January 5, 1913, and $37,500 on January 5, 1914. The sum of $500 was paid for the option to January 20, 1912, and it was on that date to be renewable until April 5, 1912, on the following terms: Payment on January 20 of a further sum of $500, and on February 5 of $1,000 and on March 5 of $5,000, and all payments on the option to be applied on the purchase price. On April 4, Sanders was in Vancouver, and one Watson was acting for him under a power of attorney in writing and it was mutually arranged that Anderson should give an agreement for sale direct to Dunlop and Simons who held an option from Sanders to purchase the property.

The plaintiff says that he entered into negotiations with Adams and Williams on January 6 on behalf of Dunlop and Simons and that Adams and Williams refused to have anything to do with Dunlop and Simons but suggested to him that he take the option himself and, "that they would give the option direct to me and I could give it to these other men if I guaranteed $2,000. I was to guarantee that whether they paid or whether they did not. They agreed to make the price $100,000, I to sell at the same price, and they would give me $5,000 after the first payment was completed." Adams and Williams deny that Dunlop and Simons were mentioned when the option was given and deny there was any agreement to pay $5,000 to the plaintiff by way of commission or otherwise. The learned trial Judge has, it must be assumed, found as a fact that there was an

oral agreement to pay commission. It is admitted that the statute bars the enforcement of this oral agreement. When the period arrived for the taking up of the option, April 5 being a holiday, the parties met at a solicitor's office; the plaintiff who was then absent in Vancouver was represented by one Watson who had a power of attorney in writing and by Mr. Cormack a solicitor.

Dunlop and Simons had resold and their sub-purchaser was represented by Messrs. McDonald & Tighe who paid into the Imperial Bank $18,000 being the balance of the $25,000 instalment of purchase price due, under the option. The agreement for sale was executed and deposited in the bank with the payment pending an adjustment of certain charges against the lands. The judgment appealed from rests upon an alleged agreement to the effect that $5,000 of the $18,000 should remain in the bank in escrow pending the adjustment of a claim for commission of $5,000 made on behalf of the plaintiff.

Watson, the plaintiff's agent, and Mr. Cormack, his solicitor, say the money was paid into the bank in escrow. Mr. Cormack says Anderson did not object to pay some commission but refused to pay $5,000 commission on the ground that this was too much and it was then agreed that the money should be paid into the bank and await Mr. Sanders' return to Edmonton. The present action then rests upon the alleged payment into the bank of the $5,000, in the meantime, but no suggestion is made by either Mr. Cormack or by Watson as to how the dispute was to be adjusted.

The contention that as a result the fund became ear-marked in such a manner as to prevent the defendant from pleading the statute essentially rests upon an oral agreement, the effect of which was that the defendant admitted that the plaintiff was entitled to some part of the fund, and that this right arose out of the defendant's oral agreement in the first instance to pay the plaintiff a commission.

The statute ch. 27 Alberta, 1906, sec. 1, enacts that

> No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless

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the contract upon which recovery is sought in such action, or some note or memorandum thereof is in writing signed by the party sought to be charged, or by his agent thereunto lawfully authorized in writing.

The subsequent oral agreement to pay the money into the bank can not be admissible to establish a previous oral agreement to pay commission, otherwise the statute would be of no effect. I would therefore allow the appeal with costs and costs to the defendant at the trial.

Appeal allowed.

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GOODACRE v. POTTER.

British Columbia Supreme Court, Gregory, J. March, 1914.

VENDOR AND PURCHASER (§ I—1) — *Agreement for sale — Remedies of vendor — Action on covenant and foreclosure — Concurrent remedies.*] — Action for foreclosure of an agreement for sale and for personal judgment. The endorsement on the writ of summons claimed the usual accounts, etc., in a foreclosure action, and also payment of a specific sum, viz., an overdue instalment of principal and interest to date.

Plaintiff moved in chambers for an order for (1) personal payment of the sum endorsed on writ, and (2) order *nisi* for foreclosure. The defendant had not entered an appearance.

Counsel for plaintiff in support of the motion referred to *Bissett* v. *Jones*, 32 Ch. D. 635, 55 L.J. Ch. 648; *Farrer* v. *Lacy*, 31 Ch. D. 42 (C.A.), 55 L.J. Ch. 149, which establish the rule, as regards mortgages, that plaintiff is entitled to such an order. As regards agreements of sale, counsel urged that there was no difference in principle, the vendor being in the same position as a mortgagee and entitled to his remedies by action on the covenant as well as foreclosure: *Tytler* v. *Canning*, 12 D.L.R. 426, and cases there referred to. [See 16 D.L.R. 581.]

Held by GREGORY, J., in Chambers, that the plaintiff was entitled to the order as asked for in the summons of February 27, 1914. For form of order see *Farrer* v. *Lacy*, *supra*. *A. Campbell*, for plaintiff, applicant. No one for defendant.

Motion granted.

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Judicial Committee of the Privy Council. Present: The Lord Chancellor (Viscount Haldane), Lord Moulton, Lord Sumner, Sir Charles Fitzpatrick, and Sir Joshua Williams. November, 1914.

1. CONSTITUTIONAL LAW (§ I A—30)—CONSTRUCTION—APPLICATION OF FEDERAL CONSTITUTION TO PROVINCES—SELF-EXECUTING PROVISIONS—B.N.A. ACT.

The British North America Act being founded upon a political agreement, the judicial interpretation of sections thereof stating the distribution of legislative power between the provinces and the Dominion should be limited to concrete questions which are in actual controversy from time to time without entering upon a general interpretation of the Act, the form of which shews that it was intended to leave the interpretation of seemingly conflicting provisions to practice and judicial decision.

[*Citizens* v. *Parsons*, 7 A.C. 109, and *Attorney-General* v. *Colonial Sugar Refining Co.*, [1914] A.C. 254, applied.]

2. CONSTITUTIONAL LAW (§ I A—20)—FEDERAL AND PROVINCIAL RIGHTS—"CIVIL RIGHTS IN THE PROVINCE"—CONSTRUCTION OF B.N.A. ACT.

The expression "civil rights in the province" as used in the confirming of provincial powers in sec. 92 of the British North America Act is to be construed as excluding cases expressly dealt with elsewhere in secs. 91 and 92.

3. CORPORATIONS AND COMPANIES (§ I—1)—FRANCHISES—FEDERAL AND PROVINCIAL RIGHTS TO ISSUE—B.N.A. ACT.

The power of legislating with reference to the incorporation of companies in Canada with other than provincial objects belongs exclusively to the Parliament of Canada as a matter affecting the "peace, order and good government of Canada" under sec. 91 of the British North America Act.

4. CORPORATIONS AND COMPANIES (§ I E—19)—GOVERNMENTAL REGULATION—COMPANIES WITH OBJECTS EXTENDING TO THE ENTIRE DOMINION—FEDERAL AND PROVINCIAL POWERS—RIGHT TO SUE, WHENCE DERIVED.

The legislative power to regulate trade and commerce which by sec. 91 of the British North America Act belongs to the Dominion Parliament enables the latter to prescribe to what extent the powers of trading companies which it incorporates with objects extending to the entire Dominion should be exercisable and what limitations should be placed on such powers; and sections 5, 29, 30 and 32 of the Companies Act (Can.) and sec. 30 of the Interpretation Act, 1906 (Can.), purporting to enable any federal company incorporated under the Companies Act of Canada to sue and be sued and to contract in the corporate name and establishing the place of its legal domicile and declaring the limitations of personal liability of the shareholders are within the legislative powers of the Parliament of Canada.

5. CORPORATIONS AND COMPANIES (§ I—1)—CREATION; FRANCHISES; GOVERNMENT REGULATION—FEDERAL COMPANY, HOW AFFECTED BY PROVINCIAL LAW—COMPANIES ACT OF CANADA—B.C. COMPANIES ACT.

The provisions of British Columbia Companies Act in so far as they purport to compel a trading company incorporated under the Companies Act of Canada with powers extending throughout the whole of Canada to take out a provincial license as a condition of exercising such corporate powers in British Columbia, and of suing in the courts of that province, are *ultra vires*.

[*Wharton* v. *John Deere Plow Co.*, 12 D.L.R. 422, reversed; *John Deere Plow Co.* v. *Duck*, 12 D.L.R. 554, reversed; *Re Companies Act*, 48 Can. S.C.R. 331, 15 D.L.R. 332, considered.]

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6. CORPORATIONS AND COMPANIES (§ I A—2)—FEDERAL COMPANY—HOW AFFECTED BY PROVINCIAL LAWS OF GENERAL APPLICATION—B.N.A. ACT.

A company incorporated by the Dominion with powers to trade is not the less subject to provincial laws of general application enacted under sec. 92 of the British North America Act.

[*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580; *Colonial Building Assocn.* v. *Attorney-General*, 9 A.C. 157; *Bank of Toronto* v. *Lambe*, 12 A.C. 575, and *Citizens* v. *Parsons*, 7 A.C. 96, referred to.]

CONSOLIDATED appeals from judgments of B.C. Supreme Court, *Wharton* v. *John Deere Plow Co.*, 12 D.L.R. 422, and *John Deere Plow Co.* v. *Duck*, 12 D.L.R. 554.

The appeals were allowed.

E. L. Newcombe, K.C., for Atty.-Gen. of Canada.

Sir Robert Finlay, K.C., and *Geoffrey Lawrence*, for Atty.-Gen. for B.C.

F. W. Wegenast, for appellant company.

E. Lafleur, K.C., and *Raymond Asquith*, for respondents.

The judgment of the Board was delivered by

Haldane, L.C.

HALDANE, L.C.:—These are consolidated appeals from judgments of the Supreme Court of British Columbia. The Attorney-General for the Dominion and the Attorney-General for the Province have intervened.

By the first of the judgments the appellant company was restrained at the suit of the respondent Wharton from carrying on business in the province until the company should have become licensed under part 6 of the B.C. Companies Act. By the second judgment the appellant's action against the respondent Duck for goods sold and delivered was dismissed. The real question in both cases is one of importance. It concerns the distribution between the Dominion and the Provincial Legislatures of powers as regards incorporated companies.

The appellant is a company incorporated in 1907 by Letters Patent issued by the Secretary of State for Canada under the Companies Act of the Dominion. The Letters Patent purported to authorize it to carry on throughout Canada the business of a dealer in agricultural implements. It has been held by the Court below that certain provisions of the B.C. Companies Act have been validly enacted by the provincial legislature. These provisions prohibit companies which have not been incorporated

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under the law of the province from taking proceedings in the Courts of the province in respect of contracts made within the province in the course of their business, unless licensed under the Provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a license, it or they carry on the company's business in the province. The appellant was refused a license by the registrar. It was said that there was already a company registered in the province under the same name, and sec. 16 of the provincial statutes prohibits the grant of a license in such a case. The question which has to be determined is whether the legislation of the province which imposed these prohibitions was valid under the B.N.A. Act.

The Companies Act of the Dominion provides by sec. 5 that the Secretary of State may, by Letters Patent, grant a charter to any number of persons not less than five, constituting them and others who have become subscribers to a memorandum of agreement a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, with certain exceptions which do not affect the present case. The Interpretation Act of 1906, by sec. 30, provides among other things, that words making any association or number of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name and to acquire and hold personal property for the purposes for which the corporation was created, and shall exempt individual members of the corporation from personal liability for its debts, obligations, or acts, if they do not violate the provisions of the Act incorporating them. Sec. 10 of the Companies Act makes it a condition of the issue of the Letters Patent that the applicants shall satisfy the Secretary of State that the proposed name of the company is not the name of another known incorporated or unincorporated company, or one likely to be confounded with any such name, and sec. 12 gives him large powers of interference as regards the corporate name. Sec. 29, sub-sec. 3, provides that on incorporation the company is to be vested with, among other things, all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking, as if it were incorporated by Act of Parliament. Sec. 30 enacts that the

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company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicile of the company in Canada, and that the company may establish such other offices and agencies elsewhere as it deems expedient. By sec. 32 it is provided that the contract of an agent of the company made within his authority is to be binding on the company, and that no person acting as such agent shall be thereby subjected to individual liability.

Turning to the relevant provisions of the B.C. Companies Act, these may be summarized as follows: An extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the province or the former colonies of British Columbia and Vancouver Island (sec. 2). Every such extra-provincial company having gain for its object must be licensed or registered under the law of the province, and no agent is to carry on its business until this has been done (sec. 139). Such license or registration enables it to sue and to hold land in the province (sec. 141). An extra-provincial company, if duly incorporated by the laws of, among other authorities, the Dominion, and if duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the provincial legislature extends, may obtain from the registrar a license to carry on business within the province on complying with the provisions of the Act and paying the proper fees (sec. 152). If such a company carries on business without a license it is liable to penalties (sec. 167), and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the province in respect of contracts made within the provinces (sec. 168). The registrar may refuse a license when the name of the company is identical with or resembling that by which a company, society, or firm in existence, is carrying on business or has been incorporated, licensed, or registered, or when the registrar is of opinion that the name is calculated to deceive, or disapproves of it for any other reason (sec. 18).

The charter of the appellant company was granted under the seal of the Secretary of State of the Dominion in 1907. It purported, as already stated, to confer power to carry on through-

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out the Dominion of Canada and elsewhere, the business of a dealer in agricultural implements and cognate business, and to acquire real and personal property. It is not in dispute that it was an extra-provincial company having gain for its object. The chief place of business was to be Winnipeg. The registrar refused, as has been mentioned, to grant a license under the provincial Act to the appellant company. The power of the registrar is not challenged, if the sections of the provincial statute under which he proceeded were validly enacted. What their Lordships have to decide is whether it was competent to the province to legislate, so as to interfere with the carrying on of the business in the province of a Dominion company under the circumstances stated.

The distribution of powers under the B.N.A. Act, the interpretation of which is raised by this appeal, has been often discussed before the Judicial Committee and the tribunals of Canada and certain principles are now well settled. The general power conferred on the Dominion by sec. 91 to make laws for the peace, order, and good government of Canada, extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the provinces. But if the subject matter falls within any of the heads of sec. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of sec. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by sec. 92.

Before proceeding to consider the question whether the provisions already referred to of the B.C. Companies Act, imposing restrictions on the operations of a Dominion company which has failed to obtain a provincial license, are valid, it is necessary to realize the relation to each other of secs. 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October 1864. To these resolutions and the sections

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founded on them, the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case (*A.-G. for the Commonwealth* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237 at 254), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side, shews that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

The structure of secs. 91 and 92, and the degree to which the connotation of the expressions used overlaps render it, in their Lordships' opinion, unwise on this or any other occasion, to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions, in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96 at p. 109, to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of the 91st and 92nd sections of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases.

It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases, but it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context.

Turning to the appeal before them, the first observation which their Lordships desire to make, is that the power of the provincial legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of sec. 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 13, Property and Civil Rights. Unless these two heads are read disjunctively the limitation in No. 11 would be nugatory. The expression "civil rights in the province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of sec. 92, and also to much of the field of sec. 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one "not coming within the classes of subjects" "assigned exclusively to the legislature of the provinces," within the meaning of the initial words of sec. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order and good government of Canada."

Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance*

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Co. v. *Parsons*, 7 A.C. at pp. 112, 113, on head 2 of sec. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression, "property and civil rights in the province" in sec. 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are, therefore, of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act. They do not desire to be understood as suggesting, that because the status of the Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by secs. 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96; *Colonial Building Association* v. *Attorney-General for Quebec*, 9 A.C. 157, and *Bank of Toronto* v. *Lambe*, 12 A.C. 575.

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It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the Judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada. Two of these questions bear directly on the topics now under discussion. The sixth question was whether the legislature of a province has power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province in the absence of a license from its government, if fees are required to be paid upon the issue of such license. The seventh question was whether the provincial legislature could restrict a company so incorporated for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred, or could limit such exercise within the province. This question further raised the point whether a Dominion trading company was subject to provincial legislation limiting the business which corporations not incorporated under the legislation of the province could carry on, or their powers, or imposing conditions on the engaging in business by such corporations, or restricting a Dominion company otherwise in the exercise of its corporate powers or capacity.

Their Lordships have read with care the opinions delivered

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by the members of the Supreme Court, and are impressed by the attention and research which the learned Judges brought to bear in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by the 91st and 92nd sections and between their various sub-heads *inter se*. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act, that this cannot be satisfactorily accomplished in the case of general questions such as those referred to. It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by sec. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (*Colonial Building Association* v. *A.-G. of Quebec*, 9 A.C. 157 at 164); or escape the payment of taxes, even though they may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*, 12 A.C. 575). Again, such a company is subject to the powers of the province relating to property and civil rights under sec. 92 for the regulation of contracts generally (*Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96).

To attempt to define *a priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their Lordships do not attempt. The duty which they have to discharge is to determine whether the provisions of the provincial Companies Act already referred to can be relied on as justifying the judg-

ment in the Court below. In the opinion of their Lordships it was not within the power of the Provincial Legislature to enact these provisions in their present form. It might have been competent to that legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a statute of general application regarding procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under sec. 92 to the Provincial Legislature. The analogy of the decision of this Board in *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

They will, therefore, humbly advise His Majesty that these appeals should be allowed, and that judgment should be entered for the appellant company in the action of *Wharton* v. *John Deere Plow Co.* with costs. The action by the company against the respondent Duck must, until the parties come to an agreement, be remitted to the Court below to be disposed of in accordance with the result of this appeal. As to the interveners, the Attorney-General of the Dominion and the Attorney-General of the Province, there will be no order as regards costs. The respondents, Wharton and Duck, must pay the costs of the appellant company of this appeal except in so far as these have been increased by the interventions.

Appeals allowed.

Annotation

Corporations and companies—Dominion and provincial powers of incorporating.

Annotation—Corporations and companies (§ I—1)—Franchises — Federal and provincial rights to issue—B.N.A. Act.

G. M. CLARK, TORONTO.

Ontario was the first province to put in force an Act requiring extra-provincial corporations to obtain a license before carrying on business within the province and imposing disabilities for non-compliance with its provisions. This Act, passed in 1900, was followed by similar Acts in all of the other provinces, excepting Prince Edward Island, in which province provision is made for an annual tax upon all such companies, but non-payment of the tax does not involve disabilities. Of the Acts of these provinces it is to be noted that every one excepting that of Quebec includes within its terms companies incorporated by the Dominion, and requires such companies to obtain provincial authority before being allowed to carry on business within the province or sue in the provincial Courts. Such provincial authority was provided to be given by way of a license, upon complying with certain formalities and payment of certain fees, and in most cases it was discretionary whether or not the license should issue. Nova Scotia was the last province to impose disabilities for failure to comply with the provisions of the Act. Quebec expressly excepted Dominion companies from the operation of the Act.

From the time that the earliest Act was passed great doubt has been expressed by lawyers as to the validity of the provisions which denied to Dominion companies the right to exercise within the province the powers conferred upon them by the Dominion until they complied with the licensing provisions imposed by the province. But the provincial Courts have been unanimous in upholding their validity, as in cases such as *Ireland* v. *Andrews* (1904), 6 Terr. L.R. 66; *Rex* v. *Massey-Harris* (1905), 6 Terr. L.R. 126, 9 Can. Cr. Cas. 25; *Waterous Engine Works* v. *Okanagan Lumber Co.* (1908), 14 B.C.R. 238; *Semi-Ready* v. *Hawthorne* (1909), 2 A.L.R. 201.

Although the matter was one of great importance to the business community, it was not until the case under consideration reached the Judicial Committee that that Committee had an opportunity of considering the respective powers of the Dominion and the provinces as to the incorporation of companies. The case itself is fortunate in its facts as they were such as to bring the question of provincial licensing of Dominion companies squarely before the Courts for decision. The appellant company, incorporated as it was by the Dominion, had applied to the Registrar of Joint Stock Companies in British Columbia for a license under the Provincial Act, had offered to pay all the required fees, but was refused a license on the ground that the name of the company unduly conflicted with the name of a company already registered in the province. So that we have the case of a company empowered by the Dominion to transact business throughout Canada under a certain name, and yet prohibited by one of the provinces from transacting its business within that province and from using its Courts unless it changed that name (and paid fees, etc.). Here, then, was undoubted interference of the province with the powers given by the Dominion.

The gist of the Judicial Committee's decision is to be found in the fol-

Annotation (*continued*)—Corporations and companies (§ I—1)—Franchises —Federal and provincial rights to issue—B.N.A. Act.

Annotation

Corporations and companies—Dominion and provincial powers of incorporating.

lowing words: "The province cannot legislate so as to deprive a Dominion company of its status and powers." It is to be carefully noted that all the Acts of the type of the British Columbia Act provide, in effect, that obtaining a license is a condition precedent to the right of the company to carry on business within the province, or to sue in the provincial Courts. Obviously this deprived Dominion companies both of their status and their powers, and the Judicial Committee, accordingly, proceeds to find all such legislation beyond the power of the provinces.

The case is the first one in which the Judicial Committee has given its opinion respecting the power of the Dominion over the incorporation of companies, and it finds in a very clear and logical manner that the Dominion has full power to incorporate companies with objects other than provincial, and with power to trade throughout the Dominion. The second point in the decision is that no province can impose upon such companies any conditions, restrictions, or taxes *as a condition precedent* to trading within the province.

But it is submitted that the judgment does not go so far as to hold that it is beyond the power of the province to impose a tax upon Dominion companies as such. The legislation under consideration was a prohibition to Dominion companies from trading in the province until they complied with the provincial requirements, and the payment of a fee was only one of those requirements. The provinces have express and exclusive power under sec. 92(2) of the B.N.A. Act to make laws in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes," and it is submitted that it is competent to the provinces under this decision to impose a tax for revenue purposes upon Dominion companies. But that tax must be clearly for revenue purposes and not for the purpose of requiring Dominion companies to obtain provincial sanction for the exercise of their corporate powers. This was the view of Mr. Justice Anglin in *Re Companies*, 48 Can. S.C.R. 331 at 460, 15 D.L.R. 382 at 340, 341. And it is submitted that the ordinary methods of recovering payment of the tax such as by suit or distress can be adopted. But payment of the tax must not be a condition upon which the company is allowed to trade within the province.

It is to be noted that the Judicial Committee again expresses disapproval of the consideration of any abstract questions under sections 91 and 92 of the B.N.A. Act. Appreciation is expressed of the careful judgments delivered by the Supreme Court in the *Companies Case*, 48 Can. S.C.R. 331, 15 D.L.R. 332, but the significant remark is made that their Lordships' task was an impossible one. In view of this it is doubtful whether an appeal from the judgment of the Supreme Court will be of any substantial value.

Apart from the importance of the judgment in relation to Dominion corporations the case itself takes a leading position in the long line of cases decided by the Judicial Committee upon the difficult questions arising under the B.N.A. Act. And the decision appears to depart in no particular from the rules laid down by the Committee for the construction and interpretation of the apparently interlocking sub-sections of sections 91 and 92.

QUE.

K. B. 1914

BOILARD v. CITY OF MONTREAL.

Quebec King's Bench (Appeal side), Archambeault, C.J. November, 1914.

1. VACCINATION (§ I—1)—VACCINE—INFECTED IN ITS PREPARATION—CITY SUPPLYING SAME, NOT LIABLE, WHEN.

Where a city supplies vaccine free for the general vaccination of its resident children the onus is not on the municipality to shew that such vaccine was not infected in its preparation, it appearing that the city, with due care and prudence, buys the vaccine already prepared from a reputable Institute of Vaccination after examination and approval by the Provincial Board of Health.

2. MASTER AND SERVANT (§ II A—115)—SELECTION AND RETENTION OF EMPLOYEES—CITY EMPLOYING DOCTORS FOR GENERAL VACCINATION—CITY'S LIABILITY, HOW LIMITED.

Where a city exercises due care and prudence in the selection of the physicians whom it employs to perform (without city supervision) the operations in the general vaccination of the resident children of the city, the alleged negligence or fault of one of such physicians in performing a vaccination is not competent or admissible as against the city in an action for personal injuries following the operation.

[*Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, and *Wallis* v. *North Shore*, 20 Quebec K.B. 506, applied.]

3. EVIDENCE (§ XII B—925)—WEIGHT, EFFECT AND SUFFICIENCY—CAUSE AND EFFECT—REVERSING JURY.

In an action for personal injury alleged as resulting from infected vaccine used in the vaccination of a child, a finding by the jury that the vaccine was infected will be set aside where the evidence in the case does not go beyond shewing that the injury complained of might be attributed to (*a*) infected vaccine, or (*b*) infantile paralysis, or (*c*) any of several other causes, and there is no direct evidence of the use of infected vaccine.

Statement

APPEAL from the judgment of Quebec Court of Review dismissing an action in damages against the City of Montreal for personal injury alleged as resulting from the vaccination of a resident child under a municipal by-law.

The appeal was dismissed.

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—This is an action in damages brought by the appellant against the respondent. In 1909, the appellant, widow of Ernest Poirier had her child of 8½ years vaccinated. Some days after this vaccination the child lost completely the use of the vaccinated arm. The appellant alleges that this was caused by the vaccine used; that the appellant was compelled under the city by-law to have her child vaccinated; that the vaccine was furnished by the city and that the operation was performed by a physician employed by the city. The appellant further alleges that her child is no longer in a condi-

tion to earn his living as he would otherwise have been able to do; and that it is due to the fault of the city and its employees that this partial or permanent incapacity has been caused. The appellant therefore demands that the city be held in damages as well to her personally as in her quality of tutrix to her minor child, and claims $2,000 for herself and $8,000 for the child.

The respondent admits that the lad Ernest Poirier was vaccinated by Dr. Lesage with the vaccine furnished by the city and that the appellant had her child vaccinated in conformity with the city by-law, but the respondent denies that the nervous affection with which the child was afflicted and the paralysis of his left arm were caused by the vaccine with which he was treated. The city further alleges that there was no fault on its part and none on the part of its employees in the vaccination of the boy; that such vaccination was performed according to the recognized rules of the profession; that the vaccine used was the very best to be had; and that the paralysis of the child's arm may have been caused by the fault of the lad himself, who may have transmitted infection germs into the wound caused by the vaccination; or by the fault of the appellant who may not have given the little fellow the necessary care and attention; or even by outside causes such as infantile paralysis or other disease. Moreover, the respondent sets up that the appellant failed to give notice of the accident within fifteen days as required by the City Charter, and that for this reason there is no longer any right of action in damages against the city.

The case was submitted to a jury and it returned a verdict in the appellant's favour finding that the condition of the child was caused by the respondent's fault or by the fault of persons for whom the respondent is responsible and that this fault consisted in the use of infected vaccine. The jury awarded $2,000 to the appellant personally and $4,000 for the child. Following the verdict the appellant moved for judgment in conformity with it while the respondent made a motion demanding the dismissal of the action on the ground that there was no evidence to shew liability.

The trial Judge reserved the case for the Court of Review on

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points of law so raised. The Court of Review found in the respondent's favour, granting its motion for judgment "*non obstante veredicto*" and dismissing the appellant's action. It is this judgment which is submitted for our consideration and of which the appellant demands reversal.

I shall first deal with the question of the absence of notice of the accident.

Section 536 of the City Charter prescribes that no right of action lies against the city for damages resulting from personal injuries inflicted by an accident, or for damages to personal property, unless within fifteen days from such accident or from such damages a notice is given the city setting forth certain details specified in said section. I am of opinion that this provision of the charter does not apply to the present claim. It is not here a question of personal injuries resulting from an accident nor of damages to personal property. The appellant was not, in my opinion, required to give the city the notice necessary in the cases so provided by the charter. The allegation of the respondent's pleading that the paralysis of the child's vaccinated arm was caused by the lad himself or by the appellant is equally ill-founded. There is no proof in the record supporting this allegation.

The judgment of the Court of Review dismissing the appellant's claim is based on the absence of proof of infection of the vaccine used. As we have seen above, the jury found that the paralysis of the child's arm was caused by the use of infected vaccine. The Court of Review holds that there is no proof to this effect in the record.

The appellant alleges on the other hand that the evidence rendered justifies the verdict of the jury. It is then in this case a question of evidence and our examination of the record will enlighten us on the point in dispute.

The lad Poirier was vaccinated August 28, 1909, by Dr. Edmund Lesage. This was Friday. Saturday of the following week the child complained of headache; and the second next morning, Monday, the appellant found that the arm which had been vaccinated, the left arm, was completely paralysed. The

appellant took the child at once to Dr. Lesage's. The doctor treated him for about a month but without any success. The family doctor, Dr. Defeutrel, also treated the boy, and other doctors were called in consultation. But nothing could be done to improve the condition of the diseased arm, and the child will very likely be a cripple for life. Was this infirmity caused by the child's vaccination, whether because the vaccine used may have been infected in the first place or because the operation was so performed as to bring about the infection of the vaccine?

We have then in this case a question of pathology on which we may express opinions, but which cannot be fixed definitely or positively or with certainty. As Dr. Lesage, in his evidence says, there is nothing absolute in medicine; one can only go on inferences. It is only necessary to read the evidence in this case to be convinced of the correctness of this proposition. There are nearly as many opinions expressed as there were doctors testifying. One of them, Dr. Defeutrel, is positively of the opinion that the paralysis of the child's arm was caused by a nervous affection due to the use of infected vaccine. He does not know whether the infection was caused by the vaccine itself being originally prepared from impure serum or whether it was the result of a secondary infection caused by the operation. There is, he says, very great difficulty in determining this point.

He admits that there are a variety of causes for this affection and that it might result from some infectious disease liable to assert itself at any moment in life. But he adds that in this case there is no doubt that the sole cause of the trouble was the use of infected vaccine. I quote his evidence, "If I come to find as a doctor a disease of a couple of days' standing presenting considerable ulceration with a lesion put into the arm I see no reason for looking anywhere else for the cause of a condition which could not otherwise exist. It's just the same thing as if a man being dead after having been struck with a car, you were to say that this man died from a fainting fit suddenly coming on at the moment he was struck by the car and not that his death resulted from the stroke of the car which he had received. The only cause for the child's condition, the only possible cause

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in this case, is the lesion occasioned by the vaccine. It is manifest that there could have been other causes, but why look for other causes when we have this one, which is quite sufficient in itself, staring us in the face." In another part of his evidence he repeats that in this case the cause of the trouble was easy to find, that it was staring one in the face.

Other doctors are of the opinion that the paralysis of the child's arm could result from the use of infected vaccine or from infantile paralysis. Admitting, they say, that in this case the vaccine used was not infected, then the cause of the paralysis in the arm may have been infantile paralysis. Then there is a third group of doctors admitting that the trouble may have been caused by the use of infected vaccine but that, in their opinion, in this case the actual cause was infantile paralysis. I ought to add that there was, during the period in question, an epidemic of infantile paralysis in Montreal.

Infantile paralysis is a disease caused by the impairment of the nerve centres attacking the spinal marrow and crippling one or several members of the child so afflicted. The germ of this disease is seated in the throat and in the back of the nose. A child, being vaccinated, might, if the microbe of infantile paralysis were present in the throat or nose, transmit this disease by carrying its finger from its mouth or nose to the sore caused by the vaccination. The microbe of infantile paralysis might in this case infect the vaccine. The microbe of infantile paralysis can also be conveyed through the digestive tube, the stomach or the intestines. In the present case there was from one day to another total impairment of the muscles of the upper part of the shoulder. The doctors conclude from this that there was from birth, lesion of the nerve centre which supports this part of the arm, that is to say in the spinal marrow, and that this lesion could have been produced only by infantile paralysis.

I have quoted part of the evidence of Dr. Defeutrel. I should like in the same way to quote part of Dr. Marien's evidence. After saying that he examined the lad Poirier he adds:—

I found all the clinical symptoms of a complete paralysis of the shoulder and a partial paralysis of the arm, hand and fingers.

He is asked:—

Could the paralysis be attributed to the vaccination, could a person say that the vaccination might have been the cause of the paralysis of the child's arm?

To this he replies:—

That is not my opinion, because infantile paralysis is a specific disease just as is typhoid fever or diphtheria, induced by a specific microbe, an epidemic microbe which specially attacks perhaps the "plexus brachial" or may attack some other member. The impairment of the "plexus brachial" appears on the upper part of the shoulder and that is where we always find it, the upper members and the other members, and we always find from a clinical point of view, this very thing or nearly so; it is the result of the authorities on infantile paralysis. These are the clinical symptoms which we recognize in cases of infantile paralysis.

He was asked if he thought that the vaccination of the child's arm or even the sore caused by the vaccination itself could have caused the paralysis with which the child is now suffering and he replied that such was not his opinion, and, moreover, he repeated that he did not believe the vaccine or the vaccination could have caused the trouble in question.

As it seems to us we are confronted with several theories. One is that the cause of the paralysis of the child's arm may have been the use of infected vaccine and that it could have been due to nothing else; a second theory is to the effect that it may have been caused either by the use of infected vaccine or by infantile paralysis; still a third theory is that it must have been caused by infantile paralysis and that the use of infected vaccine could not possibly have brought it about. One thing is clear in the midst of all this confusion, and that is, it is entirely a matter of opinion and not of definite positive facts. No witness testified positively that the vaccine was infected. The most that some of them could say was that the result tended to shew or to raise a presumption that the vaccine was infected. The jury then has only been able to come to a decision between these conflicting opinions so given out and in turn to give its own opinion. This is not then the finding of a fact; and juries have no other jurisdiction than to determine the questions of fact in a case.

The appellant alleges in his factum that all jury verdicts in

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damage actions are based on hypotheses, and that to eliminate this function would be to do away with trial by jury.

This proposition is true in part only. Doubtless it is proper to seek the opinion of doctors, or experts, to fix the effect, the consequences of an accident. So a nervous disease said to result from an accident, doctors should be admitted to prove that such disease was actually caused by the accident. In the same way the evidence of doctors is admissible to shew whether the trouble is permanent or temporary. But in those cases the accident itself ought to be proved in the first place as well as the fault of the party whom it is desired to hold responsible for the damages which have resulted from the accident. In other words the primary cause for responsibility ought to be established by the witnesses who testify to the existence of the responsibility itself. The consequences from this primary cause could then be established by the experts. In the present case if we could find proof that the vaccine was infected I could understand that the theory of the medical experts who allege that the paralysis of the child's arm could only have been caused by infantile paralysis might be weighed and rejected by the jury. But the evidence of the use of infected vaccine nowhere appears. It is only by inference because of the result found to exist that there is any assumption that the vaccine was infected. This is peculiarly a question of opinion and the jury had no proof whatever that the vaccine was infected. No person any more than the Court or the jury is in a position to say in a definite, positive way what was the real cause of the paralysis of the left arm of the lad Poirier.

The appellant alleges that the respondent is responsible because every person is responsible for the damage caused by the things which he has under control, and that the vaccine used was under the control and care of the respondent. This, in my opinion, is begging the question. The question really is whether the injury was caused by the vaccine or not, and this argument assumes that the vaccine was the cause of the injury. The appellant then assumes the cause to reach the effect. For these reasons I am of the opinion that the judgment of the Court of

Review finding that there was no evidence in the record shewing the vaccine used to have been infected is well founded and ought to be affirmed.

But there is another reason for denying the appellant's claim and this is that the respondent would not necessarily be responsible even if the vaccine used was infected in its preparation or even if there was fault on the part of the doctor in performing the vaccination.

The vaccine used for the vaccination at Montreal is not prepared by the city itself. It is prepared by the Institute of Vaccination at Montreal and is examined by the Provincial Board of Health before being placed on the market. It is sold in bottles hermetically sealed. The City of Montreal buys it from the Institute of Vaccination and distributes it then free for the vaccination of children. It is not then a question as to who is in control. The city is no more responsible for the bad quality of the vaccine than an apothecary would be for the quality of the patent medicines which he offers for sale. The only cause which would shew a responsibility by the city would be its negligence or want of prudence and precaution in the purchase of the vaccine which it distributes, but we cannot charge such negligence when it buys the vaccine at the Institute of Vaccination which does not sell until after examination and approval by the Provincial Board of Health.

Neither is the city responsible for the fault of the doctors who administer the vaccine unless it is shewn to have been guilty of negligence in the choice of those doctors.

Article 1054 of the Civil Code does provide that a person is responsible for the damages caused by another person under his control and that masters and employers are responsible for the damage caused by their servants and workmen in the execution of their functions. The basis of responsibility in this case rests on a double consideration; the choice of the superintendent and the right of superintendence and direction in the carrying on of the work by the superintendent.

Employers are at fault when they have badly chosen, or directed, or superintended, their overseers. If the employer has

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not the superintendence or control of the overseers, the employer is responsible only for his selection of such overseers. If he has acted with proper care and discretion in choosing his overseer and if the overseer is not working under his direction, he is not responsible for the faults of the overseer in the execution of his functions. Sourdat gives an example:—

When the employer assigns a skilled member of a profession for the execution of some particular work the person so assigned is considered to be his own overseer, and if he causes some injury to a third party in carrying on the work so assigned to him, is the employer to be held responsible?

And he replies:—

No. Of what fault was the employer guilty? Can I direct supervise the carrying on of the work in a case of this kind? No, because it is clearly expert work calling for expert knowledge which I am not obliged to have. (On Responsibility, vol. 2, No. 890.)

The French Pandects, on Responsibility, No. 1073, report a decision of the civil Court of Bordeaux finding that the doctor assigned to a hospital is his own overseer responsible to the department employing him but not acting under its direction as to expert detail. In such a case the hospital Board is not responsible for the negligence of the doctor in carrying out the expert service.

The English Court of Appeal laid down the same doctrine in 1909 in the case of *Hillyer* v. *The Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820. This was an action in damages for the negligence of the surgeon attached to the hospital involving the method of performing an operation. The Court decided that the hospital Board was merely responsible for the care of its choice of the doctors and nurses of the hospital. Once it had made a proper and prudent selection, the hospital Board was not responsible for the negligence of the person so chosen.

The relationship of master and servant (said the judgment) does not exist between the governors and the physicians and surgeons who give their services at the hospital; and the nurses and other attendants assisting at the operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon and not from the hospital authorities.

The same doctrine has been laid down in the United States, 12 Mass. Reports 432, *McDonald* v. *Massachusetts General Hos-*

pital. I would also cite the case of *Wallis* v. *North Shore Power and Navigation Co.*, decided by this Court in 1911, in which the Hon. Mr. Justice Carroll laid down with his usual clearness the principle governing in such cases (20 Que. K.B. 506).

In that case a company engaged a doctor to take care of its employees. The doctor had been negligent in an operation performed on an employee and the company was sued in damages. We sustained the action because the company had not taken proper precautions to ascertain whether the doctor was duly licensed as such, and as a matter of fact he was not licensed. But the distinction which was drawn in France, in England and in the States was there brought out by the Judge to shew that there was a difference between the case decided and the case of the selection of a duly licensed physician. In the case at bar the doctor is licensed, having had several years' practice. There is no evidence of negligence on the part of the city in the selection of this doctor and it cannot be held responsible even if negligence on the part of the doctor were shewn. So that however we consider the case there is no proof of fault against the repondent and without such proof there is no responsibility. The action was not well founded and the case was properly dismissed.

Appeal dismissed.

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Alberta Supreme Court, Hyndman, J. October 29, 1914.

1. INTEREST (§ I A—1)—WHEN RECOVERABLE—ON CONTRACTS—ESTOPPEL.

Where a real estate agent stipulates with the owner for a percentage commission on the selling price of the lands as and when paid in, this does not necessarily import interest, and the agent may estop himself from claiming interest as to specific tracts sold where he has accepted cheques for the commission covering principal only.

2. CONTRACTS (§ II D—165)—TRANSFER OF PROPERTY—LANDS—SALE.

A transfer of lands by the owner thereof to a corporation for substantially all of which transfer the owner receives stock of the corporation is a sale and not merely a change in the manner in which the title should be held by the owner, especially where it appears that the owner (*a*) received some cash (*b*) values the shares at par or better and (*c*) fixed the consideration.

[See also *Kennerley* v. *Hextall*, 9 D.L.R. 609, as to premature action.]

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3. BROKERS (§ II B—12)—REAL ESTATE—COMPENSATION—SUFFICIENCY OF BROKER'S SERVICES—SALE BY OWNER.

Where a real estate agent's commission on "all lands" sold within a specific subdivision during the continuance of his contract, is stipulated to be payable upon certain services and expenses by him promoting the sale, whether the lands be sold "by the agent, by the owner, or by any other person"; a sale in block by the owner to a corporation for a price fixed by him substantially all of which is paid in corporation stock, is basis for the commission, the services and outlay by the agent being established.

[See also *Kennerley* v. *Hextall*, 9 D.L.R. 609, as to premature action.]

Statement

ACTION by a real estate agent claiming commission based on a sale by the owner and alleging sufficiency of services and outlay by the agent, the sale having been made to a corporation and the purchase price substantially paid in corporation stock.

Judgment was given for the plaintiff.

A. H. Clarke, K.C., and *Clifford Jones*, K.C., for defendant.

Hyndman, J.

HYNDMAN, J.:—The plaintiff is a real estate agent residing and doing business at Calgary, Alberta, and on April 21, 1911, entered into a written agreement (ex. 1) with the late defendant John Hextall appointing plaintiff exclusively to act as his sales agent of certain lands particularly described in the statement of claim of which there remained undisposed of on February 7, 1912, about 1,244 acres and on terms that the said John Hextall would pay the plaintiff as and for commission and compensation for plaintiff's services, time, expenses and outlay 10 per cent. of the selling price of all lands which might be sold during the continuance of the agreement, whether the lands should be sold by plaintiff or said Hextall or by any other person, and such payments should be due and payable and should be made out of the first instalment of purchase price when and as the same was received by the owner. The agreement also provides that it should bind the owner, his executors and administrators and should not be terminated by the death or incapacity of the owner and should only be terminated by the death or incapacity of the agent (plaintiff) or in the manner provided in the agreement.

It might be mentioned here that since the commencement of this action the said John Hextall died and the proceedings have been revived against his estate, but all material facts leading to the claim of the plaintiff happened in the lifetime of the said

Hextall and for convenience any remarks hereinafter will be as if the said John Hextall personally was still the defendant. It might also be stated that an action was begun in April, 1912, and tried before the Hon. Mr. Justice Stuart (9 D.L.R. 609), who dismissed same on the ground that it was launched prematurely, but without prejudice to plaintiff to begin a fresh action later and the examinations on discovery of the said John Hextall in connection with the first trial were by consent used in this action. The agreement never was terminated in the manner provided in the agreement at any rate up to the happening of the events which led to the present action. It was provided that the owner should immediately arrange for the subdivision of the lands and within 30 days from the date of agreement furnish the plaintiff with a schedule of prices for the lots to be sold.

The defendant had at all times the right to fix prices for the lots and should approve of the forms of application or agreement to be used, etc. Everything appears to have been done to enable plaintiff to proceed to carry on a sale of the property along the lines indicated in the agreement and plaintiff did in fact enter upon the duties of selling part of the property and actively prosecuted the business of selling same to the entire satisfaction of the defendant.

It was agreed between counsel at the trial that on November 9, 1911, block "C" as shewn in plan (ex. 5), consisting of 80 acres was sold for the price of $100,000, and that plaintiff was entitled to receive commission thereon at the rate provided for in the agency agreement, viz., 10 per cent., out of the first payments when and as same were received by the defendant. The terms of payment in connection with said sale were as follows: $1,000 cash on November 9, 1911, $24,000 February 1, 1912, $37,500 November 9, 1912 and 1913. The agreement of sale also provided for interest at 8 per cent. per annum. The payments out of which plaintiff would be entitled to receive commission were made at following dates: $1,000 at date of agreement, February 1, 1912, $1,000; February 6, 1912, $3,000; February 20, $2,000; February 27, $5,500. The plaintiff in fact did receive $10,000 in connection with the sale in two cheques as follows: March 23, 1912, $7,000; April 22, 1912, $3,000. It was admitted

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that defendant received interest at the rate of 8 per cent. per annum on the said payments between November 9, 1911, and February 27, 1912, and plaintiff claims that he should receive interest on these amounts up to $10,000 as from the dates when they were received by defendant until his claim of $10,000 or such unpaid portion thereof was fully paid. There was no agreement on the matter of interest, but Mr. Bennett contends that Hextall should be held a trustee as to the interest (8%) received by him to this extent. No mention of interest was made at the time the cheques for $7,000 and $3,000 were given, but it was later charged up in an account rendered by the plaintiff to defendant.

There seems never to have been any settlement of this particular item, but I am inclined to the view that at the time the plaintiff accepted the two cheques mentioned it must have been intended as a full settlement. I do not think that Hextall could be looked upon as a trustee and at most would be liable for the legal rate of interest by way of damages. I, therefore, disallow this claim.

I now come to the more important part of the action, namely, the claim for (1) $12,998 commission on sales made between February 1, and March 29, 1912, with discovery of the dates of the respective sales and interest at the current rate on money since the respective dates of the respective commission as set up in para. 5 of the statement of claim—and (2) $99,061.66 being commission on the total selling price as set out in para. 9 of the statement of claim with interest from June 28, 1913, until payment. (3) Account, discovery, etc., etc.

On February 7, 1912, whilst in England and without any notification to or knowledge by the plaintiff the defendant entered into a written agreement (ex. 2) with Canadian Securities Ltd. of London, England, whereby it was provided that the Canadian Securities Ltd. should on or before March 30, 1912, unless a later date was mutually agreed upon, or Canadian Securities Ltd. should be prevented from so doing, form and register a company under the Companies Consolidation Act, 1908, with a nominal capital of £280,000, shares of £1 each with the purpose of acquiring the property comprised in the agency

agreement of the plaintiff and other lands hereinafter mentioned. The memorandum and articles of association and names of directors and prospectus offering shares to the public were all to be approved by the defendant. All costs, charges and expenses incidental to the new company were to be paid by Canadian Securities Ltd. including costs of obtaining valuation reports of the property, etc., and all other expenses down to first allotment of shares and it was stipulated that such expenditure not exceeding £5,000 should be repaid to Canadian Securities Ltd. by the new company. Clause 2 of said agreement (ex. 2) provided that the defendant therein called the vendor, should sell and Canadian Securities Ltd. should purchase about 1,724 acres coloured red on the plan filed as ex. 5 for the sum of £260,000 to be paid and satisfied as follows: As to £130,000 by the allotment to vendor or his nominee of 130,000 fully paid up shares in the capital of the new company of £1 each and as to the balance at the option of the directors of the new company either in cash or by the allotment to him or his nominees of fully paid up shares to be treated as of par value or partly in cash and partly in shares fully paid up. The purchase price to the new company was not to exceed the sum of £268,000, the £8,000 being payable to the Canadian Securities Ltd. to be paid to them in cash or shares in the same proportions as the second £130,000 should have been paid the defendant vendor.

It was also provided that defendant would make out at his own expense a good title to the property. Conveyance was to be completed on or before May 31, 1912, or at such later date as might be agreed upon in London on allotment of all the shares representing purchase money and not less than 50 per cent. of the cash purchase money (if any) the balance (if any) of cash to be paid within 6 months thereafter, the defendant in the meantime having a vendor's lien for such costs and being at liberty to enter a caveat protecting such lien.

Para. 5 of said agreement provided for cancellation by one calendar month's notice in writing in case the purchase money should not be paid and satisfied in the manner provided. The defendant agreed to join the board of directors of the new company and not as a local director in consideration of his receiving

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his fees as an ordinary director. The defendant agreed at his own expense to assist in the promotion of the new company to the best of his ability by obtaining valuations and reports to be paid for by the Canadian Securities Ltd. and then proceed to Calgary forthwith to obtain same. The Canadian Securities Ltd. was to cause the agreement to be filed with the Registrar of Joint Stock Companies. The agreement (clause 9) further provided that on completion of the conveyance the new company would enter into a covenant with the defendant vendor to observe and perform the terms and conditions of the agency agreement with the plaintiff and indemnifying the vendor (defendant) therefrom. Clause 10 also enabled the defendant to sell any part or parts of the property at any time previous to the completion of the purchase at prices not less than those theretofore obtained by the vendor for lots or blocks similarly located and such sales were to be for the benefit of the new company if and when the purchase money is fully paid or satisfied, the new company allowing all usual and proper commissions, discounts, etc.

Pursuant to the agreement (ex. 2) a new company was formed and registered in England under the name of Bowness Estates Ltd. and an agreement was executed between the Canadian Securities Ltd. and Bowness Estates Ltd. bearing date March 25, 1912, which recited the agreement (ex. 2), and providing that the Canadian Securities Ltd. therein called the sub-vendors would sell and the Bowness Estates Ltd., therein called the sub-purchasers, would purchase said lands for £268,000, payable as hereinbefore mentioned, the sub-purchasers to have the benefit of and adopting the said agency agreement with plaintiff. All the provisions of agreement (ex. 2) (except clause 1) was deemed (*mutatis mutandis*) to be incorporated in the said agreement (ex. 3) and the new company is to indemnify the sub-vendors from the provisions of the plaintiff's agreement. When the purchase was completed the sub-purchasers were to pay or allot to the sub-vendors £8,000 cash or fully paid shares in the proportions mentioned. If the principal agreement (ex. 2) was determined, agreement (ex. 3) would also determine without compensation to either party.

It will be noticed that the agency agreement (ex. 1), affected

only about 1,244 acres and the quantity of land included in the agreement with Canadian Securities Ltd. amounts to 1,724. It appears that on April 22, 1910, John Hextall sold to Astley & Shackle a one-half undivided interest in 480 acres adjoining the lands in the agency agreement for $40 per acre. On April 20, 1912, Hextall re-purchased their interest at $500 per acre or $120,000, one-half cash and balance in shares in Bowness Estates Ltd., then being formed. Eventually Astley & Shackle received from defendant cash and £19,658 in shares of the new company in full settlement. This 480 acres was, therefore, added to the 1,244 and transferred to the Bowness Estates Ltd., making the average price of the whole per acre about $750.

Hextall in order to qualify as a director subscribed for and was allotted shares to the amount of £200. Later on he proceeded to Calgary to obtain experts' reports and valuations. A lengthy prospectus was issued containing amongst other features a statement from Chalmers, Wade & Company, chartered accountants, shewing prices realized from the sale of portion of the land included in the Kennerley agreement and such sales were no doubt due largely to the work and energy and skill of the plaintiff. The time for completion of the transaction was extended by Hextall and on June 28, 1912, a transfer was duly executed and registered on July 23, 1912, in the Land Titles Office at Calgary, whereby Bowness Estates Ltd. became the registered owner of the lands in question free of incumbrance. At the time of the transfer Hextall received in cash £15,000 and £245,000 in shares in the company. Out of these shares Hextall discharged part of his liability to Astley & Shackle by transfer of certain of them. He has also transferred a number of the shares to members of his family and on October 7, 1912, he held himself £200,000. (See examination for discovery, questions 598, 599.)

In addition to the sale of 80 acres for $100,000 already mentioned it was agreed between counsel at the trial that Hextall himself, in England, on March 14, 1912, sold 83.96 acres, being blocks 42 and 43, for $125,000. This sale was to the International Realty Co. and was accompanied by an agreement to agents in England to withdraw all lots in the sub-division from sale there

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for one year from that date. Payments were made in excess of the 10 per cent. commission which in the ordinary course would be due to the plaintiff, but the benefit of the sale was agreed to be for the Bowness Estates when the arrangement was consummated. The commission on this sale would, therefore, be $12,500, which has never been paid the plaintiff. There were other sales made also for the benefit of the new company aggregating $4,980, upon which no commissions were ever paid the plaintiff, two of the lots having been sold by plaintiff himself for $715. The commission in the ordinary course of affairs on this last sale being $498, the two items totalling $12,998. These sales were made before plaintiff had any knowledge of the arrangement between Hextall and the company. Counsel for defence contends that if it is held that the plaintiff is entitled to commission at all he should not receive the said $12,998, as the sale was for the benefit of the company and after the agreement to sell, but only on the price per acre of the lands so sold as disposed of "*en bloc*" to the company, viz.: about $750 per acre. Hextall also admitted in his examination on discovery that he regarded the shares as being worth par or even more than par. Also that the new company had disposed of about $750,000 of the property and that he has received cash dividends from the company. The question then to be decided is, was the transfer to Bowness Estates Ltd. a sale or was it merely a change in the manner in which the title should be held by the owner Hextall. If Hextall had incorporated a limited company for the purpose of being able to escape certain personal liability or for convenience of handling the lands, I would not think that sufficient to justify plaintiff in claiming the commissions as set forth in the agency agreement, although he might possibly have an action for damages owing to the changed position.

The transaction, however, is quite different from a mere change in the title as last mentioned. It has all the ear marks and accompaniments of an absolute sale. It is true Hextall is the largest shareholder and one of the directors, but there are four others according to the prospectus, all gentlemen of apparent high standing and strangers to defendant, each of whom would have as great voice in directors' meetings as defendant.

The price of the land was fixed and the method of judgment fully provided for. Furthermore, defendant's agreement bound him to act as director for only three years. He also received about $50,000 in cash; the fact of outsiders paying in so substantial a sum of money, thus insuring their interest and influence in connection with the property must have been of great consideration and advantage to defendant. He also purchased the interest of Astley & Shackle largely by payment in shares; has received substantial cash dividends from the company and what to my mind is also significant, he himself values the shares at par or even more.

Mr. Clarke urges that if the transaction is held to be a sale then the commission payable should be divided between cash and shares in the proportion in which Hextall received them. But I do not think such a contention a good one. In the first place Hextall did receive at the date of sale and since in dividends a sufficient amount in cash to pay the commission. There was no agreement on plaintiff's part to take anything but cash and if defendant under the circumstances of this case decided to accept shares in lieu of cash which shares he regarded as good as or better than par and discharged all further liability of the company for purchase money, I am of the opinion that plaintiff had a right to expect his commission payable when such arrangement was consummated. On the other hand there is nothing to shew that defendant himself ever contemplated paying plaintiff in shares. He endeavoured to escape his liability by engaging the new company to protect and carry out the agency agreement with plaintiff. Plaintiff knew nothing of the arrangement until after it had all been agreed upon in England. When he was informed of it he refused to accede to defendant's request to continue on as agent for the new concern. I think plaintiff was quite within his rights in declining to act for the company. I am, therefore, of opinion that the transaction must be regarded as a sale entitling plaintiff to his commission provided for in the agency agreement.

The wording of the agency agreement is plain and unambiguous. Para. 5 says:—

> The owner will pay to the agent as and for commission and compensation to the agent for his services, time, expenses and outlay ten per cent.

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of the gross selling price of *all lands* which are sold within subdivision of Bowness aforesaid during the continuance of this contract whether the same be sold by the agent, by the owner, or by any other person, and such payments shall be due and payable and shall be made out of the first instalment of purchase price when and as the same is received by the owner.

It might well be argued that the agreement contemplated only a commission on sales of separate or groups of lots within the subdivision and not on a sale "*en bloc*." The object, however, evidently was to dispose of the whole property in any event and the owner had at all times the absolute right to fix prices. If he was fortunate enough to find a purchaser for the entire property at a satisfactory price or consideration, I do not see how he would be any worse off than by selling retail. In my opinion it would be of great advantage to escape the trouble and expense of the many details which a multitude of sales would cause. The agreement does not restrict the character of sales to be made. It does not say whether the lots shall be large or small or how many there shall be. It says the plaintiff shall receive a commission on "*all lands* which are sold within the subdivision."

It is, therefore, necessary for me to decide upon what basis commission should be paid on the sale for $125,000 to the International Realty Co. and the other smaller sales to individuals amounting to $4,265 and the sales made by the plaintiff himself amounting to $715. The transaction between Hextall and the Bowness Estates must be taken to have been made as at the date of the agreement of February, 1913. Plaintiff does not claim damages, but commission, on the sales by defendant. If then the sale of the whole property was made as of February, 1912, and the other smaller transfers were made afterwards and for the benefit of Bowness Estates Ltd., I do not think the plaintiff can claim his 10 per cent. commission on more than defendant actually received. Then, again, Mr. Bennett also contended that the land sold by Astley & Shackle was bought at $500 per acre and tendered evidence to the effect that it was much less valuable than that comprised in the agency agreement. This may be so, but as Hextall had the right to fix the prices and as no distinction was made at the time of sale in February, 1912, I think it ought to be held that commission should be charged only on the average price received for the whole property which was stated

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to be about $750 per acre. It was admitted at the trial that there should be a set-off or counterclaim of $208.27.

There will be a reference to the Clerk of the Court to ascertain the amount of the selling price to Bowness Estates Ltd. of the land included in ex. 1 intended to be comprised in the agreement to Canadian Securities Ltd. (ex. 2), and the price thereof which shall be fixed at the average price per acre of the whole of the lands included in ex. 2.

There shall be judgment for the plaintiff for 10 per cent. of the amount of purchase price as so found by the clerk, together with interest thereon at the rate of 5 per cent. per annum from June 28, 1912, and costs of the action less amount of defendant's counterclaim, $208.27. There will be no costs of the counterclaim. Either party shall be at liberty to apply from time to time as they may be advised.

It might properly be mentioned that the defendants at the trial put in as ex. 10 an agreement between the plaintiff and one William Pentlowe Taylor whereby the said Taylor should participate in the commission earned by the plaintiff under his agency agreement. Mr. Taylor, who is a solicitor of this Court, undertook in open Court to abandon any claim he might have as against the defendant thus eliminating any necessity to consider such agreement in this action.

Judgment for plaintiff.

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Judicial Committee of the Privy Council, Lord Dunedin, Lord Moulton, Lord Parker of Waddington, and Lord Sumner. May 22, 1914.

1. EVIDENCE (§ II D—125)—ONUS—EXCEPTIONS OR EXEMPTIONS—RAILWAY CONSTRUCTION CONTRACT—STATEMENT AS BASIS FOR SUBSIDY.

Where a railway construction contractor and his employer stipulate that the payment to the contractor of a certain item of the contract price must depend upon the contractor's statement of the construction cost being passed by the Federal Government as basis for a specified additional subsidy, the employer is relieved from the payment where the subsidy in question is withheld by the Government on the ground, among others, that the contractor's construction statement is not even in part established, unless the contractor satisfies the onus shifted upon him and affirmatively proves some other efficient cause for the denial of the subsidy.

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APPEAL from the judgment of Quebec King's Bench (appeal side) sustaining a release of part of the contract price by a railway construction contractor conditioned upon his furnishing to the federal government satisfactory proof of the cost of construction of the railway as a basis for a subsidy.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—The respondent being interested in some stone quarries situate a few miles distant from a portion of the line of the Canadian Pacific Railway Company was anxious to have a branch line constructed to the said quarries. By the Canadian law, subsidies are paid by the Federal Government under certain conditions for the construction of railway lines. The eventuality of the matter was as follows: The C.P.R. Co. procured the passing of the necessary Acts of the legislature for the construction, and arranged with the Government to construct the desired railway. Mr. Brunet contracted on certain terms—one of which was that he was to receive the Government subsidy to make the line for the C.P.R. Co. Mr. Brunet sub-contracted the line to the appellant Mr. Dini. Mr. Dini was to be paid a lump sum and extras at a certain rate. The line was constructed, and Mr. Dini rendered his account to Mr. Brunet for $55,423, being $37,500 for the lump sum, and $17,923 for extras. Mr. Brunet disputed the extras, and the matter was settled by an agreement, which forms the basis of the matter in dispute.

The agreement was as follows, the material parts alone being quoted:—

Que le compte de la partie de seconde part pour tels travaux est de cinquante-cinq mille quatre-vingt-trois dollars et soixante-quatorze centins suivant état actuellement en possession des parties aux présentes.

M. Brunet s'engage à payer à M. Dini, à tout évènement, la somme de ($9,600), équivalent au montant du subside additionel à être payé par le gouvernement fédéral pour les trois premiers milles du dit chemin de fer. (Si le compte ci-dessus mentionné de M. Dini est réduit par le gouvernement fédéral ou ses officiers, et si à cause de cette réduction le subside additionnel de $3,200 par mille n'est pas payé en plein, mais se trouve réduit, cette réduction sera supportée par M. Dini.)

Cet exposé fait, il est convenu, et M. Dini consent à cela, que si le parlement fédéral votait un subside pour le quatrième mille et une fraction du dit chemin de fer, pour lequel mille et une fraction aucun subside n'est

encore voté, le premier subside appartiendra à M. Brunet, et le subside additionnel appartiendra à M. Dini.

A raison de ce que ci-dessus M. Dini donne à M. Brunet quittance pour toute réclamation qu'il peut avoir contre lui à raison du contrat qu'il a fait avec lui pour la construction du dit chemin de fer Staynerville Branc.

Tous les paiements à être faits seront faits à la Banque d'Hochelaga, au compte de M. Dini.

Le paiement à faire par M. Brunet à raison du subside additionnel pour les trois premiers milles devra être faite dans six mois de cette date.

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Before going further it is necessary to revert to the matter of the subsidies.

According to the bargain between the Government and the C.P.R. Co. the subsidy was payable in two divisions, first, a payment of $3,200 per mile on each mile or fraction of completed railway; second, a payment of the half of such sum per mile as the completed railway cost in excess of $15,000 per mile, with a limitation in any event to $3,200 per mile. It should further be explained that as originally authorized the railway was three miles in length; it was subsequently increased to a length of four and a fraction.

The appellant, who is the representative of Mr. Dini, sues Mr. Brunet, the respondent, for payment of $9,600. Originally a claim was made for a further sum in connection with the extended portion of the railway, but that claim has been abandoned.

The respondent resists payment, alleging that as a matter of fact the additional subsidy in respect of the three miles has never been received by him.

The facts as to this are as follows. The C.P.R. Co. duly approached the Government for payment of the subsidy. The Government admitted the claim to and paid the original, or first part of the subsidy, viz., of $3,200 per mile. But as regards the additional subsidy they decided that the C.P.R. Co. had failed to shew that the cost of the line exceeded $15,000 per mile. The reason why they failed to shew this was because the statements they put in were not properly vouched. Now the statements they put in were statements of the cost of the line divided into three heads. Head 1, was sums paid by the C.P.R. Co. amounting to $15,000 odd; Head 2, sums paid by Mr. Dini amounting to

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$55,423.74, and Head 3, sum paid by Mr. Brunet amounting to $25,000 odd. It will be observed that the sums paid by Mr. Dini are exactly the figures brought out by Mr. Dini's account rendered to Mr. Brunet. The Government official held that so far as the sums paid by the C.P.R. Co. were concerned, they were, in great part, though not entirely established, but that as regards the sums paid by Mr. Dini and Mr. Brunet, they were really not established at all. The whole question, therefore, turns on the true meaning of the agreement. The appellant argues that there is an absolute undertaking on the part of the respondent to pay $9,600, and that that obligation is only elided if the default of the subsidy is shewn to be due to the cutting down of Mr. Dini's account, and to that alone, and that as the failure of the subsidy was just as much to be attributed to the non-substantiation of Mr. Brunet's account—to say nothing of that of the C.P.R. Co.—the clause relieving Mr. Brunet of the payment does not apply.

It is first to be observed that it is obvious that the parties to the agreement knew perfectly well that Mr. Dini's account as rendered was, along with the others, to serve as forming one of the ingredients of the grand total of expenditure which alone could justify the exaction of the additional subsidy; and they knew that that account would be subject to investigation and audit by the Government. Keeping this in view their Lordships go so far with the appellant in thinking that there is to begin with an engagement on the part of Mr. Brunet to pay $9,600 and that the onus therefore lies on him to shew that he is within the exception. It seems to them, however, that he has *primâ facie* discharged that onus when he has shewn, first, that Mr. Dini's account has, in fact, been "reduit" by the Government officials (in point of fact it was "cut down" to nothing, being *in toto* disallowed) and, second, that in the result no subsidy was paid. It might have been possible (if the facts had permitted of such result) for the appellant to have again turned the tables by shewing that it was the non-substantiation of the other accounts, and not of that of Mr. Dini, that caused the Government officials to refuse to pay. Such a proceeding was,

however, on the facts as known quite impossible, and it therefore seems to their Lordships that the respondent has established that he is within the words of exemption.

Their Lordships are accordingly of opinion that the judgment of the Appeal Court of the Province of Quebec was right, and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

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PROVINCIAL FOX v. TENNANT.

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Nova Scotia Supreme Court, Drysdale, J. August 20, 1914.

1. EVIDENCE (§ VI E—535)—PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITINGS—MEANING, INTENTION, EXPLANATION — CONTRACT FOR BRED FOXES.

A written agreement of sale of bred animals (ex. gr. blue foxes) is to be interpreted in the light of all the circumstances surrounding the parties at the time it was made, and if it bears internal evidence of an intention to deal with the progeny of the vendor's own stock and such is shewn to be in line with the ordinary course of the vendor's business, such a term may be read into the contract although there would not otherwise have been sufficient parol evidence to warrant a reformation of the contract by adding a specific clause to embody such term.

Statement

ACTION by a company whose business is breeding and selling foxes for the purchase price of a number of "blue foxes," based on a written agreement executed by the defendant as purchaser, the defence setting up certain correspondence and verbal negotiations to vary the writing and involving the question as to whether the agreement was consistent only with a common intention between the parties that the deal was to be with foxes bred by the plaintiffs themselves and which the plaintiffs were in the market to breed and sell though such intention was not expressed in the instrument.

The plaintiff company had its head office at St. John in the Province of New Brunswick and the defendant resided at Amherst in the Province of Nova Scotia. Verbal negotiations took place over the telephone between the defendant and an agent of the plaintiff company resulting in a verbal bargain for the purchase by the defendant of two pairs of blue foxes to be born in the plaintiff company's ranch at St. John. A few days later a written agreement was executed by the parties for the sale and

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delivery of the foxes but omitting all reference to the term of the verbal agreement that they were to be born in the plaintiff company's ranch at St. John. Defendant re-read the agreement a few days after he executed it and discovered the omission and then wrote and sent the following letter to the plaintiff's sales agent:—

With further reference to the four pairs of blue foxes I now have under contract with you, it was verbally understood between myself and Mr. Barker that these foxes were to be the progeny of the blue foxes now being ranched by you in the vicinity of St. John and it was distinctly understood that in no case are the foxes that I am to receive to be foxes born in Alaska. This is the verbal understanding that I had with Mr. Barker although it is not mentioned in your contract. Please confirm it by letter and oblige.

and in reply thereto he received the following letter:—

Your letter of April 14th at hand regarding blue foxes. If you would be kind enough to send us back the contract we will mail you new contracts to sign and will state in the new contracts that the blue foxes will be born on the ranch in the vicinity of St. John. This will no doubt meet with your views.

Upon receipt of this letter the defendant filed it away with his contract, being satisfied that the correspondence fully protected his right to receive foxes born in St. John. No blue foxes were born in the company's ranch at St. John that year and the defendant refused to accept any other and plaintiff brought action to recover the purchase money. The defendant counterclaimed for reformation of the agreement and also for a return of a deposit of $160 paid on account of the purchase price.

The action was dismissed and the latter part of the counterclaim was allowed.

V. J. Paton, K.C., and *James A. Hanway*, for the plaintiff.
F. L. Milner, K.C., and *L. E. Ormond*, for the defendant.

Drysdale, J.

DRYSDALE, J.:—The plaintiff company is a company incorporated and doing business chiefly in New Brunswick. Its business is the breeding and selling of foxes. In April, 1913, it entered into an agreement (set out in the claim) with the defendant for the sale of two pairs of the breed of foxes known as "blue foxes." The difficulty between the parties has arisen by reason of the defendant insisting that the subject-matter of the agreement related to foxes bred by plaintiff company, whereas plaintiffs insist that any blue foxes of any breed purchased in

Alaska or elsewhere fit the contract. I am not at liberty, I think, to vary the contract which is in writing. The defence seeks to reform it, but in view of the flat contradiction between Mr. Barker and Mr. Tennant I am of opinion the doctrine of reformation cannot be exercised in favour of defendant. The matter before me is the interpretation of the admitted written agreement and this must be interpreted as it is on its face in the light of all the circumstances surrounding the parties at the time of the making. Was it the common intention of the parties, on reducing to writing their agreement, to deal with foxes that plaintiffs were in the market to breed and sell? Is the agreement really consistent with this and with this only. The surrounding circumstances, especially previous dealings and the correspondence, lead me to think that it was the intention of the parties to make a contract respecting foxes to be bred and sold by plaintiff company. This company was in business to breed and sell this peculiar breed of foxes. It is selling in the ordinary course its anticipated product and if it had not been for its failure of pups in this (1913) year I fancy no one would have supposed this agreement was dealing with anything except plaintiff company's own product. Certainly in this case plaintiff company's selling agent and defendant both thought so. Whilst the contract cannot be varied, I think I am at liberty to scan critically all the circumstances surrounding the parties at the time of entry to interpret it and to apply it to the subject-matter that it was properly intended to deal with. I think the agreement on its face bears internal evidence of an intention to deal with plaintiff company's own product. This coupled with the correspondence and dealings established by the evidence convinces me that the defendant's position is well taken. I find the failure to complete was not owing to defendant's fault but to the misfortune that overtook plaintiff company's enterprise during the year in question.

I am of opinion the action ought to be dismissed as against defendant, and that defendant is entitled to a return of his deposit by virtue of his counterclaim.

Action dismissed and counterclaim allowed for the deposit.

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REX ex rel. LIVINGSTONE v. McNAMARA.

Alberta Supreme Court, Ives, J. October 26, 1914.

1. OFFICERS (§ I E—57)—REMOVAL — DISQUALIFICATION—GROUNDS OF — MUNICIPAL COUNCIL.

A member of a municipal council is disqualified from sitting where it appears that his judgment may be clouded by having a personal interest in a contract with the municipality and the disqualifying provision of sec. 22 of the Edmonton city charter affecting any member of the city council who has any such interest is construed strictly.

Statement

APPLICATION to vacate the seat of the mayor of Edmonton for his alleged interest in a contract with the city.

The application was granted.

A. M. Sinclair, for relator.

S. A. Dickson, for respondent.

Ives, J.

IVES, J.:—This is an application before me in Chambers for an order declaring that W. J. McNamara, the respondent has become disqualified to hold his seat as mayor of the city of Edmonton. The necessary fiat granting leave to serve notice of the application, required by sec. 192 of the Edmonton charter, has been granted by Mr. Justice Beck and the recognizance approved. The proceedings seem to have been regular and I shall take only the merits into consideration.

The ground upon which the relator relies is an alleged contravention of the statutory provision contained in the first paragraph of sec. 22 of the Edmonton charter, which reads as follows:—

> . . . no person having by himself or his partner an interest in any contract with or on behalf of the city . . . shall be qualified to be a member of the council.

This is a provision that for a great many years has, in effect, been incorporated in municipal or local government legislation in Great Britain, Canada and the United States. The principle underlying it is obvious. No person should be or become member of a municipal council who cannot give a disinterested vote on a matter of dispute that may arise. If his judgment may be clouded by self interest in a matter of contract or *quasi contract*, he should not be a member of the council.

The facts in evidence here are shortly as follows: Previous to

April 28, 1914, a number of public-spirited citizens of the city of Edmonton, in the interests of the city's welfare associated themselves together, but without incorporation, under the name of "The Edmonton Ad. Club." One of the objects of this club appears to have been to discover natural gas in such location and quantity as would make it available for general use by the citizens of the city. Funds for this purpose were subscribed by the members, of whom the respondent was one, he having subscribed $5,000 and paid over to the club a part, viz.: one thousand. The idea of the club was that if successful in the discovery of natural gas in such quantity and location as would make it desirable for city use, then the whole matter should be acquired by the city at its option, and the members of the club would receive back such sum as was actually expended in the discovery. To bring the matter to a definite basis with the city an authorized member of the club attended at a meeting of the city council on April 28, 1914, and made the club's offer as above outlined, and the council thereupon at that meeting passed the following resolution:—

> That the request of the Ad. Club to have an agreement drawn whereby it should be allowed to drill for gas, be granted, and that upon gas being found in quantities satisfactory to the council, the same will be taken over at cost, reimbursing the Ad. Club what they have put into it, and that the necessary expenditure be authorized to place an expert inspector on whatever may be deemed necessary by the commissioners, on behalf of the city.

The relator urges that the moment this resolution was passed the mayor, as a member of the unincorporated Ad. Club, became disqualified in his seat on the council, and in this instance, I regret to say, I think the relator is right. This judgment in effect punishes a man for an act not only innocent in itself, but praiseworthy. Here it is not pretended that the respondent was seeking private gain, quite the reverse. The members of the club were bound to be out of pocket to the extent of interest on their money, at all events.

All that the respondent did appears to me just what a public-spirited citizen and municipal councillor should do if the law permits. But I am compelled to construe sec. 22 of the Edmonton charter strictly and in the light of many judicial decisions

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such construction will embrace an act such as here complained of and disqualify the respondent. The latest authority I can find upon the necessity of strict construction of the section and the effect is a judgment of Mr. Justice Riddell in the case of *Rex ex rel. Fitzgerald* v. *Stapleford*, reported in 13 D.L.R. 858.

It would also appear to be well established by judicial decisions that whether the contract by reason of which disqualification is urged be enforceable or not at law is immaterial: See the judgment of Robinson, C.J., in *Reg. ex rel. Moore* v. *Miller*, 11 U.C.Q.B. 465, and of Wilson, J., in *Reg. ex rel. Fluett* v. *Gauthier*, 5 P.R. (Ont.) 24.

The evidence further shews a contract entered into between the International Supply Co., Ltd., and the Ad. Club and respondent and others on March 5, 1914; the incorporation under the Companies Ordinance of the Ad. Club under the name of "Edmonton Industrial Association Drilling Co., Ltd.," at the end of August, 1914, and an agreement entered into between such incorporated company and the city at the same date, but I cannot see that these facts in any way affect the position forced upon the respondent by the resolution of April 28.

The relator may take his order applied for but under the circumstances there will be no costs.

Application granted.

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REX ex rel. LIVINGSTONE v. EAST.

Alberta Supreme Court, Ives, J. October 26, 1914.

1. OFFICERS (§ I E—57)—REMOVAL—DISQUALIFICATION—GROUNDS OF—MUNICIPAL COUNCIL.

The provision of sec. 22 of the Edmonton city charter disqualifying any member of the city council who either by himself or his partner has an interest in any contract with the city must be construed strictly and the seat will be vacated whether or not the contract appears (*a*) to have personally benefitted the respondent or (*b*) to be even enforceable at law.

[*Rex ex rel. Fitzgerald* v. *Stapleford*, 13 D.L.R. 858, and *Reg. ex rel. Moore* v. *Miller*, 11 U.C.Q.B. 465, referred to.]

Statement

APPLICATION to vacate the seat of a member of the Edmonton city council for his alleged interest in a contract with the city.

The application was granted.

A. M. Sinclair, for relator.

S. A. Dickson, for respondent.

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IVES, J.:—This is a twin application by the same relator as in the matter of W. J. McNamara and it was agreed that the evidence in the first should apply in this.

For the reasons given in the judgment of even date against W. J. McNamara I am here likewise compelled to declare that James East became, on April 28, 1914, disqualified to hold his seat as an alderman of the city of Edmonton. Judgment accordingly without costs.

Judgment accordingly.

HOBBS v. ATTORNEY-GENERAL OF CANADA.

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Alberta Supreme Court, Scott, Stuart, Beck and McCarthy, JJ.
October 23, 1914.

1. ASSIGNMENT (§ I—7)—FUTURE WAGES—CREDITOR'S RIGHT TO IMPOUND.

Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution whether legal or equitable.

[*Holmes* v. *Millage*, [1893] 1 Q.B. 551, applied.]

2. EXEMPTIONS (§ II A—16)—WAGES—PUBLIC OFFICE UNDER THE CROWN —RIGHT OF ATTACHMENT—EXIGIBILITY.

Where a judgment debtor holds a public office under the Crown whose remuneration is payable out of national funds, *e.g.*, in the R.N.W.M. Police force it is contrary to the policy of the law that his remuneration, intended to maintain him in a state of usefulness in the force, should be subject to attachment or other method of execution.

3. COURTS (§ IV—250)—JURISDICTION—RELATION OF PROVINCIAL TO FEDERAL—EXCHEQUER COURT—ALBERTA SUPREME COURT.

The Alberta Supreme Court has jurisdiction to entertain an application for an order for the appointment of a receiver of moneys owing by the Crown to a public officer whose remuneration is payable out of national funds, *e.g.*, a member of the R.N.W.M. Police force, notwithstanding the jurisdictional provisions of the Exchequer Court Act, R.S.C. 1906 ch. 140, which are not exclusive.

Statement

APPEAL from an order of Simmons, J., appointing a receiver of moneys owing by the Crown to a public officer.

The appeal was allowed.

H. R. Milner, for appellant, defendant.

G. B. O'Connor, K.C., for respondent, plaintiff.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from an order of Simmons, J., appointing a receiver of moneys owing by the Crown to the

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defendant for remuneration to him as a sergeant in the R.N. W.M. Police. I think the appeal should be allowed without costs and the order discharged.

In *Holmes* v. *Millage*, [1893] 1 Q.B. 551, it was held that wages or other remuneration for personal services to be performed in the future were not attachable by any process of execution direct or indirect:—

> Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by an ordinary process of execution whether legal or equitable.

That decision has ever since been recognized as sound. It, and a large number of other cases which I have examined, make it clear too that no sum of money which the judgment debtor is entitled to receive can be made exigible under any process of execution if it is not assignable by him. The converse, however, does not hold good. It does not follow that a sum of money which is assignable by a judgment debtor can be reached by some process of execution.

In *Barwick* v. *Reade* (1791), 1 H. Bl. 627, it was held that an assignment of his full pay by a lieutenant of marines was invalid,

> it being contrary to the policy of the law that a stipend given to one man for future services, should be transferred to another who could not perform them.

In *Flarty* v. *Odlum* (1790), 3 Term. Rep. 681, it was held that the half pay of a lieutenant in a reduced regiment of foot was not assignable on the ground as stated by Lord Kenyon, C.J., that,

> emoluments of this sort are granted for the dignity of the State and for the decent support of those persons who are engaged in the service of it. It would be highly impolitic to permit them to be assigned, for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty. . . . It might as well be contended that the salaries of the Judges, which are granted to support the dignity of the State and the administration of justice, may be assigned.

Buller, J., said:—

> If the question had been whether or not the pay which was actually due might be assigned, I should have thought it, like any other existing debt assignable; but that does not extend to future accruing payments.

Grose, J., said:—

> The *future* half pay could not have been sold by the defendant himself.

In *Lidderdale* v. *Montrose* (1791), 4 Term. Rep. 248, it was held that the *future* half pay of an army officer was not assignable. In *McCarthy* v. *Gould* (1810), 1 Ball & B. 389, the Lord Chancellor said:—

> It has been decided both at law and in equity, that the half pay of an officer is not assignable or attachable, on principles of public policy. In the case of *Stone* v. *Lidderdale*, 2 Anstr. 533, the reason given was that he may be forthcoming when his services are required; but Lord Chief Baron McDonald in his judgment makes a distinction between the case of a half pay officer and a pension granted to an individual.

I continue to quote from his judgment for the purpose of shewing the proper procedure in cases where the moneys sought to be taken in execution are owing to the judgment debtor by the Crown.

> In this case, the grant of the pension was to Lord Westmeath and *his assigns*. He has assigned it to the defendant, who is in receipt of it, and payment is made to him on his receipt. It is not a *chose in action*, but a grant and may be reached by the process of this Court and the proper method of effecting this is by restraining the defendant from receiving this pension and directing the sequestrators to receive the same at the Treasury without serving any order on the Lords of the Treasury for that purpose.

Wells v. *Forster* (1841), 8 M. & W. 149, 10 L.J. Ex. 216, is to the same effect. Lord Abinger, C.B., says:—

> This pension is on the same footing as half pay of an officer in the army and, therefore, is not assignable. It is essential to the welfare of the community that public servants have the means of decent subsistence without suffering from poverty which often occasions the destruction of moral principle.

Parke, B., and Alderson, B., adopt the opinion of Lord Kenyon in *Flarty* v. *Odlum*, 3 Term. Rep. 681. In *Lucas* v. *Harris* (1886), 18 Q.B.D. 127, the distinction between half pay and a pension was recognized, but as by statute the pension in question was inalienable, it was held that it could not be taken in execution. In *Apthorpe* v. *Apthorpe* (1887), 35 W.R. 728, it was held that the full pay of an officer in the Royal Navy on active service could not be assigned and, therefore, was not exigible by any method of attachment. Cave, J., in *Re Mirams*, [1891] 1 Q.B. 594, says that

> to make the office a public office, the pay must come out of national and not out of local funds and the office must be public in the strict sense of that term.

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That was the case here as to the source of payment, but it is not an indispensable condition to the office being public: *Central Bank* v. *Ellis*, 20 A.R. 364.

The reasoning of all the cases which hold that the remuneration for services in a public office is on grounds of the policy of law not attachable is almost, if not quite equally applicable to moneys due in respect of past services as in respect of future services, and if it was not intended to be applied equally to past services, all these decisions and the reasoning upon which they are founded may be put aside in view of the decision in *Holmes* v. *Millage*, [1893] 1 Q.B. 551, in which it is held that future earnings by way of wages or salary payable even by a private individual are not attachable.

For the reasons indicated I think the judgment debtor holds a public office under the Crown, whose remuneration is payable out of national funds and that it is contrary to the policy of the law that that remuneration, intended to maintain him in a state of usefulness in the R.N.W.M. Police force, should be subject to attachment or other method of execution.

Though this ground, of course, in my view disposes of the matter I venture to refer to another point raised during the argument, namely: Whether in view of the provisions of the Exchequer Court Act (R.S.C. (1906) ch. 140) there was under any circumstances jurisdiction in this Court to make such an order. Section 19 says that

> The Exchequer Court shall have exclusive original jurisdiction in all cases *in which demand is made or relief sought* in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

I doubt very much whether the word contract in this section is intended to apply to the legal relation resulting from enlisting in the R.N.W.M. Police or other similar organization.

At all events in the case of an admitted debt owing by the Crown, which if owing by a private individual would be attachable there is no need of any attempt being made to take any

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suit or action or other proceeding against the Crown or any of its officers or officials. The proper proceeding is purely *in personam* and by way of an injunction to restrain the creditor from receiving and a receiver order merely authorizing the receiver to receive and receipt for the debt and in a proper case to sign the Crown's creditor's name as endorser of any cheque or order for payment of the amount. So far as the order gave a direction to the superintendent of the force it was, I think, quite improper. Sec. 24 of the Exchequer Court Act gives jurisdiction to the Exchequer Court in cases of interpleader, but it is not stated to be exclusive jurisdiction and such proceedings can be instituted only "upon application of the Attorney-General of Canada." So that assuming that the present proceeding is not purely *in personam*, I think this provision does not take away the jurisdiction of this Court. I, therefore, think that had the debt owing by the Crown been of such a character as to be exigible if owing by a private individual there was jurisdiction in this Court to make an order for an injunction and receiver.

Appeal allowed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. June 19, 1914.

1. ESTOPPEL (§ III L—145)—BY CHARACTER OR RELATION OF PARTIES—OPTION TO PURCHASE IN ORIGINAL LEASE—EFFECT OF NEW LEASE.

A lessee, whose lease contains an option to purchase the demised premises during the term, does not *prima facie* waive his option by taking (some time in advance) a new lease without the option clause to begin when his original term expires; nor is he estopped from asserting his option to purchase at any time during the original term.

[*Mathewson* v. *Burns*, 18 D.L.R. 287, reversed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 30 O.L.R. 186, 18 D.L.R. 287, reversing the judgment at the trial in favour of the plaintiff.

The appellant was lessee of land for a term expiring on April 30th, 1913. The lease provided that she could purchase the property at any time during the term for a specified price. In March, 1913, she accepted and signed a new lease for a year from May 1st, 1913, and shortly after tendered the purchase money for the property and a conveyance for execution to the owner

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who refused to convey, and in an action by the lessee for specific performance claimed that the option was abandoned by the acceptance of the new lease. The Appellate Division upheld this contention, reversing the judgment at the trial in the appellant's favour.

The appeal was allowed, ANGLIN and BRODEUR, JJ., dissenting.

Geo. F. Henderson, K.C., for the appellant.

W. C. McCarthy, for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an action for specific performance of an option agreement for the sale of certain property on Stewart Street, in the city of Ottawa. The option is contained in a lease dated April 30th, 1910, given to the appellant by the late Thomas A. Burns, under whose will the respondent is devisee of the property. The option is in these words:—

> The said Mary A. Mathewson to have the option of purchase at any time on or before the expiration of this lease for the sum of $2,800 (twenty-eight hundred dollars).

The lease was registered by the appellant on the 8th of February, 1911, after the death of the late Thomas A. Burns. Before the expiration of the lease, the appellant notified the respondent of her intention to exercise the option.

The learned Chancellor of Ontario, who tried the case, found that the appellant would not have taken the lease except upon the condition that she was given an option to purchase exercisable at any time during the period specified and holding that she acquired a vested right to purchase during the full term of her lease maintained the action. On appeal, the judgment was reversed on the ground that the appellant waived or abandoned her option to purchase by entering into an agreement on March 10, 1913, to rent the same premises for a term of twelve months from the first day of May, 1913.

The abandonment or waiver of the option to purchase would require to be proved like any other agreement in clear and unequivocal terms, and with all respect, I am entirely unable to appreciate how that second lease which would only begin to run at the expiration of the option period can be construed as an agreement to waive the right to purchase which the appellant

admittedly had at the time the agreement was made. I cannot find evidence of anything done or said by the appellant by reason of which the position of the landlord was in any way altered. In accepting the lease, in March, 1913, the appellant cannot be held, in view of the relations then existing between her and the respondent, to have admitted more than that, at that time, the landlord had power, as the fact was, to rent the property at the expiration of the then current lease if she did not exercise her option in the meantime. There is no evidence that in consideration of the new lease she agreed to abandon her option, and taking a new lease in anticipation of a possible failure to exercise an option to purchase is not conduct evidencing an intention to abandon the right to the option when, as in this case, the lease was to begin to run only at the expiration of the option period. If there is any ambiguity or doubt, it should be construed in favour of the appellant who without legal advice was dealing with the respondent's solicitor.

If this case arose in Quebec, I would be disposed to hold that, in the circumstances, the agreement to abandon the option before the expiration of the delay would require to be in writing.

The right to the option is not inconsistent with the right to a lease subject to the option which will only take effect if the option is not exercised. Both may run concurrently. It would be different if the appellant had taken a lease which began to run before the expiration of the option period. The taking of that new lease at that time might be said to be inconsistent with the intention to exercise the option, but I can see no reason why the intention to exercise the option should not continue to exist concurrently with the right to a lease of the premises if the option is not exercised in the meantime. I agree entirely with the Chancellor when he says:—

> There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease to begin at the termination of the other was merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease that would *ipso facto* have determined the relation of landlord and tenant and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative on the plaintiff electing to purchase at the end of the first term.

The appeal should be allowed with costs.

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IDINGTON, J.:—I think this appeal should be allowed with costs for the reasons assigned by the learned Chancellor in which I entirely concur.

In the almost infinite variety of rights and interests which a man may acquire in or over real estate and enjoy concurrently there is nothing more common than an option to acquire either the whole estate or some new interest therein.

It is a novel doctrine that by the acquisition of some new interest his option must be presumed to have been waived unless there is some necessary inconsistency between what he has newly acquired and the continuation of the option.

There is no more inconsistency between the continued existence of an option for the time it has to run and a renewal or extension of a lease, than there was between the option to purchase during the currency of the lease in which the option to purchase was expressed, and that lease itself.

There might have been embodied in the renewal lease a term or condition that its acceptance ended the option, but there was not. Or there might have been in the negotiations between the parties leading to such renewal something agreed upon that would have rendered the exercise of the option so inequitable that a Court would not enforce its specific performance, but there was nothing of the kind.

It might as well be argued that the renewal of the lease interfered with the appellant's right to enforce her mortgage when falling due during either term, as that the renewal in question extinguished the right to exercise her option as she did before the term thereof had expired.

The respondent never changed his position in such a way as to entitle him to claim that appellant had surrendered her right.

The learned Chancellor has so fully covered the ground that I can add nothing useful, and only add these remarks suggested by the course of the argument addressed to us for respondent.

Duff, J.

DUFF, J.:—I concur in the conclusion and the reasoning of the learned Chancellor of Ontario who tried the action. I think the appeal should be allowed and the judgment of the learned Chancellor be restored.

ANGLIN, J. (dissenting):—In taking in March, 1913, an unqualified lease for one year from the 1st of May, 1913, the appellant, in my opinion, entered into a contract wholly inconsistent with her right to exercise the option, expiring on the 30th April, 1913, contained in the three years' lease of the 30th April, 1910, of which she asserts in this action the right to avail herself. If that option should be exercised, the lease of March, 1913, could never become operative. In accepting the lease the appellant recognized the absolute title of the respondents to make it. She either meant, in consideration of the new lease, to forego all claim to exercise her option (it may be because she thought it unenforceable, or of such doubtful efficacy that a compromise on the basis of a new lease was advisable) and in that case waiver of it would seem to be clear; or she proceeded under under the mistaken belief that her acceptance of the new lease without any reservation of her option to purchase the property would not affect her right to exercise that option, and in that case she would appear to be seeking relief against the effect of taking the new lease on a ground of mistake in law. That she cannot have.

With deference to those who take the contrary view, I am unable to read into the absolute and unqualified lease of March, 1913, the condition or qualification that it shall be of no effect if the lessee should exercise an option to purchase, the existence or efficacy of which was in dispute between the parties. That seems to me to be introducing by some sort of inference into a written contract a term so inconsistent with its express provisions that it is destructive of them. There is not even an attempt to adduce parol evidence (which in my opinion would have been inadmissible) that the appellant intended to make the new lease subject to the option. But if that term, not expressed in the document, may not be imported into it by explicit oral evidence that it was intended that the lease should be subject to it, I cannot see my way to import it as a matter of inference from extrinsic facts which, as I read the evidence, are quite as consistent with the intention that the option should be abandoned, as that it should be preserved. For my part I prefer to determine the rights of the parties by interpretation of the writing in which they have undertaken to express them.

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In any event I do not consider this a proper case for the extraordinary and discretionary remedy of specific performance.

I would dismiss the appeal.

BRODEUR J. (dissenting):—I would dismiss this appeal for the reasons given by my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *MacCracken, Henderson, Greene & Herridge.*

Solicitor for the respondent: *Napoleon Champagne.*

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JONES v. SULLIVAN.

New Brunswick Supreme Court, McLeod, C.J. October 20, 1914.

1. ADVERSE POSSESSION (§ III—65)—REALTY—WHO MAY HOLD ADVERSELY—PRIMA FACIE EVIDENCE OF SEISIN IN FEE.

The fact of possession by the plaintiff and his predecessors in title is *primâ facie* evidence of seisin in fee, and the defendant can only oust the plaintiff by shewing a better title.

[*Perry* v. *Chissold*, [1897] A.C. 73, and *Asher* v. *Whitlock*, L.R. 1 Q.B. 1, referred to.]

Statement

ACTION for a declaration against the defendant as to title and right of possession in a certain wharf property, and for damages.

Judgment was given for the plaintiff as to right of possession and in damages.

Fred R. Taylor, K.C., for the plaintiff.

H. A. Powell, K.C., for the defendant.

McLeod, C.J.

MCLEOD, C.J.:—This action is brought by the plaintiff for a declaration that he is the owner of a certain wharf property situate on the Miramichi river, in the parish of Nelson, in Northumberland county on which the defendant Sullivan now has a mill, and for possession of the same. The plaintiff claims that he is the owner of the said wharf property, and he charges that the defendant wrongfully had a saw mill on it, and that in operating the said mill, owing to the faulty and negligent construction of it, sparks from it set fire to a building belonging to him on property adjoining the said wharf, and destroyed it, and he

claims damages for the loss of the said building. The defendant, Sullivan, is the real defendant in the action—the defendant Tingley at the time the action was brought appears to have been operating a rotary mill on this wharf property, cutting lumber for Sullivan. He has and claims no interest in the property, and, I understand from the evidence, that his mill is not now on the property.

The plaintiff claims the property under the following circumstances: Between the years 1860 and 1870, Messrs. John Flett and William Flett, who were brothers, operated a saw mill on a property situate on the Miramichi river, in the said parish of Nelson, which I will call the Thomas W. Flett property, and which was at that time owned by the late Hon. J. B. Snowball. During the time the Messrs. Flett occupied the property and operated the mill they built from the edgings and slabs from the mill a wharf out in the river below high water mark for use in connection with the mill and the operations there carried on. This wharf was used by them for piling lumber on, and vessels were brought alongside of it and moored, and loaded from the wharf. It was in fact what may be termed a deep water wharf from which they could load vessels. Mr. William Flett died in the year 1867, intestate, and Mr. John Flett continued the business, and, in the year 1870 bought the property from the late Hon. Mr. Snowball, who, on February 5, 1870, conveyed it to him by deed The description in the said deed is as follows:—

All that certain piece or parcel of land, and land covered with water, situate, lying and being in the said parish of Nelson, on the south side of Miramichi River, opposite Beaubear's Island, and abutted and bounded as follows: commencing on the northerly side of the Queen's highway at the upper or westerly line of that part of lot number forty-one, conveyed by Elizabeth Hewson to William Flett and known as the Fraser property; thence westerly along the said highway, thirty-nine rods; thence northerly at right angles with the said highway to the channel of the river; thence easterly down stream, following the said channel until it meets prolongation of the upper or westerly side line of the said Fraser property; and thence southerly along the said line to the north side of the Queen's highway; being the place of beginning; Together with the wharf and mills standing or being upon or in front of the said premises, and the steam engines and machinery of every description contained in the said mills or appertaining thereto, and all other, the houses, outhouses, buildings, erections, booms,

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improvements, hereditaments and appurtenances to the same or any part thereof belonging or in anywise appertaining, or with the same had, held, used or enjoyed, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; Also all the estate, right, title, interest, property, claim and demand whatsoever in law or equity of him, the said Jabez Bunting Snowball of, into or out of the said lands and premises, and every part thereof. To have and to hold all and singular the lands and premises hereinbefore described and conveyed or intended so to be, with the appurtenances and every of them unto the said John Flett, his heirs and assigns, to the only proper use, benefit and behoof of him, the said John Flett, his heirs and assigns, forever.

It will be seen that the description given in the deed does not include this wharf property. It is claimed, however, that the terms of the deed are wide enough to convey it as a part of the property. The title to the land on which the wharf is built is in the Crown, but anyone in possession of it could only be dispossessed by the Crown or some one having a higher title than the person in possession. Mr. John Flett continued in the possession of the property he purchased, and operated the mill and used this wharf now in dispute for the purposes of his mill until the year 1887 when he appears to have become financially involved, and in that year a number of executions were issued against him, and under these executions all his property was seized by the sheriff of Northumberland County and sold, and purchased by one Thomas W. Flett. Among the properties so sold was the property purchased by John Flett from the Hon. Mr. Snowball, and on September 21, 1887, the sheriff, by deed, conveyed all the properties so sold to Thomas W. Flett. The description of what I term the Thomas W. Flett property is as follows:—

All that certain piece or parcel of land and land covered with water, situate, lying and being in the parish of Nelson, and county of Northumberland, on the south side of the Miramichi River, opposite Beaubear's Island, and abutted and bounded as follows: Commencing on the northerly side of the Queen's highway, on the upper or westerly line of that part of lot number forty-one (41) conveyed by Elizabeth Hewson to William Flett and known as the Fraser property; thence westerly along the said highway thirty-nine rods; thence northerly at right angles with the said highway to the channel of the said river; thence easterly down stream following the said channel, until it meets a prolongation of the upper or westerly side line of the said Fraser property; and thence southerly along the said line to the north side of the Queen's highway, being the place of

beginning, being the same lands and premises conveyed to the said John Flett by Jabez Bunting Snowball by deed dated February 5, 1870: Together with the wharves, blocks, mills, chimneys, slips, ways, waters, easements and erections standing or being upon or in front of the said premises, and the steam engines, boilers and machinery of any nature and kind contained in any of the mills and buildings thereon.

Thomas W. Flett went into possession of the property and used and occupied this wharf property for the purpose of his mill, the same as had been previously done. Becoming indebted to the Bank of Montreal he, on May 18, 1904, conveyed this property by way of mortgage to the Bank of Montreal. The description in the mortgage is practically the same as the description in the deed from Snowball to Flett. He, however, continued in possession of the property, operating the mill and using the wharf in connection with it as had been previously done. The mortgage contained a power of sale. The amount secured by the mortgage not having been paid, the Bank of Montreal under the power of sale contained in the mortgage, advertised the property for sale at public auction, and on August 19, it was sold and the plaintiff became the purchaser, and the Bank of Montreal by deed dated August 19, 1910, conveyed it to the plaintiff, and he went into possession of the property. It does not appear that he operated the mill, but he had a man, Mr. James Lynch, who looked after the property for him. The plaintiff claims, as I have said, to own this wharf property and he, in fact, was in possession of it. The defendant on his part, claims to have acquired his title through Mrs. Helen H. Flett, the widow of William Flett, who died in 1867, and his claim is as follows:—

William Flett, as I have said, died intestate in 1867, leaving him surviving his widow, Helen H. Flett, and the following children: George C. Flett, James Hendrie Flett, William Flett and Penelope Flett, and on August 16, 1893, all of these children of William Flett, conveyed and released to their mother, Helen H. Flett, all their right, title and interest, as heirs of the said William Flett, in two lots of land, one of which was conveyed to the said William Flett by one Elizabeth Hewson by deed dated August 31, 1860, registered in the records of Northumberland County, on September 4, 1860, and the other of which

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was conveyed to the said William Flett, and one George Flett, Jr. by the said Elizabeth Hewson by deed dated November 1, 1860, and registered in the records of Northumberland County on November 6, 1860, the interest of George Flett, Jr. in the latter lot being at that time, owned by the said Thomas W. Flett.

Some differences appear to have arisen between Mrs. Helen H. Flett and Thomas W. Flett, and, on August 23, 1901, a deed of partition of the lot conveyed by said Elizabeth Hewson to William Flett and George Flett, Jr. by deed dated November 1, 1860, was made between them, but in that deed of partition no reference is made to this wharf property in dispute. This deed of partition was registered in the records of Northumberland County on October 25, 1902. Mrs. Helen H. Flett died in estate in 1903, and on May 29, 1913, the said George C. Flett, James Hendrie Flett, William Flett, and Penelope Flett, the aforesaid children of the said William Flett and Helen H. Flett, by deed conveyed to the defendant Sullivan, a part of the lot of land conveyed to William Flett by the deed dated August 31, 1860, and "that part of the adjacent lands set off and conveyed to the said Helen H. Flett as aforesaid by the said deed of partition." The deed then proceeds to convey the following lot of land covered by water by metes and bounds.

The description of this lot of land, in the said deed is as follows:—

Also all that other piece or parcel of land and land covered with water situate, lying and being in front of the said piece of land hereinbefore described and conveyed, and abutted and bounded as follows, viz.: southerly, or in front, by the said highway; on the lower or easterly side by the upper or westerly side line of the said Michael Monohan lands and a prolongation thereof; on the upper or westerly side of the land and premises known as the wharf of the Thomas W. Flett Lumber Company, Limited, and now owned by Robert Jones, and extending northerly into the Miramichi River as far as the said parties hereto of the first part own the same or have any right thereto. Together with all and singular the buildings, wharves, blocks, docks and improvements thereon, and the rights, members, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, also all the estate, right, title, interest, dower, or thirds, right and title to dower or thirds, property, share, claim and demand whatsoever at law or in equity of them the said parties hereto of the first part, and all, each and every of them of, in, to or out of the said lands and premises.

It is on this land last described that the wharf in dispute is built, and it is under this deed that the defendant claims this wharf property. At the time this suit was brought, as I have said, the defendant Tingley had a rotary mill on the wharf, sawing lumber for the defendant, Sullivan. I gather from the evidence that since then that mill has been removed, and that the defendant, Sullivan now has a rotary mill of his own on that wharf, and is operating it. I have already said that the title to the land on which this wharf was built is in the Crown, but it is claimed by the plaintiff that Thomas Flett and William Flett having built this wharf for the purposes of the mill on the Thomas W. Flett property that was then owned by the late Hon. Mr. Snowball, and used it for the purposes of the mill, that when the late Hon. Mr. Snowball conveyed the property to them his deed was broad enough to convey this wharf.

From the view I take of the case, I think it is not necessary to determine whether the wharf when built became the property of the Hon. Mr. Snowball and whether, under the circumstances in evidence and a proper construction of the deed, given by the Hon. Mr. Snowball, it was conveyed to John Flett. John H. Flett and William Flett, during the life of William Flett commenced at all events to build this wharf; whether it was completed before the death of William Flett does not appear in evidence. He died in 1867. John Flett continued in possession of the mill property and of this wharf, and if it was not completed in 1867 he had completed it in 1870, and in that year was in possession of it, and used it for the purposes of the mill. He continued in possession of it and used it in connection with the mill property down until 1887. In 1887, Thomas W. Flett having, as I have said, purchased the mill property, took possession of it, and took possession of this wharf, and used the wharf in connection with the mill property down until December, 1905, when he appears to have conveyed the mill property to a company known as The Thomas W. Flett Lumber Co. Ltd., and that company went into possession of the property and of the wharf, using the wharf in connection with the property until the time of the transfer to the plaintiff, and the plaintiff from the time

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of his purchase from the Bank of Montreal has been in possession of the property and of this wharf, having his agent Lynch looking after it for him. That possession then of the plaintiff and his predecessors in title is good against all the world save only the true owner. The plaintiff is entitled to hold this property against all the world save someone who can shew a better title. See *Perry* v. *Chissold*, [1897] A.C. 73, and *Asher* v. *Whitlock*, L.R. 1 Q.B. 1. The fact of possession is *primâ facie* evidence of *seisin in fee*. The defendant, as I have said, claims through Mrs. Helen H. Flett and her heirs. These parties from the view I take, had no title to the land on which the wharf was built. They never were in possession of the wharf; all the right the defendant gets he gets under the deed given to him by the heirs of Helen H. Flett. They had no title; they were not in possession; therefore they could give him neither a legal nor a possessory title. When the deed was made, the plaintiff was in possession, and the defendant Sullivan can only oust him by shewing a better title and this he has not done. He simply intrudes on the possession of the plaintiff.

A deed was put in evidence given by Thomas W. Flett to the Thomas W. Flett Lumber Co. Ltd, dated December 26, 1905. The Thomas W. Flett Lumber Co. did have possession of the property for a time, and there was also a mortgage from the Thomas W. Flett Lumber Co. to John William Jones, a brother of the plaintiff, dated March 28, 1906. This mortgage has no bearing on the plaintiff's title whatever. I find as a matter of fact, that the plaintiff and his predecessors in title had possession of this wharf property.

The bill further asked for an injunction restraining the defendant from so using his mill there as to injure the plaintiff's property. As I have determined that the mill is wrongfully there and that the defendant has no right to continue the mill there, I do not think that the injunction is necessary. The bill further asked damages for a building that was burned on the plaintiff's property adjoining the wharf. I think from the evidence, and so find that the building was set fire to by sparks from the mill owned by Tingley that was then being operated on

this wharf for the defendant Sullivan. The building itself was of but slight value. I do not discuss the matter particularly as to whether there was negligence in the operation of the mill or not, because under the finding I make, the mill had no right to be there. It was wrongfully on the plaintiff's property, and therefore the defendants are liable for the damage done. I will assess the damage done to the house at $75.

The order will be that the plaintiff is entitled to the possession of the wharf property in dispute, and that the defendants must pay the plaintiff $75 damage for the house that was destroyed. The defendants must also pay the costs of this action.

Judgment for plaintiff.

SASK. AND WESTERN ELEVATOR v. BANK OF HAMILTON.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Elwood, JJ. July 6, 1914.

1. BANKS (§ IV A—45)—BANKING—DEPOSITS—MANAGER'S AUTHORITY TO RECEIPT FOR, HOW LIMITED.

A bank is not bound by a receipt given by its agent or branch manager in charge of a branch bank to its customer's agent for moneys said to have been deposited to the customer's credit on current account if no such deposit was in fact made, as it is not within the scope of the manager's authority to give a receipt for money he had not received and as such limitation of authority is generally known by business men.

[*Grant* v. *Norway*, 10 C.B. 665, 20 L.J.C.P. 93, applied.]

2. ESTOPPEL (§ III L—145)—BY CHARACTER OR RELATION OF PARTIES—PRINCIPAL BY ACTS OF AGENT—BANK BY ITS MANAGER—IMPROVIDENT RECEIPT FOR DISHONOURED CHEQUE.

A principal who settles with his agent on the strength of a receipt by the manager of a branch bank purporting to shew a deposit made by the agent to his principal's credit, has no claim against the bank on the ground of estoppel where the deposit was of the agent's personal cheque which was dishonoured.

Statement

APPEAL from the judgment of the District Court in the defendant bank's favour in an action for money had and received, involving the question of estoppel where the bank's branch manager improvidently receipted for an alleged bank deposit which had not actually been paid in.

The appeal was dismissed.

H. J. Schull, for appellant.

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

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Newlands, J.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action for money had and received. The defendants deny the receipt of the money, and the plaintiffs reply estoppel.

The facts of the case are that one McDiarmid was the agent of the plaintiff company at Marquis, Sask., and one J. H. Morrison the manager of the defendant bank at that place. Part of the duty of McDiarmid was to deposit to the plaintiff company's credit in the defendant bank, moneys he received in the course of his employment, for which the manager of the bank had been in the habit of giving receipts. On January 23, 1913, McDiarmid went to the office of the bank after banking hours, paid to the manager $300 in cash, gave him his personal cheque for $276.70, and told him that he had deposited $150 to the credit of the plaintiff company on the previous day, and got from him three receipts for these amounts, and on the same day, being asked by the plaintiff company's manager if McDiarmid had deposited any money that day, J. H. Morrison, the manager of the bank, told him that he had deposited between $500 and $600. The next day Morrison found that McDiarmid's cheque for $276.70 was no good, and that he had not deposited $150 the previous day. He therefore only put $300 to the plaintiff company's credit. The plaintiff company settled with their agent McDiarmid on the strength of these receipts. Upon these facts the learned District Court Judge held that the defendant bank was not estopped from denying that the money as shewn by these receipts had not been deposited with them, and that the plaintiff company could not, therefore, recover.

I am of the opinion that he was right. As to the receipt for $150 which was given on the representation by McDiarmid that he had deposited this money on the previous day, I am of the opinion that the bank is not bound by this receipt because it was not within the scope of the bank manager's authority to give a receipt for money he had not received, and as this fact is generally known by all business men it would be the same as if the plaintiff company had express notice of the limitation of the bank manager's authority. In *Grant* v. *Norway*, 10 C.B. 665,

20 L.J.C.P. 93, where a shipmaster had signed a bill of lading for goods which had not been received on board and where an endorsee of the bill of lading contended that the owners of the ship were estopped by the bill of lading from denying that the goods had been shipped, Jervis, C.J., in giving the judgment of the Court, said:—

> Is it then usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? for, all parties concerned have a right to assume that an agent has authority to do all that is usual. The very nature of a bill of lading shews that it ought not to be signed until goods are on board; for, it begins by describing them as "shipped."
>
> It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by endorsement, would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.
>
> If, then, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped.

The same applies to the receipt for the cheque. It was only good if McDiarmid had funds to meet it, and he not having funds it was not a payment of money. If it could be said that Morrison had been acting within the scope of his authority in giving the receipts, then it could with equal force be argued that McDiarmid made the false representations in the course of his employment, and, the act of the agent being the act of the principal, the plaintiff company would be presumed to know that McDiarmid did not make the deposits for which he got the receipts, and as a receipt is "not pleadable in bar as an estoppel, being merely a *primâ facie* acknowledgment that the money has been paid" (Everest & Strode on Estoppel, p. 337), the bank could shew the true facts and the plaintiff company could not recover.

The appeal should be dismissed with costs.

Appeal dismissed.

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KENNEDY v. GROSE.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Brown, JJ. July 15, 1914.

1. NEGLIGENCE (§ I A—4)—AS BASIS OF ACTION—INJURY TO CATTLE BEING TAKEN TO POUND FOR TRESPASS.

In taking trespassing cattle or horses to the pound, the landowner must take the same care of them which a man of ordinary discretion and judgment might be expected to exercise if they were his own, and where he directs another to remove the animals to the pound he is responsible for such person's wrongful and negligent method of fastening the animal to a vehicle whereby the animal was injured, although there was no intention to commit the injury.

[*Lloyd* v. *Grace*, [1912] A.C. 716; *Bignell* v. *Clarke*, 5 H. & N. 485, and *Union Bank* v. *McHugh*, 10 D.L.R. 562, [1913] A.C. 299, applied.]

Statement

APPEAL from the judgment of His Honour the District Court Judge of Moose Jaw, dismissing the plaintiff's action in damages for injury to his colt being taken to pound for trespass.

The appeal was allowed.

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

H. V. Bigelow, K.C., for respondent.

Haultain, C.J.

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

Lamont, J.

LAMONT, J.:—In this action the plaintiff sues the defendant for damages for injuries sustained by the plaintiff's colt through ill-treatment by the defendant's servants in removing it to the pound. The colt in question was at large upon the defendant's land, and he directed two men on his place, Blackie and McLean, to take it to the pound. In taking the colt to the pound Blackie and McLean first put a halter on it and tied it to the sleigh. It would not follow without throwing itself. They then put a three-quarter inch rope over its back and brought the two ends between its front legs and knotted the rope some distance from its breast and then fastened the rope to the sleigh. They then drove on. As the rope tightened the colt pulled back, with the result that they dragged the colt a short distance. They kept the rope in this position on the colt until it had learned to follow. When they got to the pound Blackie examined the colt. He examined it, he says, because he thought the rope would hurt it. He found, according to his testimony, two marks about two inches long between the two front legs. The hair was

scalded off. The next day the plaintiff and one Harris went to the pound for the colt. They swear they found the colt burnt in two places between the front legs, and that the wounds were three or four inches deep, and they place the depreciation in the value of the colt as the result thereof at from $90 to $100. There was no evidence as to the depreciation in value caused by these injuries given on the part of the defendant except the evidence of McLean, who says that as far as he could see the colt is all right, by which I presume he means that no real damage was done. The action was tried before the Judge of the District Court for the judicial district of Moose Jaw, who dismissed the action on the ground that there was no intention on the part of the defendant to injure the animal, and that, in order to succeed, the plaintiff must shew that the defendant had such intention; and he cited *Kruse* v. *Romanowski*, 3 S.L.R. 275, as authority. With deference to the learned trial Judge, I am of opinion that the test of liability is not the intention of the defendant, nor is there anything in *Kruse* v. *Romanowski* to support that view. There is a class of cases in which the owner of property would not be liable for injuries received by a trespasser while trespassing unless the injurious agency was placed by the owner with the intention of injuring anyone who might trespass on the property. See *Bird* v. *Holbrook*, 130 E.R. 911. The principle of these cases, however, has no application here. The colt in the case was not injured while trespassing. It was injured, as the evidence amply shews, while being taken to the pound in the custody of the defendant's servants. The defendant was lawfully entitled to take the colt into custody and impound it. While on the way to the pound it was injured. The question, therefore, is, is he liable for the injuries it received while in the custody of his servants?

A principal is responsible for any wrongful act done by his agent committed within the scope of his authority. *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716. The defendant, having directed Blackie and McLean to take the colt to the pound, is responsible for any wrongful act of theirs as a result of which the colt suffered injury. Were they guilty of any wrongful act

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or negligence? The law appears to be well established that a person who is lawfully entitled to take possession of the chattels of another must, while those chattels are in his possession, take that care of them which a man of ordinary discretion and judgment might be expected to exercise in regard to his own property. Beven on Negligence, vol. 1, p. 269. In *Bignell* v. *Clarke*, 5 H. & N. 485, Martin, B., said:—

> The law is correctly laid down in *Wilder* v. *Speer*, 112 E.R. 945, that the distrainor must at his peril provide a proper pound. That is not only law but good sense. If a man thinks fit to take the cattle of another in order to obtain payment of damage, it is his duty to take care of them.

The same rule applies to a sheriff in reference to property seized by him. In Freeman on Executions, at p. 1516, the learned author says:—

> Where a sheriff seizes property under a writ of execution he must after seizure, take care of the property either personally or by his agent. It is well settled that he is answerable for any injuries suffered from the negligence of the officer in charge of the property while held by him under the writ.

In *Union Bank of Canada* v. *McHugh* (1911), 44 Can. S.C. R. 473, [1913] A.C. 299, 10 D.L.R. 562, the bank seized a large number of horses under a chattel mortgage made by the defendant. In driving them to Calgary for sale, the agents of the bank caused a depreciation in the value of the horses through over-driving them. The defendant was held entitled to damages equivalent to the depreciation sustained.

On these authorities it is clear that the defendant is responsible for any damage done to the colt through the failure of his agents to take reasonable care of it while driving it to the pound. That they did not exercise reasonable care is shewn by the fact that the colt was injured as a result of putting the rope over its back and between its front legs, and also by the fact, admitted by Blackie, that "he thought the rope would hurt it." Where a man believes a certain act will likely produce injury, yet, nevertheless, he does the act and the injury he thought probable does follow, he cannot be said to be exercising reasonable care to avoid injury. The plaintiff is therefore entitled to succeed.

The damage to the colt is placed by the plaintiff and Harris

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at from $90 to $100. The only evidence against this is that of the defendant's witness McLean who says that so far as he could see there was nothing wrong about the colt. This is very general and does not disclose whether or not he made any examination. I would therefore place the damage to the colt at $90. To this should be added $3.80 for medicine, making $93.80 in all.

The appeal, therefore, should be allowed with costs, the judgment of the Court below set aside, and judgment entered for the plaintiff for $93.80 and costs.

BROWN, J.:—I concur in the judgment of my brother Lamont. As to the amount of damages to which the plaintiff is entitled, the evidence offered on behalf of the plaintiff is as follows:—

D. C. Kennedy (the plaintiff): "The colt was worth $150 before it was injured . . . It is worth $100 less now on account of the injury. I value it to-day at not more than $50 or $60."

Robert N. Harris: "The colt is worth $100 less now than before the injury."

Harry Kennedy: "I saw the colt fifteen minutes after it got home. It was in poor condition. It was burnt over the shoulder-blades of front legs and had scum over the eye. These wounds were six inches long and about one inch wide." At that time there was no hole, but a few days later flesh all fell in, causing a wound four inches deep.

As against this, the only evidence given on behalf of the defendant on this point was that of Robert McLean, one of the parties who did the damage; and what he says is:—

"So far as I can see, there is nothing wrong about the colt."

In view of this evidence, in my opinion, the plaintiff has shewn that he is entitled to $90 damages to the colt, and this, together with $3.80 paid for medicine, makes $93.80. I would therefore allow the plaintiff as damages the sum of $93.80.

Appeal allowed.

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PEACOCK v. WILKINSON.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Brown, JJ. July 18, 1914.

1. PRINCIPAL AND AGENT (§ II A—8)—AGENT'S AUTHORITY—SALE OF LAND—BREACH OF WARRANTY OF AUTHORITY—BURDEN IN ACTION FOR.

To recover in an action for breach of warranty of authority as an agent, the plaintiff must shew that the agent entered into a contract with him which, if the agent had in fact had the authority he represented he had, would be binding on his principal.

[*Peacock* v. *Wilkinson*, 15 D.L.R. 216, reversed; *Godwin* v. *Francis*, L.R. 5 C.P. 295, applied.]

Statement

APPEAL from the judgment at the trial, *Peacock* v. *Wilkinson*, 15 D.L.R. 216, in plaintiff's favour in an action against the defendants, real estate agents, for breach of warranty of authority to sell certain tracts of land.

The appeal was allowed.

J. F. L. Embury, K.C., for appellants.

J. F. Frame, K.C., for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action against real estate agents for breach of warranty of authority to sell two lots situate in Regina. The statement of claim sets out a breach both of an express and implied warranty of authority, and in the alternative that it was made fraudulently. The learned trial Judge found for the plaintiff, not for the breach of the warranty of authority, but because the defendants sold the land to the plaintiff and made no effort to obtain the title to the lots in question for him. I am of the opinion that the learned trial Judge was wrong. There was no sale of the lots in question by the defendants to the plaintiff, *i.e.*, the defendants did not enter into a binding contract of sale on which their principal would have been liable. On March 19, 1912, as is set out in the statement of claim, the defendants verbally offered to sell to the plaintiff the lands in question, which the defendants had verbally represented were listed with them for sale, at the price of $1,000, and the plaintiff accepted same and paid the defendants a deposit of $100. The next day, March 20, the defendants produced to the plain-

tiff for his signature an agreement of sale from A. F. Carrothers to the plaintiff of the said lots. The plaintiff signed the same, and paid to the defendants the balance of the first payment, namely, $400. This agreement of sale was not signed by the defendants nor by any other person on behalf of Carrothers. The defendants gave to the plaintiff a receipt in the following words:

March 20th, 1912.

Received of George S. Peacock, $500, first payment on lots 1 and 2, block 106, Old City, bought from us at $1,000; one-half cash and the balance 6 and 12 months at 6 per cent. and listed by A. F. Carrothers.

(Sgd.) DAD LAND COMPANY,
R. Tinck.

The fact that the agreement of sale was not signed by the defendants, but was made out in the name of Carrothers and was to be signed by him, and that the defendants stated in the receipt given by them that the lots were listed with them by Carrothers, shews that the defendants had no intention of entering into a contract for the sale of these lots binding on their principal, but were in the ordinary course of their business merely finding a purchaser; and for these reasons I think the learned Judge was wrong in holding the defendants liable as vendors; besides, the action is not brought in that way, but only against them as agents misrepresenting their authority.

Upon this question the evidence does not shew that they misrepresented their authority, but only the ability of their principal to sell the land, which he had listed with them for sale. Under any circumstances, before the plaintiff can recover upon a breach of warranty of authority, he must shew that the defendants entered into a contract with him which if they had had authority would be binding on their principal. Bowstead on Agency, p. 391; *Godwin* v. *Francis*, L.R. 5 C.P. 295. This they have not been able to do. The defendants signed no agreement to convey. They only signed a receipt for the money paid, in which Carrothers' name appeared as the principal. The agreement of sale was drawn in Carrothers' name, but was not signed by anyone on his behalf. In fact, there was nothing to bind Carrothers to convey this land to the plaintiff even if he had a good title to it. Under these circumstances the defendants are not liable in this action.

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As to the question of fraud: there was no evidence that the defendants did not believe all the representations they may have made, and the learned trial Judge has not found fraud. I might say that in my opinion the plaintiff has brought the loss which he suffered upon himself by selling the land before he got a title to the same.

The appeal should be allowed, with costs, the defendants to have the costs of trial as well, these costs when taxed to be paid out of the moneys in Court, the balance to be paid to the plaintiff.

Appeal allowed.

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GUNN v. HUDSONS BAY CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 8, 1914.

1. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—CERTIFICATE OF PERFORMANCE—CONCLUSIVENESS OF ARCHITECT'S CERTIFICATE—RIGHT TO ARBITRATION UNDER STIPULATION.

A stipulation in a building contract that on a "final certificate being given by the architect either of the completion of the works and the amount due in respect of the last payment to be made by the owner or stating in what respects the works are incomplete, the architect's decision should be final, subject to arbitration," confers a right to an arbitration in the manner provided for in another clause of the contract not only where the certificate is of the unfinished details but where under an admittedly complete contract the owner desires to review the correctness of the certificate as to the "last payment due" and "the amount thereof."

[*Gunn* v. *Hudsons Bay Co.*, 16 D.L.R. 540, affirmed.]

2. ARBITRATION (§ IV—40)—SUBMISSION — STIPULATION FOR — STAY OF ACTION.

A stay of proceedings pending an arbitration is properly ordered in respect of the contractor's action against the owner for the amount certified by the final certificate of the architect, although the question in dispute is whether the cost of removing the old building was included in the contract price or was an extra as the architect had certified where the building contract made in the form adopted by the Winnipeg Builders' Exchange stipulated for a final certificate in which the amount of the last payment should be indicated by the architect and further stipulated that his decision should be final, "subject to arbitration."

[*Gunn* v. *Hudsons Bay Co.*, 16 D.L.R. 540, affirmed.]

Statement

APPEAL from the judgment of Macdonald, J., dismissing an appeal from the order of the Referee staying proceedings under the Manitoba Arbitration Act, R.S.M. ch. 9, in an action under a building contract.

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The appeal was dismissed, affirming *Gunn* v. *Hudsons Bay Co.*, 16 D.L.R. 540, HOWELL, C.J.M., and CAMERON, J.A., dissenting.

E. P. Garland, for plaintiffs.

S. J. Rothwell and *H. A. Bergman*, for defendants.

Howell, C.J.M. (dissenting)

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HOWELL, C.J.M. (dissenting), concurred with CAMERON, J.A.

RICHARDS, J.A.:—The plaintiffs contracted in writing with the defendants to construct, for a named price, a store building, on the property of the latter, at Yorkton.

The document, after stating the price, contains the following:

Note. The above price subject to additional charge of $1,000 if building is constructed in two (2) sections—to permit of the company occupying building on portion of site of new building, less any amount realized from old building, contractor to remove latter so as not to delay final completion by December 20, 1912.

There is reference in the contract to specifications, in accordance with which the building was to be erected. They have not been made part of the material before the Court. So that we have only the contract itself for guidance.

The building was erected in two sections, apparently, as provided by the above, and the architects gave a final certificate as to the completion of the building and the amount due the plaintiffs. In that they added the above $1,000 to the contract price and also allowed $512 for removal of two old buildings on the premises. It is as to that sum of $512 that the real contest now is.

The contract makes several provisions for arbitration as to disputes in specified matters. The only ones that it is necessary to refer to are those in articles 9 and 10. The portion of art. 9 which affects the matter in question, reads:—

The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof or state in writing in what respects the works are incomplete and his decision shall be final, subject to arbitration as hereinafter provided.

The article then provides that if the portion of the work still incomplete can be readily completed the contractor is to do same

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before asking for his final certificate, but if, for reasons not within the contractor's control, he cannot then complete, the architect is to make certain deductions from the contract price and to "issue a final certificate that the works are completed and the last payment due and indicating the amount thereof."

That is immediately followed in the same clause or article by the words:—

> Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor within the meaning hereof.

Then art. 10 says:—

> No certificate . . . except the final certificate . . . shall be conclusive evidence of the fulfilment of this contract by the contractor.

Art. 12 provides how, in case of arbitration, arbitrators are to be appointed.

By allowing the $512 for the removal of the old buildings the architects have treated the work of such removal as not covered by the contract price, but as an item for the payment of which the defendants are liable as for an extra. The defendants claim that it is covered by the contract price. The plaintiffs brought this action to recover the balance certified to by the architects. The defendants admit the completion of the contract and are willing to pay the sum shewn by the final certificate to be due, except the $512.

The defendants applied under sec. 6 of the Arbitration Act to have the action stayed and the referee ordered a stay on the ground that the matters in question in the action were by the agreement to be referred to arbitration.

An appeal from the referee to Mr. Justice Macdonald was dismissed, and the plaintiffs appealed to this Court.

The final certificate referred to in art. 9 in the above quoted sentence beginning "any such final certificate" is only, I think, that to be given where the architect deducts part of the contract price after finding that the work remaining incomplete can not then be completed.

By art. 10 a final certificate is by inference—not expressly—made conclusive evidence, but only of the fact that the contractor has fulfilled the contract. I do not anywhere find it stated that

it is to be conclusive on any other point except in so far as it may be so made by the first above quoted extract from art. 9, and only there, if at all, by the use of the words "and his decision shall be final." The issue then narrows down to what the word "decision" as there used, refers back to, because it is whatever that "decision" may include that is made "subject to arbitration." Does "decision" as there used refer only to a decision that the works are incomplete? Or does it also include a decision (to be shewn by the issue of a final certificate) that the works are completed, and the last payment due, and stating the amount of that last payment? If it has the latter meaning the defendants are entitled to the reference to arbitration, if the former, they are not.

The language will bear either construction. I can only say that I think the intention to be collected from the wording is that it should be interpreted in the wider sense. Such an appeal to arbitration as is covered by the narrower construction would be one exercisable only by the contractor, and it is argued that the provision as to arbitration is intended for his protection only, as the owner is protected by the fact that the architect is his agent.

So far as refers to a certificate merely that the works are completed, I can understand that argument whether agreeing with it or not. But the amount of the last payment is one that ordinarily the contractor is more likely than the owner to wish to dispute, and it seems to me that if the proviso to arbitrate was really put into the printed form for the benefit of contractors it would nevertheless have been intended that it should cover such a vital matter to them as the amount of the last payment. If intended to include that, then necessarily either party may take advantage of it.

Then, too, it is to be observed that the architects have made themselves judges of the law by holding that the work contracted for did not include the removal of the old buildings. The result is that if the defendants cannot get the matter referred to arbitration, they can probably set up no defence to the claim for the $512, as, unless covered by the proviso as to arbitration, the

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final certificate is apparently conclusive as to the amount due. I think the Court should lean against a construction that would have such an effect.

If the owners are entitled to avail themselves of it, it seems to me that the use of the last clause of the part added after the statement of the price, "and contractor to remove latter" (*i.e.*, the old building) "so as not to delay final completion," without making any provision for the contractor receiving extra pay therefor, shews that there is a substantial matter to be referred.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—This is an action brought by a firm of contractors to recover a balance claimed to be due on a contract for the erection of a building. The architect gave what purported to be a final certicate shewing the amount due from the defendants. They dispute two items amounting to $512 which the architect allowed as extras, the defendants contending that these are covered by and included in the contract price. An order has been made referring the matters in question to arbitration under the provisions of the contract and from this order the plaintiffs have appealed.

The contract is on a printed form and the heading of it shews it to be the form of contract adopted and recommended for general use by the members of the Winnipeg Builders' Exchange. A clear intention appears throughout the contract that objections to the findings, decisions or certificates of the architect in charge of the works shall be determined by arbitration. Full provision is made in art. 12 of the contract for the appointment of arbitrators and the procedure on the arbitration.

The difficulty in the case arises over the meaning of two sentences in art. 9 of the contract. The first is as follows:—

> The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within 72 hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or state in writing in what respect the works are incomplete and his decision should be final, *subject to arbitration as hereinafter provided.*

It appears to me that the proper interpretation of the above provision is that a certificate of the architect issued under it is

final, subject to arbitration, that is, it is subject to appeal to the tribunal constituted or selected by the parties, and aside from that appeal it is final. If it is a certificate that the works are completed and the last payment due and shewing the amount of that payment, it is final as to these statements, subject to appeal to arbitration. Or if the architect states in writing that the works are incomplete and in what respects, this decision is final also, subject to arbitration.

The same article then proceeds as follows:—

If the portion of the said work then remaining incomplete may be then readily completed by the contractor the same shall be done before he is entitled to ask for his final certificate, but if for reasons not within the contractor's control, he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions together with 50 per cent. thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge subject to arbitration as herein provided) from the contract price or if the portion of the said work then remaining incomplete cannot be completed then without unreasonable expense, the architect shall, at the request of the contractor, forthwith deduct double the actual value of the incomplete portions (of which value the architect shall be judge, subject to arbitration as herein provided) from the contract price, and in either case issue a final certificate that the works are completed and the last payment due and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor within the meaning hereof.

I think the final certificate referred to in the last sentence of the above extract is the final certificate mentioned in the sentence immediately preceding, which the architect is enabled to give (1) where the work is incomplete for reasons not within the contractor's control, and the value of the incomplete work with 50 per cent. thereon is deducted, or (2) where the work is incomplete and cannot be completed then without unreasonable expense, and the architect, at the request of the contractor, has deducted double the value of the incomplete portions. The intention is to declare that a certificate issued under either of these two sets of circumstances shall be conclusive evidence of the fact that the contract has been completed. This would prevent the owner from setting up that the contract had not been completed, in case the contractor had to take steps to obtain payment of the amount mentioned as due to him by the certificate.

The parties by the terms of the contract have provided a tri-

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bunal which is to decide disputes arising from the decisions or rulings of the architect. These disputes may involve questions of law as well as of fact. It is, however, provided by the Arbitration Act, R.S.M. 1913, ch. 9, sec. 29, that:—

> Any referee, arbitrator or umpire may, at any stage of the proceedings under a reference, and shall if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court or a Judge any question of law arising in the course of the reference.

I think the order appealed from should be affirmed and the appeal dismissed with costs.

Cameron, J.A. (dissenting)

CAMERON, J.A. (dissenting):—Art. 1 of the contract provides that the architect acts as agent of the owner for the purposes of the contract. Art. 3 provides for alterations being made in the works shewn by the drawings and specifications upon the written order of the architect, the value of the work so done or omitted being computed by the architect and, in case of dissent from such computation, the value of such work is to be determined by arbitration. Art. 5 provided that in case of default of the contractor and of the architect certifying thereto, the owner may enter on and complete the work, the expense of so doing to be audited and certified by the architect, subject to arbitration. Art. 7 provides for an extension of time to the contractor on the happening of certain events, the duration of such extension to be certified by the architect subject to arbitration. Art. 8 provides for the architect determining the loss or damage sustained by the owner in the event of delay by the contractor, subject to arbitration.

Art. 9 provides in part as follows:—

> The final payment shall be made within 20 days after the contractor has substantially fulfilled this contract, if the contractor shall have given satisfactory evidence that no mechanics' lien other than his own or liens of which he holds discharges exist in respect of the said works; otherwise the final payment shall be made within two days after the time for filing mechanics' liens has elapsed. The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof or state in writing in what respects the works are incomplete and his decision should be final, subject to arbitration as hereinafter provided. If the portion of the said work then remaining

incomplete may be then readily completed by the contractor the same shall be done before he is entitled to ask for his final certificate, but if for reasons not within the contractor's control, he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions together with 50 per cent. thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge subject to arbitration as herein provided) from the contract price or if the portion of the said work then remaining incomplete cannot be completed then without unreasonable expense, the architect shall, at the request of the contractor, forthwith deduct double the actual value of the incomplete portions (of which value the architect shall be judge, subject to arbitration as herein provided) from the contract price, and in either case issue a final certificate that the works are completed and the last payment due and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor within the meaning hereof.

Art. 10 is as follows:—

No certificate given or payment made under this contract except the final certificate or final payment shall be conclusive evidence of the fulfilment of this contract by the contractor, either wholly or in part, and no payment shall be construed to be such an acceptance of defective work or improper materials as would entitle the contractor to payment thereof.

It is to be observed that the words "a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof" in the second sentence of the above extract from art. 9 are repeated in the next sentence with the immaterial omission of the words "under this contract." This repetition is of some importance in considering the application of the words "any such final certificate" in the last sentence of art. 9 as above quoted, which, I think, relate back to the words "final certificate" in the previous sentences. It is the final certificate by the architect that the works are completed and the last payment due and indicating the amount that is made conclusive evidence of the fulfilment of the contract.

I read the second sentence of sec. 9 as above quoted as if it were thus set out:—

"The contractor may if he considers he has completed the works, notify the architect to that effect, and the architect shall within 72 hours thereafter (1) issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or (2) (he shall) state in writing in what respects the works are incomplete and his deci-

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sion shall be final, subject to arbitration as hereinafter provided." In my view it is his decision in writing (stating in what respect the works are incomplete) that is subject to arbitration and not his final certificate. The final certificate remains absolute and is conclusive evidence of the performance of the contract, which performance in this case in the architect's view, included the removal of the old building. The various matters in respect to which arbitration can be had under the contract are plainly specified therein, but the final certificate is not one of them. In my opinion the final certificate in this case is, under the terms of this contract, conclusive and binding upon the owner and does not come within the provisions of the contract relating to arbitration.

I think the order appealed from should be reversed and the original application to the referee dismissed.

Haggart, J.A.

HAGGART, J.A.:—The whole question here is the construction of what is known amongst architects and builders as "the Uniform Contract," being a "form of contract adopted and recommended for general use by the members of the Winnipeg Builders' Exchange." The plaintiff "under the direction and to the satisfaction of" the architect shall provide the materials and do the work. When there are alterations in the original plans or specifications the architect shall, under the provisions of art. 3, compute the value of the work added or omitted, and in case of dissent by either party this value "shall be referred to arbitration as hereinafter mentioned." When the contractor has not made sufficient progress and the work is taken over by the owner, the expenditure of the owner is to be audited by the architect, "but an appeal from his decision may be made to arbitration as herein provided."

When the contractor has been delayed by the owner, by another contractor, or by strikes or unforeseen accidents, through no fault of his own, the time may be extended and "the duration of such extension shall be certified to by the architect subject to appeal to arbitration as hereinafter provided." When either the owner or contractor delays the other party causing loss, the amount of damage shall be determined by the architect

"subject to arbitration." I refer to these provisions of the agreement to shew that wherever there was likely to be a substantial dispute the finding of the architect was subject to review by arbitrators.

Now, I come to art. 9, which is the clause of the agreement in question here. The issue between the parties is whether the contractor should be paid the sum of $500 or thereabouts, the cost of the removal of an old building. The contractor has completed the work and everything has been paid or admitted excepting this item. The architect allowed the claim of the contractor. The reading given to art. 9 will decide the question whether the defendants are entitled to the arbitration. I will cite from the clause the material words, so far as they apply to the matters in question:—

> The architect shall . . . issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof . . . and his decision should be final subject to arbitration as hereinafter provided.

I think that it was the intention and that the agreement expresses that intention, that the decision of the architect as to the completion of the contract and as to the amount of the last payment was to be subject to review by the arbitrators appointed in the manner provided for in the contract.

It was urged by the plaintiff, the contractor, that a subsequent clause in art. 9 was against the defendant, and barred their right to an arbitration. These are the words, "any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor within the meaning hereof." The defendants do not claim that the contractor has not completed the work he agreed to do under the contract, but they do say that he is asking more money than he is entitled to, and I think the defendants are entitled to this appellate tribunal to review the architect's decision as to "the last payment due under this contract . . . and the amount thereof." I would affirm the order of Mr. Justice Macdonald dismissing the appeal from the referee's order staying proceedings.

The appeal should be dismissed.

Appeal dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 23, 1914.

1. DEATH (§ IV—28)—FAMILIES COMPENSATION ACT—RELEASE OBTAINED BY FRAUD—EFFECT.

In an action by the dependants of the deceased under Families Compensation Act, R.S.B.C. 1911 ch. 82, a release set up in defence may be attacked on the ground of fraud if the right so to attack it rested with the deceased himself at the time of his death and the dependants have such right of attack without adding the personal representatives of the deceased for that purpose.

[*Trawford* v. *B.C. Electric R. Co.*, 9 D.L.R. 817, affirmed.]

2. EQUITY (§ I F—37)—FAMILIES COMPENSATION ACT—RELEASE OBTAINED BY FRAUD—MONEY NEITHER TENDERED BACK NOR TURNED INTO COURT —EQUITABLE JURISDICTION.

In an action by the dependants of the deceased under Families Compensation Act, R.S.B.C. 1911 ch. 82, a release pleaded in defence may be set aside by the Court under its equitable jurisdiction, although the money paid as consideration for the release has been neither tendered back to the defendant nor brought into Court to abide the issue of the action.

[*Trawford* v. *B.C. Electric R. Co.*, 9 D.L.R. 817, affirmed.]

3. LIMITATION OF ACTIONS (§ III F—130)—FAMILIES COMPENSATION ACT—RAILWAY ACT—WHICH ACT CONTROLS AS TO LIMITATION.

In an action by the dependants under Families Compensation Act, R.S.B.C. 1911 ch. 82, against a railway company the limitation is controlled by that Act and not by B.C. Consolidated Railway Companies Act, 1896, ch. 55, sec. 60.

[*Trawford* v. *B.C. Electric R. Co.*, 9 D.L.R. 817, affirmed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 18 B.C.R. 132, *sub nom. Trawford* v. *B.C. Electric R. Co.*, 9 D.L.R. 817, reversing the judgment of Murphy, J., at the trial, 8 D.L.R. 1026, and directing that a new trial should be had between the parties.

The action was brought, under the Families Compensation Act, R.S.B.C., 1911, ch. 82, by the widow and children of the late George Trawford, deceased, to recover damages for his death, which was alleged to have been caused through the negligence of the company while he was travelling as a passenger on their tramway. As a defence to the action, the company set up a release executed by the deceased before his death discharging them from all claims which he then had against the company on account of the injuries he had sustained or which, in future, his heirs, executors, administrators or assigns might have, in consequence of such injuries. The release was granted in considera-

tion of the sum of $1,000, which was paid to deceased by the company at the time the release was executed. The answer by the plaintiffs was that the release had been obtained through fraud and misrepresentations, but they did not offer to return the money which had been paid to deceased by the company nor did they bring it into Court. The personal representative of the deceased was not a party to the action. The trial Judge took the case from the jury and dismissed the action because the plaintiffs had not tendered back the money nor deposited the amount in Court to abide the result of the trial. This judgment was reversed by the Court of Appeal for British Columbia and a new trial was ordered.

Statement

The appeal was dismissed.

Ewart, K.C., for the appellants. The plaintiffs were not entitled to attack the release given by the deceased, upon the ground of misrepresentation and undue influence—(*a*) in the absence of any election to repudiate the settlement made by the deceased, either by him personally or by his legal representative: (*b*) in the absence of restitution by the deceased or his legal representative of the money paid by the company. We also contend that the plaintiffs' claim is barred by lapse of time.

Argument

The plaintiffs' contention is that their right of action is separate and distinct from that to which the deceased was entitled. In view of the English authorities this assertion is untenable: *Read* v. *Great Eastern R. Co.*, L.R. 3 Q.B. 555; *Griffiths* v. *Earl of Dudley*, 9 Q.B.D. 357; *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K.B. 804.

The alleged misrepresentation and undue influence, no matter how amply proved, do not make null or void the settlement entered into by the parties. They render it voidable only. Until election to rescind it is made, it is valid and binding. Election can be made only by the deceased or by his legal personal representative: Kerr on Fraud (1910), page 9; *Deposit and General Life Ins. Co.* v. *Ayscough*, 2 Jur. N.S. 812. A contract tainted with fraud remains valid until it is rescinded: *Reese River Silver Mining Co.* v. *Smith*, L.R. 4 H.L. 64, at 73. There being no suggestion of any election prior to the commencement of the action, the settlement was, at that time, valid and binding; the rights of

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the parties must be regarded as of that date. We rely upon *Lee* v. *Lancashire and Yorkshire Railway Co.*, 6 Ch. App. 527; *Foss* v. *Harbottle*, 2 Hare 461; *Clinch* v. *Financial Corporation*, L.R. 5 Eq. 450, at 482; *Bank of Toronto* v. *Cobourg, Peterborough and Marmora R. Co.*, 10 O.R. 376; *Knight* v. *Bowyer*, 23 Beav. 609, and *Greenstreet* v. *Paris*, 21 Gr. 229.

The plaintiffs' cause of action is barred by sec. 60 of the Consolidated Railway Company's Act (B.C.), 59 Viet. ch. 55. On this point we refer to *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K.B. 804; *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 Q.B. 454; *Kent County Council* v. *Folkstone Corporation*, [1905] 1 K.B. 620; *City and South London R. Co.* v. *London County Council*, [1891] 2 Q.B. 513; *Barker* v. *Edger*, [1898] A.C. 748; *Esquimalt Waterworks Co.* v. *City of Victoria*, [1907] A.C. 499; *British Columbia Electric R. Co.* v. *Stewart*, 14 D.L.R. 8, [1913] A.C. 816.

W. Hart-McHarg, for the respondents. The Families Compensation Act of British Columbia is legislation to provide for the compensation of the families of persons killed by accident and creates an entirely new cause of action of which the person injured cannot deprive them. See *Kenrick & Co.* v. *Lawrence & Co.*, 25 Q.B.D. 99, at 104, *per* Wills, J. The person injured cannot make a settlement in regard to his injuries, binding on his family, without the family's consent. We refer also to *Pym* v. *Great Northern R. Co.*, 2 B. & S. 759, 4 B. & S. 396; *Seward* v. *The "Vera Cruz,"* 10 App. Cas. 59; *Blake* v. *Midland R. Co.*, 18 Q.B. 93; *The "George and Richard,"* 3 Ad. & Ecc. 466.

It would appear that the legislation of British Columbia was intended to meet the difficulties arising under Lord Campbell's Act, where there might be a hostile executor, and to provide that, in a suit by the dependants, they should have all the rights and powers of the personal representative. They are, consequently, entitled to attack the release: *Stewart* v. *Great Western R. Co.*, 2 DeG. J. & S. 319; *Hirschfeld* v. *London, Brighton and South Coast R. Co.*, 2 Q.B.D. 1; *Johnson* v. *Grand Trunk R. Co.*, 25 O.R. 64, 21 A.R. 408 (Ont.).

As to the effect of sec. 60 of the defendant company's Act in

regard to limitation of plaintiffs' right of action, we refer to *Zimmer* v. *Grand Trunk R. Co.*, 19 A.R. (Ont.) 693; *Green* v. *B.C. Electric R. Co.*, 12 B.C.R. 199; *McDonald* v. *B.C. Electric R. Co.*, 16 B.C.R. 386. In the English cases relied upon by the appellants it is to be noted that the Public Authorities Act there in question is an Act for the protection of public authorities whereas the defendant company's Act is a private Act only. See *Parker* v. *London County Council*, [1904] 2 K.B. 501, *per* Channell, J., at 504. It is submitted also that an injury to a passenger on the company's tramway does not come within the proper construction of the words used in section 60 of the Act. See *Carpue* v. *London and Brighton R. Co.*, 5 Q.B. 747; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. Co.*, 10 O.L.R. 419; *Sayers* v. *British Columbia Electric R. Co.*, 12 B.C.R. 102; *Canadian Northern R. Co.* v. *Anderson*, 45 Can. S.C.R. 355, and *Cie. pour l'Éclairage au Gaz de St. Hyacinthe* v. *Cie. des Pouvoirs Hydrauliques de St. Hyacinthe*, 25 Can. S.C.R. 168, *per* Strong, C.J., at 173.

It is submitted that the plaintiffs have an entirely new cause of action irrespective of anything that the deceased may have done; that they have all the powers an executor or administrator would have had in so far as concerns their present action; that it is not necessary for them to bring a separate action to have the release set aside, and that they are under no obligation to tender back the money paid in consideration of the release nor to bring it into Court to abide the issue of their action.

Fitzpatrick, C.J.

Fitzpatrick, C.J.:—The statute of British Columbia gives the dependant, on the death of the injured party, a right of action against the person who has caused the wrong, if, at the time of his death, the deceased had a subsisting enforceable claim. The cause of that action is the *injuria* or prejudice resulting to the dependant from the wrongful act. In one sense it is a new action, but the condition subject to which that right of action may be exercised being that the deceased did not receive indemnity or satisfaction during his lifetime, to that extent and in that aspect, it is a representative or derivative action.

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If, therefore, the action of the dependant is met by the plea of satisfaction based upon a release, that plea being destructive of his right, the dependant should be able to meet it by denying the existence of such release or by alleging that it was obtained by fraud, and that, in the latter case, the deceased did not receive a real or tangible indemnity or satisfaction for the offence or quasi-offence in question. It may well be that it will be necessary to have all the parties to the release, or their representatives, before the Court on that incidental issue, but, if that be necessary, then I am satisfied that the resources of the British Columbia Procedure Act will be found quite sufficient to enable that to be done.

I have no hesitation in saying that it would be a cruel injustice to deny the dependant an opportunity to set up and make good the allegation of fraud against a plea of satisfaction which, if upheld, is a complete bar to his other action.

For the reasons given by Mr. Justice Anglin, I am of opinion that the company cannot set up as a defence to this action the plea of prescription (59 Viet. (B.C.), ch. 55, sec. 60).

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—This was an action brought by the widow and children of George Trawford who, in his lifetime, was injured by an accident on the defendants' railway. He died of his injuries on February 22, 1910. Prior to his decease, the company claimed that he had made a settlement with them for all claims in connection with the accident and that he had given them a release of all such claims. The company pleaded this settlement and release and the plaintiffs replied that it was obtained by wilful misrepresentation and fraud.

The trial Judge dismissed the action on the grounds: First, that it could not lie without the money paid for the release being brought into Court as a condition of setting it aside; and, secondly, that these plaintiffs, not suing in a representative capacity, cannot bring an action to set aside the release.

The Court of Appeal set aside this judgment and ordered a new trial. I agree with the judgment of the Court of Appeal and, for the reasons given by them, which I do not think it necessary to re-state at any length.

I cannot accept the contention of Mr. McHarg that the action under Lord Compbell's Act is an entirely independent one which cannot be affected by any release granted by the injured party in his lifetime. I think the authorities shew that a *bonâ fide* settlement may be made between the parties during the lifetime of the injured party and that, where this is reached and the injured party obtains satisfaction and grants a release of all his claims, apart from fraud, no action accrues to his widow and children after his death. In order to give them such a right of action the injured party must himself possess it at the time of his death. If a settlement has been made between the injured party and a release obtained from him by fraud, that would not deprive him of his right of action. I see no reason whatever why, in such a case, the statutory representatives and beneficiaries of the injured man who had died should not have the right to bring their action and set up the fraud. It was conceded by Mr. Ewart that the executor, if he sued, would have that right, and I am unable to follow the reasoning that the parties for whose benefit he had the right to sue, and who themselves had a statutory right to sue in their own names in the event of the executor not doing so, should not have the same right as the executor is conceded to have in case he brought the action.

I think these dependants and beneficiaries are, under the statute, the legal personal representatives of the deceased in respect of everything necessary to assert their rights under the statute.

It surely must be so or Mr. McHarg's contention must be sustained that the statutory action is one entirely and absolutely independent and not open to be defeated by any settlement made in his lifetime by the injured party.

The authorities are adverse to that contention which, if accepted, would practically result in the company causing the injuries being mulct in damages twice over for the same wrongful act.

But, that being so, I cannot accept the contention that the statutory rights of the widow and children can be defeated by a fraudulent release and that, in the event of the executor of the

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deceased declining to sue, their statutory action is defeated by a fraudulent release which they cannot attack.

Then, Mr. Ewart relied strongly upon the applicability to such a case as this of the limitation upon actions brought against the company contained in the Consolidated Railway Company's Act, sec. 60.

I have reached the conclusion that this contention of Mr. Ewart cannot be sustained.

The Act under which the plaintiffs sue, commonly known as Lord Campbell's Act, created, it is true, a new cause of action. That cause of action is given for the benefit of the dependants of the deceased, not solely because of the injuries he received, but because he died possessed of a good cause of action in respect of those injuries. In order to recover in this statutory action, not only in the words of the statute must "the death of a person have been caused by the wrongful act, neglect or default" of the defendant, but such wrongful act, neglect or default must be such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof. And so I agree, under the authorities, that, if the party injured had received satisfaction in his lifetime either by a voluntary settlement with the person liable or by recovery of damages in Court or otherwise, the statutory action created in favour of the dependants of the deceased person would not arise.

This special Act of Lord Campbell, creating a special cause of action arising by reason of the death of the person injured in consequence of such injuries, provides that such action must be "commenced within *twelve* calendar months *after the death of such deceased person.*"

The limitation clause in the company's Act, of 1906, provides that

> all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway or the works or operations of the company shall be commenced within *six months* next after the time when such supposed damage is sustained.

I do not think such a general clause can be held to repeal the special limitation clause of Lord Campbell's Act, the action

under which arises not alone as a consequence of the damages sustained by reason of the railway or the works or operations of the company, but by reason of the death of the injured person having, at the time of his death, a good cause of action. I agree with the Court of British Columbia, in *Green* v. *British Columbia Electric R. Co.*, 12 B.C.R. 199, that a special Act creating a special cause of action and making special provisions as to the time within which it is to be brought is not repealed by a general limitation clause passed for the benefit of a private corporation. A technical construction of the two limitation clauses which could produce such a result would bar very many actions of dependant widows and children who may not have been guilty of any neglect or delay in asserting their statutory rights which only arise on and because of the death of the uncompensated injured party. Many such deaths of injured parties may not take place within six months of the injury received and, as to all these cases, the maintenance of such a contention would be tantamount to a repeal of the Act.

The general limitation in the company's Act has reference only to "actions or suits for indemnity for damage or injury sustained by reason of the railway or the works or operations of the company," and such action would arise as soon as the injury was sustained.

But the damages sought to be recovered in this action only arise as and when death follows from the injuries and may be more than six months after such injuries.

Then, the appellants submit that, even if fraud was proved, the alleged settlement and release would not necessarily be null and void, but voidable only, and could only become void on the election of the deceased or his personal representatives. The important question Mr. Ewart suggested is not whether they have a right to sue for injuries sustained by the deceased, but whether they have a right to elect to rescind an agreement made by him.

Substantially, the submission of the company is that, assuming the alleged settlement to have been a fraudulent one, the company cannot be restrained from setting it up as against the claim of the plaintiffs, there not having been rescission made in his lifetime by the injured man or by his executor after his

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death. It seems to me the proposition contains its own refutation as it amounts to saying that a fraudulent release can be set up as a bar to defeat the statutory claim of the widow and children.

I have no doubt that such an unjust and inequitable result cannot be supported and that the Court of Appeal in so holding was right.

For the purpose of maintaining their statutory right of action the widow and children of an injured person who is dead may be considered as the statutory representatives of such party, and, as such, they have a right to attack a release obtained from him in his lifetime and which is being set up as a bar to their actions on the ground that it is fraudulent. The High Court, having the jurisdiction formerly exercised by the Court of Chancery, in the words of Sir William James, L.J., in *Lee* v. *Lancashire and Yorkshire Railway Co.*, 6 Ch. App. 527, at 531,

> should not relinquish its jurisdiction to deal with a case of fraud, but should say that the company was not to be entitled to use at all, for any purpose or under any circumstances, the document which has been obtained in that way.

The question what, if any, portion of the money paid to the injured party in his lifetime might be set off against the claim of the widow and children seems to me one which must, in each case, be left to the Court and jury trying the case. It may well be that the amount so paid was solely for the actual medical and other expenses incurred by the injured party and for damages for the pain and suffering he endured, and for the actual loss of his time while injured, none of which would be recoverable in the action brought by the widow and children. In such a case, no part of such moneys should either be returned to the dependants or allowed for in estimating the pecuniary damages these statutory claimants were entitled to recover. In other cases, the moneys paid might be taken into consideration, in whole or in part, in estimating the damages, the test being whether or not they were recoverable in the statutory action. In each case it must be left to the Court or the jury assessing the damages to determine on the facts as proved.

It seems to me that this must be the proper course to be fol-

lowed. If not, Mr. Ewart's argument must prevail that the statutory action, when brought by the widow and children on their own behalf, may be defeated by the plea and proof of a release which could be shewn by them to be a fraudulent one, or Mr. McHarg's position must be accepted that the statutory action was an entirely new and independent one, which could not be satisfied or discharged by any release given by the injured party.

In my judgment, neither contention should prevail, but the course I have suggested should be followed, which would ensure justice to all parties.

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

Idington, J.

Idington, J.:—Two questions are raised on this appeal. The first is whether or not the family of a man who has died under such circumstances as would give them a right of action founded upon Lord Campbell's Act against the appellant are, by virtue thereof, entitled to disregard a release alleged to have been obtained from deceased by fraud, or are, notwithstanding the fraud, barred thereby from any action.

The next question is whether or not the limitations in one of the company's Acts, to which I will refer at length, has created a bar to the action.

The answer to the first question must depend upon the construction of the Act upon which the action is founded and without which there can be no action by the respondents.

The action must be founded upon and within the following terms of the Act.

> That whensoever the death of a person shall be caused by the wrongful act, neglect or default and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

I must ask to be permitted to pass by much learning, heretofore and in this case, expended upon efforts to determine the knotty questions of whether it is or is not a new action or only one that the deceased had or might, but for his death, have had, yet enlarged, by the results of his death, in its consequences upon the

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pecuniary fortunes, or deprivation of pecuniary fortune, thereby wrought in and upon the welfare of the members of the family concerned.

I must read the language of this statute according to its plain ordinary meaning, and, in doing so, I discard no authority binding upon this Court. There is no dispute that, but for the alleged release (or the statutory limitation relied upon), the respondents, by virtue of what happened, had become entitled to bring this action. And the whole controversy turns upon whether or not the release, even if obtained by fraud, must stand as a bar to the action. And that depends on the meaning to be given to the words "then . . . the person who would have been liable if death had not ensued shall be liable to an action for damages in respect thereof."

It is clear that a person who had, either in anticipation of such an accident clearly accepted the risk and consequences or has wrought his own destruction or certainly contributed thereto by his own acts causing the injury and damages, may, by his agreement, acts or conduct have thus deprived his family of any chance of invoking this statute to support an action against others, though culpable in relation to the cause of death.

I will, for argument's sake, assume that by a release duly executed and covering the accident and the personal consequences to the husband himself, or the father of a family so stricken, he so releasing would have no action, and, hence, his wife and family would have no right of action.

But, if that release was obtained by fraud and, hence, was liable to be effectively repudiated by the deceased, I am unable to comprehend how or why the existence of that which was no barrier in the way of liability to him can be set up as a barrier in the way of those given by this statute an action to recover in case of any existing liability to him not that which he could have recovered for, but that which they are declared entitled to recover for as their own, by way of compensation for their pecuniary loss, as the Act has been held to mean.

It is said that a fraudulent transaction is not absolutely void,

but only voidable, and that, in case the deceased has not repudiated the fraudulent release, it stands good. This is very plausible, but also very sophistical.

The inherent right of deceased to bring an action if he so willed, and not his willing it should or should not be brought, is the test which the fair meaning of the language furnishes. It is the liability of the appellant to be so called upon that it is the condition precedent to the right of action of respondents. And the answer is that, if he was capable of bringing or had any right, notwithstanding what has transpired, to bring an action, then the family can.

Their right, in my view, no more depends upon the expression of his will or that of his representatives than upon the expression of the will of any one else.

Some propositions of law were made in argument relative to the necessity for re-payment by one defrauded, either before or concurrently with his repudiation in order to make it effective.

I entirely dissent from such or any like sweeping proposition in relation to the effective termination of the validity of a transaction induced by fraud.

Its repudiation terminates its validity. There may be an infinite variety of circumstances which may induce a Court of justice to impose or not impose terms upon one pursuing his right after such repudiation.

From the grossest kind of wilful deceit down to the case of a dubious form of misrepresentation inducing an unfair dealing, or mere mistake, the variety or complexity of what may or may not be imposed in such cases is so almost infinite that I will not attempt to discriminate herein, where I have not the facts before me, to enable me to do so if I could. All I need say here is that finding the right to repudiate existed in deceased, then the right of respondents to insist that, in fact, the deceased could have so repudiated leaves the path open to respondents to proceed with the action given by this statute.

Whether the doing so may be clogged with such conditions as a Court would have imposed upon him must depend upon the development of the facts surrounding the giving of the release.

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It may well be that the money he got was in the way of compensating him for his inability or lessened ability to maintain his family, and, in such case, be properly considered in this case, or it may be that the payment had no relation to any such thing, but merely that personal to himself by way of expenses and for his personal sufferings, when it might be something which did not concern the pecuniary claims of respondents which are alone in question in the action.

I must refrain from doing more than to illustrate here what I have concluded is the nature of the right of action respondents have under the peculiar circumstances in question herein.

I agree with the Court of Appeal that the respondents are entitled to proceed with the action, unless barred by the limitations in the statute which the appellant relies upon and which reads as follows:—

> All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

I do not think this statute of limitation applies to the claim made by the respondents. I have so frequently had to point out that a statute of limitation must, in order to be applicable to any given case, be clearly shewn to have been intended to cover the case in respect of which it is invoked, that I do not deem it necessary to repeat my views at length here.

Every word in the section I have just quoted can be given a plain, ordinary meaning without straining them to repeal this Act *pro tanto*. I can hardly imagine any legislature ever intended to repeal any part of the Act upon which respondents' action is founded, and, least of all, by such means as by use of such an enactment as this.

Of course, if the legislation could not be given a clear, sensible meaning without involving repeal of the Act in question, it must stand repealed. We are not driven to any such alterna-

tive or subterfuge. The limitation in the Railway Act involved in the action in question in the case of the *Canadian Northern R. Co.* v. *Robinson*, 43 Can. S.C.R. 387, is somewhat analogous, and we did not find the limitation there claimed applicable, though much like this, and the Judicial Committee of the Privy Council refused to disturb the ruling.

The English authorities relied on are the result of considerations that are not open to the appellant and to the application in its favour of the clause in question.

On the other hand, a great body of judicial interpretation in this country relative to this very section of the Act and similar Acts, and their bearing upon the Act upon which respondents rest their claim, is ranged against the ground taken by appellants, and, no doubt, has been acted upon for years in this country.

Hence, I do not think, unless imperatively driven to put another view forth, we should disturb what seems so long settled.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The first ground of this appeal is that the action is barred by sec. 60 of the Act under which the appellant's railway is operated. That section is as follows:—

> All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

In this connection there are two points: First, whether this action, which charges the appellants with causing the death of the late George Trawford, a passenger on their railway (through negligent default in their duty as carriers), is within the contemplation of this provision. That point was dealt with in *Sayers* v. *The British Columbia Electric R. Co.*, 12 B.C.R. 102, and I think it is unnecessary for me to do more than to say that, having reconsidered the question, I see no reason to alter the view which was given effect to in that case.

The other point arises in this way. The respondents contend

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that, assuming sec. 60 to apply to an action charging default by the appellants in respect of their duty as carriers of passengers, the defendants of Trawford can, notwithstanding that section, bring their action within the limit of one year fixed by Lord Campbell's Act. That point also has been dealt with by the Courts in British Columbia in *Green* v. *The British Columbia Electric R. Co.*, 12 B.C.R. 199. I was a party to the judgment of the Chief Justice in that case, in which the opinion was expressed and acted upon that sec. 60 does not apply to actions brought under Lord Campbell's Act. I think that view is right, and for the reasons then given.

The principal ground upon which counsel for the appellants contends that the action ought to be dismissed is that the deceased George Trawford, before his death, entered into a contract with the appellants whereby, in consideration of certain sums of money (which were paid), he agreed to release the appellants from all claims for damages in respect of the negligence charged in this action; that this release has never been set aside or repudiated by Trawford or by his legal personal representatives, and that, according to the settled law as to the nature and conditions of the right of action created by Lord Campbell's Act, the subsistence of this release presents an insuperable obstacle to the respondents' success in this action. Lord Campbell's Act created a new cause of action, but, with full acknowledgments for the able argument addressed to us by counsel for the respondents upon the point, I think it must be taken as settled, for this Court at all events, that it is a condition of the right of action which the statute confers upon the dependants that the victim should himself have been entitled to maintain an action, if he had lived. As Blackburn, J., puts it in *Read* v. *Great Eastern R. Co.*, L.R. 3 Q.B. 555, "the intention of the enactment was that the death of the person injured should not free the wrongdoer from an action," or, to use the words of Lush, J., in the same case,

> the intention of the statute is to enable representatives of the person injured to recover in a case where the maxim *actio personalis*, etc., would have applied.

Read's Case, L.R. 3 Q.B. 555, was decided forty-six years ago,

and the decision seems to have been treated as sound law by Lord Watson, who delivered the judgment of the Judicial Committee in *Robinson* v. *The Canadian Pacific R. Co.*, [1892] A.C. 481, at 487. If, therefore, the appellants had proved at the trial that the deceased George Trawford had entered into a contract whereby, for good consideration, he had agreed to release all his claims in respect of the negligence complained of in this action, and the consideration had been paid, and the matter had ended there, that would constitute a complete defence against the respondents' claim. But, in answer to this defence, the respondents allege that the settlement relied upon was obtained by fraudulent misrepresentations and undue influence, and at a time when the deceased Trawford was ill and without legal advice. At the trial, the learned trial Judge permitted the appellants to prove the execution of the document—it is not under seal—by Trawford, which is in the following terms:—

I, George Trawford, do hereby declare, for the sum of $1,000 and doctor's and hospital expenses to date, which I acknowledge to have received on the execution hereof, I hereby release and acquit and forever discharge the B.C. Electric from all claims which I, my heirs, executors or administrators and assigns now have, or may in future have, by virtue of an accident happening to me on the 10th November, 1909, . . . whereby I sustained personal injuries, without acknowledgment on their part of any liability whatever, and I further declare that said release has been read to me and I fully understand its contents.

(Signed) GEORGE E. TRAWFORD.

(Before two witnesses.)

The learned trial Judge refused to allow the respondents to shew the circumstances under which this document was obtained, and, treating it as a conclusive answer to the respondents' claim, dismissed their action. It seems, however, quite clear to me that if it should appear from the evidence—it is, of course, a question of fact—that Trawford really did agree with the appellants to accept the sum mentioned in full satisfaction of all claims to compensation which he might have in respect of all injuries arising from the negligence in question, but that his assent, although a real assent, was obtained by fraud or by an unconscientious abuse of the opportunity which his situation afforded the appellants, then the respondents would be entitled to say in this action that as Trawford, if he had lived, could have maintained an

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action against the appellants (notwithstanding the existence of the agreement thus procured), so they, likewise, are not debarred by it from claiming compensation under Lord Campbell's Act. On the other hand, if it should appear that, in fact, Trawford did not assent, that "his mind did not go with" that which appears upon the document, to use the language of Erle, C.J., in *Rideal* v. *The Great Western R. Co.*, 1 F. & F. 706, so that there never was an agreement, then, although the appellants should be acquitted of fraud, the respondents would be equally entitled, on the same principle, to maintain their action. As to the rights of the appellants arising out of the fact that moneys were paid to Trawford—that is a question which, to some extent, depends upon the facts as developed at the trial. In either of the supposititious cases above suggested, if Trawford himself had been suing, while it seems clear that, in the first case at all events, it would not have been necessary for him to bring or offer to bring the money into Court [*Clough* v. *London and North-Western R. Co.*, L.R. 7 Ex. 26], yet, in my opinion, the defendants would have been entitled to rely upon the document as a binding receipt for the amount in fact paid as a payment on account of the compensation to which Trawford was justly entitled. On the other hand, if it should appear that Trawford had been led to believe, by the artifices of the appellants, that this document was something other than it, in truth, was, and that the receipt he was giving was a receipt for damages only suffered down to the time when the receipt was given, then Trawford would have been entitled to maintain an action for subsequent damages without bringing the amount paid into account; for the appellants would be estopped by their conduct from alleging that the receipt was other than that which they pretended it was. In the last mentioned case, the respondents, in my judgment, would be entitled to have the amount of their compensation estimated without reference to the moneys paid. In either of the other two cases, I think the respondents' action must be subject to the same incidents as Trawford's action would have been, if he had lived—to this extent, at all events, that the appellants are entitled to have the amount paid brought into account.

The substance of Mr. Ewart's contention at this point is that

the agreement relied upon can only, at worst, be a voidable agreement which stands and must be given effect to until it is repudiated by the legal personal representatives of Trawford. It occurs to one at once that this contention is open to the observation that the respondents have not had an opportunity of raising, before the proper tribunal, the question whether or not there ever was an agreement such as that alleged. But, let us assume that such an agreement was really entered into, that is to say, that the mind of Trawford was really brought to the point of assenting to such a settlement as that evidenced by the document produced; and let us also assume that the respondents are in a position to shew that this agreement was brought about by fraud or in such circumstances of unfairness as would have entitled Trawford to rescind it. It follows (I repeat) that Trawford, in his lifetime (there being no suggestion that there was any conduct of his which would have precluded him from repudiating the arrangement), could have maintained an action against the appellants in respect of the negligence upon which the present action is based. That being so, the condition of the statutory right of action is satisfied; the case is, indeed, within the express words of the statute—the death of Trawford having been "caused by wrongful act, neglect or default," and the act, neglect or default being such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.

The only criticism Mr. Ewart attempts to make upon this application of the very words of the statute itself is this: He argues that to permit the action to proceed might be unjust to the estate of Trawford whose legal personal representatives might desire that the settlement should stand. But the only possible interest the estate could have would be to retain the benefit of that which it had received, and if justice should require that the benefit should be restored without detriment to the estate, or, in other words, at the cost of the dependants, it is for these to say whether or not they will pursue their remedy at such a price. If there is any reason to suppose that the interests of the estate

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are really involved, there can be no difficulty adding as a party defendant an administrator *ad litem* to keep an eye on these interests.

It might easily happen, of course, that the interests of the estate and the interests of the dependants should be far from identical, and it may very fairly be argued that the Act does not contemplate the estate being called upon to set aside a settlement for the benefit of the dependants at the cost of giving up the advantages the deceased had derived from the settlement. But, on the other hand, I see no reason to doubt that it would be within the authority, if not the duty, of the executor (the interests of the estate being properly protected) to take the necessary proceedings on behalf of the dependants, including the impeaching of any fraudulent settlement; and, if the executor refused to act or if there were no executor, I can see no reason for holding that the right of action vested in the dependants in such circumstances does not *ipso jure* include as one of its incidents this same right to impeach a fraudulent settlement. That seems a reasonable implication when one bears in mind that the object of the statute was to afford a way of escape from the injustice which often attended the application of the principle *actio personalis*, etc., according to the settled doctrine of the Courts.

Anglin, J.

ANGLIN, J.:—The chief question in this case is whether the plaintiffs, suing under Lord Campbell's Act, are debarred from maintaining their action by a release of his claim against the defendants arising out of his injuries, given by the injured man, since deceased, in consideration of a payment of $1,000 made to him. In answer to the plea of this release, the plaintiffs reply that it was procured by fraud of the defendants, and is, therefore, not available to them as a defence. The defendants contend that, until the release is set aside, it is binding, and that only the personal representatives of the deceased can take proceedings to set it aside. The plaintiffs, on the other hand, maintain that the issue as to the validity of the release can be raised by them in this action and without the presence of the personal representatives. They also contend that the release, even if unimpeachable, is not a bar to their recovery, because their right of action

under Lord Campbell's Act is new and independent and not a statutory continuance of the right of action which the injured man had. On the last point, compare *Read* v. *The Great Eastern R. Co.*, L.R. 3 Q.B. 555; *Seward* v. *The "Vera Cruz,"* 10 App. Cas. 59, at 67 and 70; *Pym* v. *The Great Northern R. Co.*, 2 B. & S. 759, 4 B. & S. 396; *Robinson* v. *The Canadian Pacific R. Co.*, [1892] A.C. 481, and *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K.B. 804.

I find no satisfactory ground of distinction between the extinguishment of the cause of action by the injured man by an accord and satisfaction, evidenced by a release, and its extinguishment by the recovery of a judgment upon it or the expiry of a period of limitation. If, on a proper construction of Lord Campbell's Act, it is a condition of the plaintiffs' right of action that the deceased shall have had, at the time of his death, a subsisting and enforceable cause of action against the defendants, as I think the English authorities establish, a release binding on the deceased would seem to present a very formidable—I think an insurmountable—obstacle to the plaintiffs' recovery. It has, however, been the view of some eminent Judges that the existence of a cause of action in the deceased, enforceable by him up to the time of his death, is not made a condition of the right of action given to his wife and others by Lord Campbell's Act. See *Erdman* v. *Town of Walkerton*, 20 A.R. (Ont.) 444, at 456, *per* Burton, J.A.

But, if the release pleaded by the defendants is voidable for fraud, it did not bind the deceased man. The defendants remained liable to him up to the moment of his death, and, in an action brought by him against the company, if they had pleaded the release, its validity could have been questioned and determined: *Johnson* v. *The Grand Trunk R. Co.*, 21 A.R. (Ont.) 408. Apart from the objection that they do not sufficiently represent the deceased, I see no reason why the plaintiffs may not raise and require the determination in this action of the question as to the validity of the release set up by the defendants. That, I think, is the proper practice under modern procedure.

There is, no doubt, some anomaly in permitting the validity of a contract made by a dead man to be impugned in the absence

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of his personal representative. But, having regard to the nature of the right of action conferred on the wife and other beneficiaries by Lord Campbell's Act, and to the conditions upon which that right is given, I think it essential to "advancing the remedy" which the statute was designed to afford that these beneficiaries should have the same right to attack a release, such as that relied upon, so far as it presents an obstacle to their maintaining their statutory action, as the deceased himself would have had if surviving. Otherwise "the person who would have been liable if death had not ensued" would not be "liable to an action for damages, notwithstanding the death of the person injured," although the statute declares that he shall be so liable. 9 & 10 Vict. (Imp.) ch. XCIII.

The release being impeached for fraud, the Court, in the administration of equity, does not require that the money paid by the defendants should be refunded or brought into Court as a condition precedent to the right of repudiation being asserted. Equity may be done in the action by deducting the whole of the money already paid by the company, or such part of it, if any, as may be deemed proper, from any verdict which the plaintiffs may recover.

On this branch of the appeal I would, for these reasons, affirm the judgment of the Court of Appeal.

I am also of the opinion that the company cannot set up as a defence to this action sec. 60 of ch. 55, of 59 Vict. (B.C.), which gives it the benefit of a period of limitation of six months from the doing or committing of such damage, in all actions or suits for indemnity for "any damage or injury sustained by reason of the tramway or railway or the works or operations of the company."

The plaintiffs maintain that a claim for damages for personal injuries sustained in a railway accident is not within the purview of that provision. While inclining very strongly to that view, I do not rest my judgment upon it, because I am satisfied that the section invoked is not available as a defence in an action under Lord Campbell's Act." The Ontario Court of Appeal, in *Zimmer* v. *The Grand Trunk R. Co.*, 19 A.R. (Ont.)

693, held that a similar limitation provision did not affect rights of action conferred by Lord Campbell's Act. It would be supererogatory to do more than express my respectful concurrence in the opinions there delivered by Hagarty, C.J.O., and by Burton and Maclennan, JJ.A., on this point. I would merely add that, if applicable to actions under Lord Campbell's Act, the provision relied upon by the appellants would entirely cut out the right of action specifically given to the widow and other beneficiaries by the amendment of 27 & 28 Vict. (Imp.) ch. XCV, in all cases where there is an executor of the deceased or an administrator to his estate, because in such cases the right of the beneficiaries to sue arises only after the expiry of six calendar months from the death of the injured person. That cannot have been intended. See, too, *Green* v. *British Columbia Electric R. Co.*, 12 B.C.R. 199.

Two English cases are cited by the appellants in support of their contention that the period of limitation given by the statute which they invoke applies to this action, rather than the period of twelve months from the death specified in Lord Campbell's Act. They are *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 K.B. 454, and *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K.B. 804.

Unless the former decision is to be distinguished on the grounds that the Act there invoked was a public Act, whereas that in question here is a private Act, and that the English statute was enacted for the protection of public authorities and officials, whereas that before us is for the protection of a private corporation, it would seem to be in point. But it is an opinion of a Divisional Court by which we are not bound, and, if it be not distinguishable from the case at bar, I respectfully decline to follow it.

Williams v. *Mersey Docks and Harbour Board*, [1905] 1 K.B. 804, which is a decision of the English Court of Appeal, is clearly distinguishable on the ground that, at the time of his death, the right of action of the injured person had been barred by the limitation provision of the Public Authorities Protection Act. The existence of a cause of action against the defendants

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by the deceased at the time of his death was there held to be a condition of the right of action conferred by Lord Campbell's Act. Here the injured man, admittedly, had a cause of action against the defendants at the time of his death, unless it had been extinguished by the accord and satisfaction evidenced by the release pleaded, of which the validity is in question.

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

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitors for the respondents: *Abbott, Hart-McHarg, Duncan & Rennie.*

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BASSI v. SULLIVAN.

Ontario Supreme Court, Hodgins, J.A. September 11, 1914.

1. ALIENS (§ III—19)—ALIEN ENEMY—RIGHT TO SUE—HOW DETERMINED.

An alien enemy of this country is one whose Sovereign is at enmity with the Crown of England and one of his disabilities is that he cannot sue in our Courts during war unless he is here "in protection," the burden of shewing such status being on himself.

2. ALIENS (§ III—19)—IN WAR TIME—SUITS BY OR AGAINST—STATUS OF ALIEN ENEMY.

A citizen of a nation at war with this country who institutes a civil action will have his action stayed unless and until in the first place he establishes as a condition precedent to the right to sue that, although technically an alien enemy, he is "in protection" in such sense that he is not a man professing himself hostile to this country nor in a state of war against it.

Statement

MOTION by the plaintiff to continue an interim injunction, involving the right of an alien enemy to sue in our Courts.

The injunction was dissolved, but action stayed.

W. R. Smyth, K.C., for the plaintiff.

R. McKay, K.C., for the defendants.

Hodgins, J.A.

HODGINS, J.A.:—The plaintiff, who holds an unregistered chattel mortgage, dated the 18th May, 1914, on the stock in trade of Wiwcaruk & Bassi, in the town of Cobalt, brings this action to set aside the defendants' registered chattel mortgage upon the same goods, dated the 29th May, 1914. He has obtained from the Local Judge at Haileybury an injunction restraining their sale. The present motion is to continue that injunction. The plaintiff

claims to sue on behalf of himself and all other creditors of the firm already named, and grounds his action upon the fact that the seizure and sale will, in his belief, "create an unjust preference."

The plaintiff by so suing must be taken to have abandoned his rights as a secured creditor. Insolvency is not suggested except inferentially, and apparently will only arise after the defendants have realised upon their security.

I do not understand upon what principle a simple contract creditor, even suing in a class action, can restrain a chattel mortgagee from realising upon his security, unless he in the first place alleges more than this plaintiff does, and in the second place satisfies the Court that the circumstances under which the mortgage was given indicate some infraction of the statutes relating to preferences. This the plaintiff does not attempt to do.

So far as the amount due upon the mortgage is concerned, the Court will not, upon this application, take the account, nor, as I understand the practice, will it restrain realisation by a solvent creditor under his mortgage, except upon at all events *primâ facie* proof of invalidity.

I am, therefore, unable to continue the injunction.

The defendants, however, contended that the action is not maintainable and that I should dismiss it, because the plaintiff is an alien enemy, being an Austrian and not naturalised. The plaintiff does not deny that he is a native of Austria, and by his counsel admits that he is not naturalised. The writ was issued on the 27th August, 1914, which was after the date at which a state of war existed between his Britannic Majesty and the Emperor of Austro-Hungary, viz., the 12th August, 1914.

This raises a most important point, of which the Court is bound to take notice: per Lord Davey in *Janson* v. *Dreifontein Consolidated Mines Limited*, [1902] A.C. 484, at 499. The position of an alien enemy has not, except in a few isolated cases, been dealt with in the Courts since the Napoleonic and Crimean wars. The doctrines then established have not, in consequence, undergone much, if any, modification. But, if not altered in substance, the extreme rights arising thereout are rarely—according

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to Lord Loreburn in *De Jager* v. *Attorney-General for Natal*, [1907] A.C. 326—put into actual practice.

An alien enemy is one whose Sovereign is at enmity with the Crown of England, and one of his disabilities which has always been strongly insisted upon is that he cannot sue in a British Court during war. But this rule is always stated with an exception. In *Wells* v. *Williams*, 1 Ld. Raym. 282, 1 Salk. 46, Sir George Treby, Chief Justice of the Common Pleas (temp. Wm. III.) said: "An alien enemy who is here in protection may sue his bond or contract." And in the oft-quoted case of The Hoop (1799), 1 C. Rob. 196, Sir William Scott laid it down that, even in British Courts, by the law of nations, "no man can sue therein who is a subject of the enemy unless under particular circumstances, that, *pro hac vice*, discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. But otherwise he is totally *ex lex*."

This exception is recognised in more modern time by Sir Alexander Cockburn, L.C.J., in his work on Nationality (1869), p. 150: "An alien enemy has no civil rights in this country, unless he is here under a safe conduct or license from the Crown. In modern times, however, on declaring war, the Sovereign usually, in the proclamation of war, qualifies it by permitting the subjects of the enemy resident here to continue, so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends."

But to the enjoyment of this privilege important qualifications are annexed. One is that the alien enemy must shew himself possessed of what amounts to such a license: *Esposito* v. *Bowden* (1857), 7 E. & B. 762, 793. And, further, if the license be a general one, the alien enemy may be prevented from asserting it. In *Sparenburg* v. *Bannatyne* (1797), 1 B. & P. 163, at p. 170, Eyre, C.J., says: "I take it the true ground upon which a plea of alien enemy has been allowed is that a man professing himself hostile to this country and in a state of war with it cannot be heard if he sue for the benefit and protection of our laws in the Courts of this country."

The Crown has, by Royal Proclamation dated on the 15th

August, 1914, directed: "That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained, or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council, or proclamation."

In the present case the Court has no means of knowing whether this Proclamation, the terms of which are relied on as giving a right to maintain this action, covers this particular plaintiff. He may or may not be quietly pursuing his ordinary avocation, or he may be, for all that is before me, one of the class excluded by its subsequent provisions, or otherwise disentitled to take advantage of provisions intended for those who have resided here and engaged in business for some length of time. Nor am I at all sure that the Proclamation has the effect contended for. It appears to have been issued under sec. 6, sub-sec. (b), rather than under sub-secs. (e) and (f) of the War Measures Act, 1914, and may well refer only to police protection. It is not incumbent on the Court to make, still less to act upon, any presumption in favour of natives of either of the two nations now at war with the British Crown; and I think that every facility should be afforded for local inquiry, so that the Court should be fully informed as to whether or not the plaintiff is in fact entitled to set up the protection extended by the Crown under the wording of the Proclamation. Such an inquiry may properly be made at or before the trial, and may be called for at any time on motion; but, if pleadings had been delivered in this case, I should prefer to leave the questions both of fact and law to be determined when the case came up for trial, especially as recent English statutes and proclamations have not yet reached this country. But, as attention is pointedly called to it on this motion, and as the Crown has drawn a distinction between peaceable alien enemies and those who may be otherwise engaged, I

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think, at this early stage of the war, it will be proper to stay the action until the plaintiff satisfies the Court that it ought to allow him to proceed to trial, and there urge the contention that he is here under what amounts to a license sufficient to enable him to sue on such a cause of action as he is setting up.

Reference to recent discussions in the English law periodicals and to the report of an expert committee of the London Chamber of Commerce in August may be of use in finally determining the extent of the Proclamation and the scope of its provisions.

The injunction will be dissolved and the action stayed meantime, with leave to apply on notice to a Judge of the High Court Division to permit the action to proceed after time has been given to make the inquiries I have indicated. Two weeks will be sufficient. If the action proceeds, the costs of this motion will be to the defendants in the cause, unless the trial Judge otherwise orders. If no further proceedings are taken, the costs will be paid by the plaintiff to the defendants after taxation.

Injunction dissolved; action stayed.

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MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Ontario Supreme Court, Lennox, J. September 11, 1914.

1. SCHOOLS (§ III A—56)—RIGHTS AND LIABILITIES OF MEMBERS OF SCHOOL BOARD—DISCRETIONARY AND QUASI-JUDICIAL POWERS.

The discretionary and quasi-judicial powers vested in a School Board in matters relating to the schools under its control are so limited that the business of the Board must be regularly conducted within its jurisdiction in the *bonâ fide* discharge of its duties and in harmony with the laws of the province and the regulations of the Department.

2. SCHOOLS (§ III A—56)—RIGHTS AND LIABILITIES OF BOARD—JURISDICTION—DELEGATION OF POWERS.

A School Board in matters relating to the schools under its control and involving discretion or judgment is bound to exercise such functions so that the whole question *must be* presented to the Board, *should be* weighed and considered by the Board and *must be* determined upon by the Board; nor has the Board the power to delegate duties or functions of this character to another instead of exercising its own judgment and discretion throughout.

3. SCHOOLS (§ III A—56)—BOARD DELEGATING ITS POWER—IMPAIRING EFFICIENCY OF SCHOOLS—REMEDY.

Where a School Board has delegated its discretionary and quasi-judicial duties and functions to another and thereby impaired the efficiency of its schools, the Court will remedy the wrong.

4. RULES OF COURT (§ I—1)—CHIEF OBJECT OF—SECONDARY PURPOSES.

Rules of procedure are for the convenience of litigants and the Court and the advancement of justice and should not be invoked to perpetuate a wrong.

MOTION by the plaintiffs for an injunction and other relief as set forth below.

The motion was granted.

J. F. Orde, K.C., and *J. J. O'Meara*, for the plaintiffs.

McGregor Young, K.C., for the Minister of Education.

N. A. Belcourt, K.C., and *A. C. McMaster*, for the defendants.

LENNOX, J.:—The plaintiffs are a minority of the School Board. It will be sufficiently accurate to say that this action is brought to compel the Board, represented for the most part by Chairman Genest, to conduct the schools according to the departmental regulations, to engage and employ a teaching staff composed exclusively of legally qualified persons, to prevent the payment of school moneys to unqualified teachers, and the sale or disposal of certain debentures.

The Court has so far recognised the plaintiffs' status, the importance of the issues raised, and the plaintiffs' *prima facie* right to relief, by enjoining the defendants until the trial. The bulk of the evidence on both sides was put in on the 25th June last, when an adjournment was asked for and obtained by the defendants to enable them to make further searches in the records of the Education Department, and, though strenuously opposed, the injunction was continued. The adjournment was decidedly an indulgence to the defendants, as, so far as I am aware, no intimation of the application was given until the evidence for the defence was well advanced. The object of the action, the terms and aim of the injunction, and the conditions necessarily implied upon an adjournment, should without more have been a sufficient guarantee that the efficiency of the schools would be preserved, and the *status quo* honourably maintained pending the delay; but, had I known then that Mr. Genest contemplated what he has since consummated, namely, the turning out of the whole teaching staff, there would have been no adjournment without such additional guarantees as would have rendered the present disgraceful and disastrous conditions impossible.

Every separate school in Ottawa is closed, 7,000 or 8,000 boys and girls are without the means of obtaining an education, and

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the vicious and perhaps criminal habits which some of them will inevitably acquire in a life of idleness will probably never be shaken off. The teachers were discharged, if they were discharged at all, by Mr. Genest. This was done pursuant to a resolution of the Board, opposed by the plaintiffs, purporting to delegate to him the entire question of the discharge and engagement of teachers. Mr. Genest is a keen, intelligent gentleman, of excellent address, and in giving evidence argued the case from his standpoint with singular ability, but I failed to glean from his statements that he has actually a single teacher immediately available of the qualified class, and he frankly disclosed that one chief object of his action was to create a condition of things which would compel the Department to consent to the employment of some twenty-three Christian Brothers who are without professional qualification.

I am asked to continue the injunction, and the injunction will be continued until I have given judgment in the action, and it will be continued with the addition that, if the plaintiffs desire it, it will be so amended as in words to apply to the servants, agents, employees, and representatives of the defendants, as well as to the defendants; and, on the other hand, I reserve the right to the defendants to apply for leave meantime to dispose of some of the debentures should an actual emergency arise.

I am asked, too, to make an interim order directing that the schools shall be opened forthwith, and that the former teachers shall be restored to the positions they occupied in the schools prior to and at the end of the last half year. It is argued for the defendants that for me to do this would be to usurp the functions and duties of the trustees. That, of course, I cannot do, however deplorable the conditions are now or however intolerable they are likely to become during the many months—probably years—that must elapse before the issues in this action are finally determined. There is no use in saying that it is easy; it is a difficult question to deal with. It was argued at great length that the remedy does not arise in the action and that the rules of procedure bar the way. Rules of procedure are for the convenience of litigants and the Court, and the advancement of justice, and should not be invoked to perpetuate a wrong. If

the relief asked is incidental to the action, I can grant it if it would be granted upon substantive motion. But the more important point is to draw the line correctly between the jurisdiction of the Court and the exclusive functions of the trustees. If amendments of the pleadings are necessary to meet the evidence and define the issues as they have developed, and there is no answer of surprise, the pleadings can be, and in this instance they may be, amended.

As to the dividing line then? In matters relating to the schools under their control, the defendants are clothed with wide discretionary and quasi-judicial powers. Assembled at a properly constituted meeting of the Board, regularly conducted, dealing with matters within their jurisdiction, and acting in the bonâ fide discharge of their duties and in harmony with the laws of the Province, the regulations of the Department, and any existing judgment or order of the Court affecting them, the conclusions they reach, whether thought to be wise or unwise, cannot be interfered with by a Court. They are the judges in such a case. The salaries they will pay, the engagement and discharge of teachers, and the selection or rejection of duly qualified teachers, from time to time as these questions arise, but not in advance, are all matters within their jurisdiction.

But to shut out judicial actions where error or misdoing exists and a remedy is invoked, there must be the act of the Board *as a Board*, and not merely the act of its individual members. In all matters involving discretion or judgment, the whole question *must be* presented to the Board, *should be* weighed and considered by the Board, and *must be* determined upon by the Board.

What was done here was the act of Chairman Genest alone. The Board had not the power to delegate their duties or functions to him. They have not discharged the old teachers, and they have not entertained or deliberated or determined upon the selection or engagement of any teacher or teachers to take their place; and, speaking of the majority—for the plaintiffs are powerless—the Board, by their flagrant neglect to discharge the duties imposed upon them by law, have not only opened the way but have unintentionally invoked the action of the Court. More

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than this, not only was there no power to delegate, but the resolution purporting to appoint Mr. Genest was vicious and unlawful per se, for its exercise was intended, upon the face of it, to contravene and override the injunction order of the Court should it be issued. The omission of this provision from a subsequent resolution does not change the character of the act.

There is a palpable absence of good faith in the whole transaction; it is contrary to the spirit and intent of the injunction order; it is contrary to what was necessarily implied upon the adjournment; and it has created an intolerable state of things which I feel I have power to and *ought* to remedy. There will be an order directing the trustees to open the schools not later than Wednesday next, and to maintain and keep them open and properly equipped with properly qualified teachers and in all other ways until argument and judgment in this action; to suffer, permit, and facilitate the return of the ousted teachers to their former positions as teachers; and restraining the Board from interfering with or molesting these teachers in the discharge of their duties as such during the time aforesaid. The order will include the servants, agents, and employees of the defendants, and may contain provisions for notices being sent out by the secretary to the teachers concerned. If the parties cannot agree as to the terms of the order to be issued, I will settle them in the jury-room of the court-house (city-hall), in the city of Toronto, on Monday next, the 14th instant, at 10 a.m., and I will then consider any argument addressed to me as to teachers said to have been engaged before the 5th day of this month. I shall also be prepared to hear argument as to whether the Board should be restrained from giving notice terminating the engagements pending the judgment, except upon leave of the Court.

Motion granted.

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Yukon Territorial Court, Macaulay, J. July 6, 1914.

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1. ESTOPPEL (§ III J—130)—INCONSISTENT ACTS IN JUDICIAL PROCEEDING—CRIMINAL LAW—PLEA OF GUILTY AS BAR TO FUTURE CONTEST OF FACTS ON APPEAL.

A plea of guilty operates as an estoppel against the accused from calling upon the prosecution to produce evidence to establish that he is guilty, and *qua* the facts alleged in the information or indictment, he is barred from a trial *de novo* which in certain cases is available on an appeal from two justices holding a summary trial on notice of appeal being given by a person aggrieved (Code secs. 749 and 797, as amended in 1913); any objection to be taken must then be to the form of the conviction.

[*R.* v. *Bowman*, 2 Can. Cr. Cas. 89; *R.* v. *Baird*, 13 Can. Cr. Cas. 240, and *Upton* v. *Brown*, 21 Can. Cr. Cas. 190, considered.]

Statement

APPEAL from a summary conviction made on a plea of guilty.

The appeal was dismissed.

J. A. W. O'Neill, for appellant.

J. P. Smith, for the Crown.

Macaulay, J.

MACAULAY, J.:—The appellant in this case pleaded "guilty" before J. D. Moodie, Esquire, a commissioned officer of Royal North-West Mounted Police, having, possessing and exercising all the powers of two justices of the peace within the Yukon Territory, on the 26th day of May, 1914, to the charge of having resisted a peace officer within the meaning of the Criminal Code of Canada in the lawful execution of his duty, contrary to the provisions of section 169 of the Criminal Code, and was sentenced by the said J. D. Moodie to 14 days' imprisonment at hard labour.

He now appeals from the said conviction under the provisions of section 749 of the Criminal Code.

Counsel for the appellant claims the right to a trial *de novo* and that the respondent should be called upon, and that it was incumbent upon him to prove the appellant guilty of the offence charged.

I am of opinion, following the cases of *R.* v. *Brook*, 7 Can. Cr. Cas. 216, and *Harrop* v. *Bayley*, 6 El. & Bl. 218, that under his plea of guilty the appellant is estopped from calling upon the respondent to produce evidence to establish that he is guilty of the offence with which he is charged, and so far as the facts re-

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lating to his guilt or innocence are concerned he is not a person who thinks himself aggrieved within the meaning of section 749 of the Criminal Code of Canada. See also *R.* v. *Bowman*, 2 Can. Cr. Cas. 89; *R.* v. *McNutt*, 4 Can. Cr. Cas. 392; *R.* v. *Baird*, 13 Can. Cr. Cas. 240; *Upton* v. *Brown*, 21 Can. Cr. Cas. 190; also *R.* v. *Goulet*, 12 Can. Cr. Cas. 365.

No objection is taken on the appeal to the conviction as to its form.

The only other question raised was as to the excessive punishment imposed by the said justice. The maximum penalty which could have been imposed would have been six months' imprisonment at hard labour or a fine of one hundred dollars, and I am unable to say that the justice acted oppressively in this case, or imposed an excessive sentence upon the appellant by sentencing him to 14 days' imprisonment at hard labour.

The appeal, therefore, should be dismissed.

Appeal dismissed.

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REX v. ATKINSON.

Manitoba King's Bench, Macdonald, J. May 19, 1914.

1. INTOXICATING LIQUORS (§ III E—77) — DRUNKENNESS ON INDIAN RESERVE—INDIAN ACT (CAN.).

An Indian Agent has jurisdiction under the Indian Act, R.S.C. 1906, ch. 81, to try a person who is not an Indian for the offence of being drunk upon an Indian reserve.

2. CRIMINAL LAW (§ IV B—111)—IMPRISONMENT AT HARD LABOUR—SUMMARY CONVICTION UNDER INDIAN ACT (CAN.).

The Indian Act, R.S.C. 1906, ch. 81, does not empower an Indian agent to include hard labour in a sentence of imprisonment imposed on summary conviction under sec. 139 of the Act for being drunk on an Indian reserve.

Statement

HABEAS CORPUS motion in respect of a summary conviction under the Indian Act, R.S.C. 1906, ch. 81.

The motion was dismissed on an amendment of the conviction.

D. M. Ormond, for the accused.

J. Allen, for the Crown.

MACDONALD, J.:—This is a motion for *habeas corpus*. The accused was charged with being drunk on the Indian reserve of the Pas band of Indians, contrary to the provisions of section 139 of the Indian Act, ch. 81, R.S.C. 1906. He was summoned before the Indian Agent at The Pas, pleaded guilty and was sentenced to three months' imprisonment in the common gaol of the central judicial district with hard labour. Counsel for the prisoner now contends that the Indian Agent had no jurisdiction.

Section 139 of the Indian Act provides that any constable or peace officer may arrest, without warrant, any person or Indian found drunk, and may detain him until he can be brought before a justice of the peace, etc. The contention of counsel for the prisoner is that only a justice of the peace has jurisdiction. Section 161 of the Act, however, provides that every Indian Agent shall, for the purposes of this Act or of any other Act respecting Indians, and with respect to,

(*a*) any offence against the provisions of this Act or any other Act respecting Indians; or,

(*b*) any offence against the provisions of the Criminal Code respecting the inciting of Indians to commit riotous acts; or,

(*c*) any offence by any Indian or non-treaty Indian against any of the provisions of those parts of the Criminal Code relating to vagrancy and offences against morality;

be *ex officio* a justice of the peace, and have the power and authority of two justices of the peace, anywhere within the territorial limits of his jurisdiction as a justice, etc. This section, however, it is contended, applies only to an Indian, because of the fact that the latter part of the section recites,

whether the Indian or non-treaty Indian charged with or in any way concerned in or affected by the offence, . . . is or is not within his ordinary jurisdiction, charge or supervision as an Indian agent.

If this contention were correct, then, under sub-section (*b*) any offence against the provisions of the Criminal Code respecting the inciting of Indians must be construed to mean that the inciting must be by Indians. That, I do not think, was the intention of the Act. From my interpretation of the Act, I am of opinion that the Indian Agent has jurisdiction

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over all offences against the Indian Act, and the offence charged here is clearly within the Act, and the Indian Agent was within his jurisdiction in trying the charge.

The Act does not, however, give him jurisdiction to impose hard labour, and that part of the sentence will have to be eliminated.

The application must be refused.

Conviction amended.

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NICHOLAIS v. DOMINION EXPRESS CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 2, 1914.

1. DAMAGES (§ III J—201)—QUANTUM—INJURY OR DESTRUCTION—OF ARCHITECT'S BUILDING PLANS—TEST.

The damages which an architect should receive for the wrongful destruction of building plans he had prepared in a competition but which had been rejected are properly allowed at what they would be worth to display as an illustration of the architect's professional skill, and not the entire cost of reproduction, where they would not be available for another building because of the peculiar shape of the parcel of land for which they were designed.

2. APPEAL (§ VII L—509)—REVIEW OF FACTS—TRIAL WITHOUT JURY—APPELLATE COURT ITSELF RE-ASSESSES DAMAGES WHEN.

The Court of Appeal will not necessarily send a case back to reassess the damages which, at the trial, had been allowed on a wrong basis against a wrongdoer, although there is no definite basis upon which to make the proper assessment; and if the appellate court, having all the evidence of damage before it is of opinion that $300 is a proper sum to allow it will direct judgment for that amount, although the precise damage is problematical, rather than put the parties to further expense by remitting the case to another jury.

[*Chaplin* v. *Hicks*, [1911] 2 K.B. 785, and *Watson* v. *Ambergate R. Co.*, 15 Jur. 448, considered.]

Statement

APPEAL by the defendant from the judgment of His Honour Judge Schultz of the County Court in an action by an architect for damages for the wrongful destruction of building plans, the appeal attacking the assessment of the damages as resting on a wrong basis.

The appeal was allowed in part, the damages being reduced in amount by the appellate Court without sending the case back to re-assess damages in which respect MARTIN and MCPHILLIPS, JJ.A., dissented.

C. B. Macneill, K.C., for appellant, defendant.

C. L. Fillmore, for respondent, plaintiff.

MACDONALD, C.J.A., concurs with GALLIHER, J.A.

IRVING, J.A.:—I concur in the judgment of my brother Galliher reducing the damages to $300.

MARTIN, J.A.:—It is clear from the evidence that though the plans in question (which were for a building in a somewhat peculiar situation) had been rejected in the competition for which they had been drawn, yet they, nevertheless, were of considerable practical value to the plaintiff to display as an illustration of his professional skill and ability, and the question is what, in such circumstances, is the measure of damages that he has suffered by their almost total destruction. No case has been cited that is really in point, and that of *Watson* v. *Ambergate R. Co.* (1851), 15 Jur. 448, is of no more assistance to us than it was to the Court of Appeal in *Chaplin* v. *Hicks*, [1911] 2 K. B. 786 at 806, and it is also considered in *Sapwell* v. *Bass*, [1910] 2 K.B. 486 at 494: I confess I am unable to extract any principle from it after very careful examination. The Judge below awarded £20 for the loss of the chance of the prize in the competition, and one of the two Judges, Patteson, J., says that "no objection was taken that it (the measure of damages) was not" correct, while the other, Erle, J., greatly doubted its correctness but did not deal with the question as "the case laid before us does not advert to that point." I find nothing in the case to support the headnote that "*semble*, the proper measure of damages in such case is the value of the labour and materials expended in making the plan and model." As Mr. Lush truly said in his argument, "As to the damages the only question is whether the evidence was receivable or not. This Court (of Error) has nothing to do with the amount of damages and has no power to reduce them," which view both Judges adopted in their judgments. Moreover, the "goods" here have not "become useless" as Erle, J., said they had in that case. What then is the damage that the plaintiff has suffered, and how is it to be assessed? The fact that "sometimes it is a matter of great difficulty" to do so is no answer to the loss, as was pointed out by

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Lord Justice Fletcher Moulton in *Chaplin* v. *Hicks*, [1911] 2 K.B. 786 at 794, wherein also at 792, Lord Justice Vaughan Williams said:—

> Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.

And see the remarks of Lord Chancellor Halsbury in *The Mediana*, [1900] A.C. 113 at 116-8, on the subject, wherein he also points out that "the term 'nominal damages' does not mean small damages." I agree with much that the learned Judge below has said in his judgment, but as I understand it, he has assessed the damages as being the cost of reproduction of the plans in their original state, and on that principle has awarded $800 and that is the position that was urged upon us by the respondent's counsel who submitted that there was no middle course between allowing nominal damages or the whole cost of reproduction. I cannot, however, agree to this submission—it goes too far, and is not, I think, the true measure, which is, as I can best express it, that the plaintiff should be allowed whatever the value of the plans to him would have been for said display purposes had they been returned to him. That value might have been shewn by evidence to be $1.00 or $100 or $500 or possibly even $800 (the full cost claimed for his labour and materials), but assuming it would have been, say, only $100 it would obviously be unreasonable and unconscionable to encourage or permit him to expend $800 worth of labour to attain it: if not so, he might, indeed, expend on a set of plans $2,000 worth of labour and materials and the actual professional value of the result to him might only admittedly have been $500, yet to recoup him for the loss of that value he, if awarded $2,000 would be unjustly charging the defendant with the additional and useless sum of $1,500. In other words, it is not the amount of professional work expended on the restoration or reproduction of the plans that is the measure of damages but the professional benefit that he might fairly derive from them if he still had

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them in their original state. The more the matter is considered the more does it become apparent that the cost of reproduction cannot be the test because if the plans originally had no merit they could have had no value as they would not have enhanced the plaintiff's professional reputation by displaying them—on the contrary, if they did not exhibit evidence of his skill the more they were displayed the more they would only serve to advertise his professional incapacity and their own worthlessness for any purpose. An architect might, on the one hand, after months of labour, produce a set of plans which would be valueless and therefore detrimental to his reputation, and on the other hand he might in a comparatively short time produce a set which would exhibit a high degree of originality, utility and artistic treatment, and would be of corresponding value: it would be worse than a waste of time and labour to produce or reproduce the former, though it would be justifiable and profitable in the latter case. In determining this point, very divergent views might be taken, and a jury (or Judge discharging its functions) would necessarily be allowed great latitude, as is shewn by the *Chaplin case, supra,* wherein a common jury allowed £100 as the value of a chance for a prize in a competition, and in respect to which Lord Justice Farwell remarked, p. 801, "if the jury had given only a shilling we could not have interfered."

The result is that I think the verdict cannot stand because of the damages having been assessed on a wrong principle, and the case should go back to the learned Judge, not to be retried, but to assess the damages as best he may on the evidence already before him, on the principles above indicated; and I shall only add that if there is not much of the proper class of evidence to assist the learned Judge that is the fault of the party who should have adduced it and failed to do so.

The appellant should have the costs of this appeal and the additional costs occasioned by such assessment.

Galliher, J.A.

GALLIHER, J.A.:—The learned trial Judge has, in my opinion, proceeded upon the wrong principle in assessing as damages the cost of reproducing the plans. Summed up, the evidence is,

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that while the plans had served the purpose for which they were originally drawn, and had not been accepted, and although they were not such as could be used for another building owing to the peculiar shape of the land upon which the building for which the plans were drawn was to be erected, yet as a work of excellence and in demonstrating plaintiff's skill as an architect they would be a valuable asset to him on exhibition in his office. I think we can reasonably infer from plaintiff's evidence that he has no intention of reproducing these plans, so that it comes down to a consideration of what value they would be to him for the purposes of exhibition to prospective clients as evidence of plaintiff's skill. This is entering upon a more or less uncertain realm, and the cases cited by Mr. Fillmore do not assist us very much except in so far I think that they establish that plaintiff is entitled to substantial as distinguished from nominal damages.

Now, what are substantial damages here is not easy of ascertainment, and we have no definite basis upon which to proceed, but nevertheless the authorities shew that in such cases, damages which a jury may consider reasonable, may be given.

This Court, having all the evidence before us, we should, I think, deal with the matter rather than incur further expense by sending it back for a new trial.

In my view the damage to the plaintiff is more or less problematical, but I would fix them at $300. The appeal should be allowed with costs. The defendants should have the costs below.

McPhillips, J.A.

MCPHILLIPS, J.A., concurs with MARTIN, J.A.

Appeal allowed in part.

AIREY v. EMPIRE STEVEDORING CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 2, 1914.

1. NEW TRIAL (§ II—9)—MISTRIAL—OMISSION TO AMEND PLEADING—EMPLOYERS' LIABILITY ACT, B.C.—CONFUSION OF ISSUES SUBMITTED TO JURY—TERMS.

Where an employee sued his employer for damages for personal injuries arising from alleged negligence and the claim was submitted to the jury not only at common law but under the Employers' Liability Act (B.C.), but the verdict went in his favour only upon the statutory liability, the result is a mistrial where the plaintiff pleaded only at common law and declined to apply to amend when given an opportunity at the trial; and on the plaintiff appealing from the trial judge's refusal to enter judgment on the verdict he may be ordered to pay defendant's costs of the former trial as a condition of obtaining a new trial.

[*Airey v. Empire Stevedoring Co.*, 16 D.L.R. 734, varied on appeal; *Scott v. Fernie*, 11 B.C.R. 91; and *Gem Milling Co. v. Robinson*, 3 Times L.R. 71, referred to.]

Statement

APPEAL from the judgment of Murphy, J., 16 D.L.R. 734, dismissing the plaintiff's action notwithstanding the verdict, on the ground that the plaintiff's pleadings (which he declined on leave to amend) did not make a claim under the Employers' Liability Act, B.C., the verdict being based on the Act and not on the Common Law which alone was pleaded.

The appeal was allowed, but on terms as to costs.

Craig, for appellant, plaintiff.

S. S. Taylor, K.C., for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The jury found a verdict for the plaintiff under the Employers' Liability Act, but the learned Judge dismissed the action after verdict on the ground that it could not be sustained on the pleadings which, in his opinion, did not make a claim under the Act. Disregard by the plaintiff of r. 229 which declares that every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, has brought about the unfortunate result that, while the plaintiff was, in the opinion of the jury entitled to $1,750 by way of damages for his injury, he must lose that sum because his claim was not properly presented to the Court. His counsel applied for and was given the opportunity of amending the statement of claim at the opening of the trial, but ap-

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parently for the purpose of avoiding the possible postponement of the trial and the payment of the costs of the postponement to enable the other side to meet the case set up in the amended pleadings, he did not take advantage of the leave given. It is to be regretted that the question of amendment was not then definitely settled and an amendment in writing then made. Instead of this the question appears to have been to a certain extent left open and a consequent misunderstanding arose between counsel and the learned Judge which resulted in the learned Judge submitting the case to the jury not only at common law but under the Employers' Liability Act, and after the jury had found against the plaintiff on the common law branch and in his favour under the Act, the learned Judge thought that it would be unjust in the state of the pleadings and because of the misunderstanding to enter up judgment upon that verdict and hence dismissed the action. In my opinion, there has been a mistrial. The result has been brought about largely by the fault of plaintiff's counsel, though not entirely by his fault.

I would therefore send this case back for a new trial, but only under the Employers' Liability Act. On the common law branch of the case I would confirm the verdict of the jury. The appellant should have no costs of this appeal because it was largely his fault that an appeal became necessary. He should also pay to the respondent all the costs of the former trial. All such to be costs to the respondent, in any event, in the cause.

Irving, J.A.

IRVING, J.A.:—I do not think the plaintiff has established a defective system by shewing that the foreman neglected to bring to the scene of the operations the tools which had been supplied to him by the defendants.

As to the question whether the Employers' Liability Act was invoked by the plaintiff, I think it was, and that at the trial it was assumed that it had been invoked. I would allow the appeal on that ground. I do not see that there was any misdirection.

Martin, J.A.

MARTIN, J.A.:—As regards the common law branch of this action, the appeal should, I think, be dismissed because the fol-

lowing instruction the learned trial Judge gave to the jury on the question of defective system was correct in the circumstances of the case:—

> Now, it has been contended that that (the common law duty) goes so far as to require a company, operating as this company does in a great many different points, to see that it has the tools that are necessary, even down to the small tools of that nature (*i.e.*, claw bars) actually on the job, and that that duty cannot be delegated to anyone else. In my opinion, that is not the law. If you find that there was a defective system in the distribution of their tools then there would be a common law action against them; but if they have a central depot, and if they have a proper distribution of their tools, then because a competent man forgot or overlooked in some way the getting of these tools from the central depot, for instance, there is no action against them in common law.

Then as to the claim under the Employers' Liability Act, there should, in my opinion, be a new trial because what took place amounts to a mis-trial which in Wharton's Law Lexicon and Mozley & Whiteley's Law Dictionary is succinctly defined as an "erroneous" or "false and erroneous trial," examples of which in civil cases are cited in Holmested & Langton's Judicature Act, 3rd ed., p. 1024, and in criminal cases I need only cite *Reg.* v. *Yeadon* (1861), 31 L.J.M.C. 70, 7 Jur. (N.S.) 1128; and *Rex* v. *Fowler* (1821), 4 B. & Ald. 273, wherein at 276 it is said that "the first trial is to be considered a mis-trial and therefore a nullity." In this Court on May 1, 1913, we held that there had been a mis-trial in the case of *Huynczak* v. *B.C. Electric Ry. Co.*, because it had fallen into inextricable confusion, and sent it back for a new trial. I note that in *Gem Milling Co.* v. *Robinson* (1886), 3 T.L.R. 71, the Court of Appeal held that in a special case, and upon great caution, it "has power to grant a new trial when something had been done inadvertently or by mistake, or where there had been a mere slip, even at the instance of the defeated party." In the present case I think the trial that was had must be held to be a "mistake" on the ground that no issue was really joined between the parties on the question of the Employers' Liability Act—see 20 A. & E. Enc. of Law, 2nd ed., 833. This question which clearly was not originally raised upon the pleadings by the plaintiff, yet was permitted by the learned trial Judge to crop up during the proceedings before him, and though it does

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not appear from the appeal book that he actually allowed in terms any amendment, yet, in spite of objection, he gave the case to the jury on that branch and specifically directed them upon it, which he could not properly have done unless he considered that what had happened in the course of the trial was tantamount to an amendment having been granted, or that the case had been fought out on that question—*Scott* v. *Fernie* (1904), 11 B.C.R. 91. And his subsequent action in deciding that after all as a matter of law there had in any event been no case to go to the jury, and, consequently, in setting aside its verdict that had been given on his direction in that respect, points further to the unusual uncertainty in these unusual proceedings. The truth is that the trial drifted into confusion because the plaintiff was neither definitely required to put in a written amendment if he desired to amend, nor was he restricted to the case that was open to him on his statement of claim as he ought to have been in default of amendment. And I also feel that the uncertainty was contributed to from a third quarter, the defendant's (but in a much less degree) by not making its position at all times as clear as it might have been, *e.g.*, in respect to the admission of the notice of injury, though I recognize that it was placed in a somewhat difficult position. It is because of this common participation in this confusion and uncertainty that I find it impossible to say with necessary legal exactitude what the true state of affairs was when the case went to the jury, and so I can only come to the conclusion that there has been "a false and erroneous trial" otherwise judgment should be given in favour of the defendant. To order a new trial because of a mis-trial, properly so-called, is, fortunately, a very unusual thing in this province at least, and I can only recall two other instances in civil cases in over fifteen years of judicial experience, but it is the only course open to us in the circumstances, otherwise justice would be frustrated. It is not easy to make a wholly satisfactory disposition of costs depending upon such unusual circumstances. In the present case the first trial—the mis-trial—has not been abortive because the defendant has been able to free itself from any liability at com-

mon law, which is a substantial benefit, and for that reason I think the plaintiff who was the original author of the difficulty should pay the defendant the costs of the mis-trial in any event; there also should not be any costs of this appeal, which must, as a matter of procedure be nominally allowed in part, and a new trial ordered as to the defendants' liability under the Employers' Liability Act.

GALLIHER, and MCPHILLIPS, JJ.A., agreed with MACDONALD, C.J.A.

Appeal allowed.

SMALL v. CITY OF CALGARY.

Alberta Supreme Court, Walsh, J. June 15, 1914.

1. LIMITATION OF ACTIONS (§ III F—130)—TORTS; NEGLIGENCE — LORD CAMPBELL'S ACT—CITY CHARTER—WHICH ACT CONTROLS.

The time limited by Con. Ord. ch. 48, Alta. (Lord Campbell's Act), for bringing actions thereunder for damages for negligence causing death is not limited or controlled as to such actions against the City of Calgary arising from the operation of a street railway by the municipality, by a general clause of the Calgary Charter (sec. 125) fixing a shorter period within which any "action for damages by reason of the negligence or default of the city" shall be brought.

[*Greene* v. *B.C. Electric R. Co.*, 12 B.C.R. 199, and *Turner* v. *B.C. Electric R. Co.*, 49 Can. S.C.R. 470, 18 D.L.R. 430, considered.]

Statement

ACTION under Alberta version of Lord Campbell's Act involving the question as to whether that Act or a city charter should govern as to limitation of actions.

Judgment was given for the plaintiff; holding the charter ineffective as against Lord Campbell's Act in this respect.

R. T. D. Aitkin, for the plaintiff.

A. H. Clarke, K.C., and *C. J. Ford*, for defendant.

Walsh, J.

WALSH, J.:—This action is brought under the Alberta version of Lord Campbell's Act, which is ch. 48 of the Con. Ord. The city contends that notwithstanding the fact that this action was brought within one year from the death of the deceased, the time limited therefor by the Ordinance, it is too late, because of the following provision in sec. 125 of the Calgary charter:—

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And in any case no action for damages alleged to have been sustained by reason of the negligence or default of the city shall lie unless such action has been instituted within six months after the right of action arose.

The city's submission is that it is this section of its charter and not sec. 4 of the Ordinance that governs, and that as the accident to and the death of the deceased both happened more than six months though less than a year before this action was commenced, the plaintiff's right of action was barred when it was brought and it must therefore be dismissed.

I think that the language of sec. 125 of the charter is broad enough to cover an action under this Ordinance. An action against the city under the Ordinance is certainly one, "for damages alleged to have been sustained by reason of the negligence or default of the city," for the right of action given by sec. 2 of the Ordinance is for damages caused by the wrongful act, neglect and default which is therein described. For this reason this case is distinguishable from such cases as *Zimmer* v. *G.T.P.*, 19 A.R. (Ont.) 593; *Greene* v. *B.C. Electric R. Co.*, 12 B.C.R. 199, and *Turner* v. *B.C. Electric R. Co.*, 18 D.L.R. 430. The sections of the statutes there under consideration were markedly different in their phraseology from sec. 125 of the charter. I think it quite plain too that the time limited by sec. 125 of the charter, if it governs, would run in such a case as this from the date of the death rather than from the date of the accident for it gives six months after the right of action arose, and the right of action certainly arises only upon and by reason of the death. This marks another distinction between this case and those above referred to, for in them the Courts held that the time limited by the statutes there under consideration ran from the date of the injury and not from the date of the death resulting in a complete barring of the claim of dependants in every case in which the death of the injured person was delayed beyond the period of limitation.

Notwithstanding these distinctions I am of the opinion that sec. 125 of the charter is not effective to cut down the period of limitation below that given by the Ordinance under which the right of action is created. I adopt the concluding words of

Hunter, C.J., in delivering the judgment of the full Court in *Greene* v. *B.C. Electric R. Co., supra*, at 207:—

> There is, however, a short ground on which I think the plaintiffs are entitled to succeed. Lord Campbell's Act is a special Act creating a special cause of action and makes special provision as to the time within which it is to be brought and it would be contrary to well-settled rules of statutory construction to hold that this special cause of action, so specially provided for, came within the scope of a general limitation clause passed for the benefit of a private corporation.

This view is concurred in by Davies, J., in *Turner* v. *B.C. Electric R. Co.*, 49 Can. S.C.R. 470, 18 D.L.R. 430, at 437. The whole of the judgment in the *Greene* case is approved of by Duff, J., in the same case at p. 444, and the case is mentioned with apparent approval by Anglin, J., at p. 451.

I therefore over-rule the objection taken upon this ground by Mr. Clarke at the close of the plaintiff's case and direct the entry of judgment upon the verdict of the jury for $750 apportioned as follows: $250 to the father and $500 to the mother with costs.

I trust the defendant will see its way clear to submitting to this judgment. The girl's death was unquestionably due to the gross negligence of those in charge of the car, the amount of the jury's award is fair and reasonable, and even if I am wrong in my view of sec. 125 of the charter, no possible prejudice has resulted to the city by the delay in bringing the action.

Judgment for plaintiff.

GROVES v. HARRIS.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Brown, JJ. July 15, 1914.

1. CONTRACTS (§ III C—239)—VALIDITY AND EFFECT — AGAINST PUBLIC POLICY—TO COMPOUND CRIME—TEST.

> The misappropriation of his employer's money by an employee creates a debt in favour of the employer for which he may lawfully take security so long as there is no agreement not to prosecute. [*Ward* v. *Lloyd*, 6 M. & G. 785, referred to.]

Statement

APPEAL from the judgment at the trial in the plaintiff's favour in an action on a promissory note the consideration for which was attacked as against public policy in compounding a crime.

The appeal was dismissed.

M. McCausland, for appellant.

F. B. Morrison, for respondent.

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BROWN, J.

The judgment of the Court was delivered by

BROWN, J.:—The claim in this case is against the defendant as endorser of a promissory note made by one MacNeil in favour of the plaintiff. The defence is that there was no consideration for the making of the note, and further, that the endorsement was made in consideration of the plaintiff undertaking not to prosecute MacNeil on a criminal charge. MacNeil, while in the plaintiff's employ, had apparently misappropriated funds of the plaintiff, and in consequence he was at the time of the giving of the note indebted to the plaintiff in the amount thereof, and the evidence is that the note was taken and the endorsement made to secure such indebtedness. There can, therefore, be no question as to the sufficiency of the consideration for which the note was given. As to the other defence, we are in the dark as to the findings of the trial Judge and as to his reasons for judgment, due apparently to the fact that the Court reporter failed to take any notes of judgment. We simply know that at the close of trial, judgment was given for the plaintiff with costs, and under such circumstances it must be taken for granted that the trial Judge found all facts in favour of the plaintiff necessary to support his judgment.

An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal, because the effect of it is to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case. Such an agreement is none the less illegal though the prosecutor receives no personal benefit under it, and the effect of the compromise is to secure the object for which the prosecution was brought. There is, however, nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute (7 Hals. p. 399).

See also *Ward* v. *Lloyd* (1843), 6 Man. & G. 785. The trial Judge must have found that the defendant failed in his attempt to prove that there was an agreement on the part of the plaintiff not to prosecute MacNeil. I have carefully read over the Appeal Book, and find myself unable to say that the trial Judge was wrong in so finding.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

PIONEER TRACTOR CO. v. PEEBLES.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Brown, JJ. July 15, 1914.

1. CONTRACTS (§ V C—402)—RESCISSION—GROUNDS OF—FOR FRAUD OR MISREPRESENTATION—EXPRESSION OF OPINION AS TO FUTURE EARNINGS.

What purports to be a mere expression of opinion as to the future earnings of a company on the part of its authorized agent may be false and fraudulent so as to constitute a ground for rescission of a contract to subscribe for stock in the company made on the faith of such statements.

Statement

APPEAL by the plaintiff from the trial judgment, *Pioneer Tractor Co. v. Peebles*, 15 D.L.R. 275, rescinding a contract for alleged fraudulent misrepresentations inducing the defendant to make the promissory notes sued upon, the action involving the question as to when the expression of an opinion may constitute ground for rescission.

The appeal was dismissed, NEWLANDS, J., dissenting.

W. M. Martin, for appellant.

J. F. Frame, K.C., for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—This appeal should be dismissed. The learned trial Judge has found on conflicting evidence several fraudulent misrepresentations on the part of the plaintiff company, or its agent Blair, which induced the defendant to make the promissory notes sued on. Certain portions of the defendant's evidence were quoted by counsel for the appellant to shew that defendant did not rely on the prospectus or anything contained in it. On this point I agree with the finding of the learned trial Judge, that the defendant, at the time he decided to purchase the stock for which the notes were given was influenced by and relied on both the statements made in the prospectus and by what Blair, the agent of the plaintiff, stated to him. After a consideration of the prospectus and the correspondence between the parties, I am of opinion that the clause in the prospectus stating that "the thousands interested in this institution guarantee it a thorough financial success," was a representation that there were thousands interested in the plaintiff company as shareholders. This was undoubtedly a false statement.

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The statement with regard to the earnings of the company made by Blair was, it is true, only an expression of opinion, but the statement was false and was known by Blair to be false when he made it. This statement the learned trial Judge finds, and, in my opinion, finds correctly, was relied upon by the defendant and was "a most important fact in influencing the defendant in his decision to take stock" and to make the notes in question. Appeal dismissed with costs.

Newlands, J. (dissenting)

NEWLANDS, J. (dissenting):—I do not think the evidence in this case shews that defendant relied upon the prospectus or anything contained in it. As to the expression of opinion by Blair as to the future earnings of the company, and which the learned trial Judge found was made by Blair and was false to his knowledge, I am of the opinion that any such expression of opinion, in order to avoid the contract, must be in reference to existing facts and not as to something that will occur in the future. I therefore think the appeal should be allowed with costs.

Lamont, J.

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

Brown, J.

BROWN, J.:—I do not agree with the interpretation which the learned trial Judge has put upon the following phrase in the prospectus: "The thousands interested in this institution guarantee it a thorough financial success." This, in my judgment, simply has reference to the thousands of people who, in an agricultural country such as this, are interested in the manufacture of such an engine as the plaintiffs purposed putting on the market.

I am of the opinion, however, that the evidence supports the other findings of the trial Judge, and that such findings afford good ground for the judgment.

The appeal, therefore, should be dismissed.

Appeal dismissed.

KIER v. BENELL.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Elwood, JJ. July 15, 1914.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—DAMAGES—"LIMIT" AS DISTINCT FROM "MEASURE."

Sec. 15 of the Saskatchewan Workmen's Compensation Act fixes the limit and not the measure of damages and where these are shewn to an amount not exceeding $1,800 it is not necessary to take into consideration the estimated earnings during a three year period.

[*Phillips* v. *London & S.W. R. Co.*, 5 Q.B.D. 78, referred to.]

APPEAL from the judgment at the trial in the plaintiff's favour in an action for compensation under Workmen's Compensation Act, raising the question as to the proper method of arriving at the amount of such compensation and affecting merely the amount.

The appeal was allowed.

H. J. Schull, for appellant.

J. F. Hare, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—This was an action for compensation under the Workmen's Compensation Act. As was shewn by the evidence, and found by the learned trial Judge, the only question for decision was the amount the plaintiff was entitled to recover. The learned trial Judge, in my opinion, was wrong in his method of arriving at the amount of compensation. Sec. 15 of the Act places a restriction upon the *amount* of damages or compensation recoverable. It fixes the *limit* and not the *measure* of damages. The principle upon which damages are to be estimated in cases under this Act are the same as in an ordinary action for damages for personal injury. If the damages sustained estimated in accordance with the above stated principle are fixed at $1,800 or any less amount, sec. 15 of the Act has no application. If the damages sustained exceed the amount of $1,800, it will then, be necessary to take into consideration "estimated earnings" during the three years but only in order to determine what amount up to $2,000 can be allowed, but in no case can more than $2,000 be awarded.

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In actions for personal injuries . . . the jury are to award damages not only for the actual pecuniary loss occasioned by the injury but also

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for the pain and suffering of the plaintiff and the diminution of his capacity for the enjoyment of life as well as in respect of the probable inability of . . . the plaintiff to earn an income equal to that which he has earned in the past.

See *Phillips* v. *London & S.W. R. Co.*, (1879), 4 Q.B.D. 406, affirmed 5 Q.B.D. 78, and other cases cited in 10 Halsbury, 323-4.

The plaintiff is, in my opinion, entitled to compensation (1) for his expenses for medical services and hospital bill; (2) for pain and suffering caused by the injury and diminution of his capacity for the enjoyment of life, and (3) for his inability to earn an income equal to that which he has earned in the past. The measure of damages under (3) is the difference between what he might have earned and was likely to have earned if he had not been injured and what he might earn and was likely to earn in his injured state.

In my opinion, the plaintiff is entitled to damages in the amount of $1,800, less $80.60 paid by the defendant on account of the injury. If the defendant is willing to agree to this amount, the judgment appealed from will be set aside and judgment entered for the plaintiff for $1,719.40 and the costs of the Court below and of this appeal. Otherwise the judgment appealed from will be set aside and a new trial ordered, and the defendant will pay the plaintiff his costs of the first trial and of this appeal.

Appeal allowed.

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STEWART v. FARQUHARSON.

Prince Edward Island Court of Chancery, Fitzgerald, V.C.
January 3, 1914.

[See same case *sub nom Farquharson* v. *Stewart*, 1 D.L.R. 581.]

PARTNERSHIP (§ V—20)—*Rights of members as to each other —Accounts—Costs of litigation—Salary of manager—Losses incurred by manager.*]—Application for an accounting in a partnership matter.

C. G. Duffy and *K. J. Martin*, for the complainant.

G. Goudet, for the defendant.

Judgment accordingly.

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Alberta Supreme Court, Scott, J. September 11, 1914.

1. FORCIBLE ENTRY AND DETAINER (§ I—1)—WHAT CONSTITUTES—USING POLICE FORCE WITHOUT DUE PROCESS.

A person alleging ownership by purchase of chattels still in the possession and on the premises of the original owner is not justified, without due process of law, in using police force for the purpose of preventing the original owner from resisting the forcible taking of the chattels by the alleged purchaser.

2. SALE (§ I—1)—WHAT CONSTITUTES—NEITHER CHATTELS NOR EVIDENCE OF CONTRACT DELIVERED—EFFECT—"MERE INTENTION" TO EFFECT AN ILLEGAL OBJECT.

A declaration by the original owner of chattels that he had sold and by the alleged purchaser that he had purchased such chattels, falls short of an actual assignment of the property in the goods where there was no delivery of either documents or chattels to the alleged purchaser, nor was such want of formality cured by a "mere intention" to effect an illegal object.

[*Symes* v. *Hughes*, L.R. 9 Eq. 475, referred to.]

Statement

ACTION in damages for wrongful seizure of chattels.

Judgment was given for the plaintiff with stay pending result of the defendants' counterclaim in a concurrent action.

W. M. Chartres and *A. C. Grant*, for plaintiff.

J. S. Watt, and *A. S. Watt*, for defendants.

Scott, J.

SCOTT, J.:—The plaintiff claims that the defendants seized and took possession of certain live stock and farming implements belonging to him and have refused on demand to deliver same up to him. He claims a declaration that the chattels are his property, an order for the delivery thereof to him or, in the alternative, judgment for their value and damages for their wrongful seizure. The plaintiff and defendant Hedman came from the United States together and located upon adjoining homesteads west of Leduc for which they afterwards obtained patents. Hedman was old and of feeble mind, had no relatives and was without money or property. He appears to have come to Alberta with the intention of spending the remainder of his days with plaintiff and his family, and I have no doubt that the latter thought that, upon the death of Hedman, he would fall heir to his homestead and any other property he might accumulate. Each took up his residence upon his homestead and they appear to have worked together and for each other for many years.

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Plaintiff after obtaining his patent mortgaged his homestead to a loan company. Being unable to provide for the payment of the mortgage he abandoned the property and took up his residence on Hedman's homestead. He induced Hedman to mortgage the latter for $500 and received the proceeds of the loan, a part of which he applied in erecting a house and making other improvements thereon. The stock and implements which form the subject matter of this action were purchased or raised by him. Some of the cattle were afterwards given by him to his daughter and others are the offspring of those so given.

Hedman appears to have made a will in plaintiff's favour. It was in the possession of the latter until Hedman left the premises in September last.

In August, 1911, the plaintiff drew up and signed the following memorandum:—

> To all whom it may concern: That I have this day sold all my personal property consisting of cattle, hogs, chickens and farm implements till Louis Hedman for the sum of $300 and received pay for same.

He also at the same time drew up and procured Hedman to sign the following document:—

> To all whom it may concern that I have this day bought from N. A. Sanders all his personal property consisting of farm implements, cattle, hogs and chickens for the sum of $300 and paid for same.

Both the plaintiff and Hedman deny that there was any such sale or purchase as that referred to in these documents. The plaintiff states that his object in preparing them was to protect the property from the owner of the mortgage on his homestead. He states that he considered the land was worth enough to pay the mortgage and expenses and that he thought that the mortgagees, seeing that his property was protected, would do their best to realize the amount out of the land. These documents were never out of the plaintiff's possession. They were kept by him in the envelope which contained Hedman's will.

Hedman left the homestead in September last. He was then in a feeble condition both mentally and physically. The evidence leads me to the conclusion that for some time previous to his leaving he was neglected by plaintiff and his family, was not supplied with sufficient food or clothing or the medical attend-

ance which appeared to be necessary owing to a serious injury to one of his feet. After leaving the farm he appears to have wandered about the neighbourhood in a dazed condition. Searching parties were organized and he was found in the woods in a helpless condition and taken to the house of defendant Ohrn, where he has since remained. He subsequently gave Ohrn a power of attorney under the authority of which he advertised the property in question for sale by public auction and a short time before the day fixed for the sale he, accompanied by a sergeant of the R.N.W.M. Police, went to the Hedman place, which was then occupied by the plaintiff, and removed the chattels which he afterwards sold.

It was stated at the trial, but my notes do not shew that it appeared in the evidence, that it was upon the solicitation of the defendants or their solicitor that the police officer was present. It was also stated that the reason his presence was requested was that they feared a breach of the peace by the plaintiff when they went to take the cattle and, in support of this, there was produced at the trial a notice written by the plaintiff some two years before the sale, to a son of Ohrn who it appeared was paying attention to a school teacher then residing with the plaintiff. The notice was as follows:—

> Any young men that have any business engagements with the party living in my house on sec. 24 had better attend till that in the day time, for if I find them loafing around there after dark I may waste powder that I otherwise should use on wolves.

I doubt whether this notice could reasonably be construed as a threat on the part of the plaintiff that the plaintiff would use violence towards the defendants or any other person who came to his premises at reasonable hours and on a legitimate errand. I am satisfied that the defendant procured the attendance of the police officer in order to intimidate the plaintiff and thus prevent him from resisting their attempt to take possession of the chattels and I have no doubt that the presence of the police officer had the intended effect. The plaintiff being in possession of the chattels and claiming to be the owner was entitled to resist in every reasonable way what I think should be held to have been a forcible dispossession by the defendants and he doubtless

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would have done so had he not been intimidated by the presence of the police officer. Had he done so the defendants, if they were entitled to possession, should have obtained it by due process of law. The use of the police force for the purpose for which the defendants used it in this case cannot in my view be too strongly condemned.

The only ground of claim by the defendants that Hedman was the owner of the chattels in question is that the documents referred to constitute an assignment by plaintiff of his interest in them to Hedman and it is contended that, as plaintiff admits that his object in making the arrangement was to defeat or delay his creditors, the Courts will not assist him in setting it aside, even though it is shewn to have been made without consideration.

I doubt whether the documents referred to can be construed as an assignment of the property. They are merely a declaration on the part of the plaintiff that he had sold and on the part of the defendant that he had purchased and they appear to me to fall short of an actual assignment of the property in the goods. Even if they constituted an assignment it was not carried into effect as it is shewn that the documents never left the possession of the defendant. In *Taylor* v. *Bowers*, 1 Q.B.D 291, 46 L.J.Q.B. 39, where the possession of the goods was actually delivered to the assignee under an assignment made for the purpose of defeating creditors it was held that the sale was not carried out. In *Symes* v. *Hughes*, L.R. 9 Eq. 475, it was held that, where the purpose for which the assignment was given was not carried into execution and nothing done under it, the mere intention to effect an illegal object when the assignment was executed did not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it and this doctrine was quoted with approval by Lord Coleridge in *Taylor* v. *Bowers*, *supra*, and by Taylor, C.J., in *Mulligan* v. *Hubbard*, 5 Man. L.R. 225. I must, therefore, hold that Hedman was not the owner of the chattels in question and that the plaintiff is entitled to judgment against the defendants for the value of the portion thereof of which he was the owner.

It is admitted by the plaintiff that eleven head of the cattle sold by the defendants were the property of his daughter. I

cannot see that he is entitled to claim for them in this action. The evidence does not disclose which of those sold were her property and I, therefore, cannot determine their value.

As between the parties to the action I find the values of the cattle sold at the sale which are claimed by the plaintiff, are as follows:—

Roan cow, 7 years old	$60.00
Red and white cow, 3 years old	45.00
Spotted steer, 2 years old	45.00
Roan heifer, 1 year old	45.00
Red heifer, yearling	30.00
Red heifer calf, 6 months	18.00
Red and white heifer, 6 months	18.00
Spotted cow, 8 years old	50.00
Red cow, 5 years old	50.00
Roan cow, 4 years old	55.00
Roan cow, 3 years old	55.00
White heifer, 2 years old	60.00
Spotted steer, 18 months	45.00
Heifer calf, 4 months old	10.00
Red and white heifer, 3 years old	60.00
White heifer, 2 years old	45.00
Red heifer, 1 year old	30.00
Red and white steer, 4 months	10.00
Roan heifer (age not stated)	30.00
Steer, 2 years old	45.00
	$806.00

It is shewn that the defendants took possession of and sold in addition to the cattle a cultivator which I find was worth $40 and a stump puller worth the same amount. The evidence points to the conclusion that other chattels were taken and sold, but there is no direct evidence to that effect and if any others were taken there is no evidence as to their value.

In addition to the cattle above enumerated the defendants sold two oxen which plaintiff admits were the property of Hedman and nine other head which the plaintiff does not claim for. The evidence does not disclose which, if any, of the cattle which are the property of plaintiff's daughter are included in the above list of those claimed by the plaintiff. Unless the parties agree upon that question there will be a reference to the clerk to ascertain whether any and, if so, which of them are the property of

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plaintiff's daughter and the values I have found of such as are included shall be deducted from the amount I find the plaintiff entitled to recover.

Subject to any such deduction I give judgment for the plaintiff against both defendants for $886, made up as follows:—

Cattle	$806
Cultivator	40
Stump puller	40
	$886

I disallow any claim for damages over the value of the chattels which defendants are shewn to have taken possession of.

In view of the plaintiff's conduct towards defendant Hedman I do not award him any costs of the action.

It was stated at the trial that the plaintiff had commenced another action against the defendant in which the latter has counterclaimed for a considerable amount. I direct that if the defendants give security to the satisfaction of the clerk for the payment of the judgment recovered by the plaintiff in this action, execution herein shall be stayed until after the determination of defendant's counterclaim in that action and that, in the event of his recovering judgment for a balance in that action, the amount thereof shall be set off against the plaintiff's judgment in this action.

Judgment for plaintiff.

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CHESLEY FURNITURE CO. LIMITED v. KRUG.

Ontario Supreme Court, Kelly, J. October 20, 1914.

1. BANKS (§ VIII C—188)—STATUTORY SECURITY—RIGHT OF BANK TO SELL OR ASSIGN—SEC. 88.

There is vested in a bank no implied right to assign the securities which it is specially privileged to take under sec. 88 of the Bank Act, R.S.C. 1906 ch. 29.

Statement

MOTION by the plaintiffs for an interim injunction restraining the defendants from interfering with the plaintiffs' possession of factory premises and goods in the town of Chesley.

The motion was granted.

G. H. Kilmer, K.C., for the plaintiffs.

KELLY, J.:—As appears from the affidavit of their secretary-treasurer and manager, the plaintiffs, in the early part of September, 1914, were indebted to the extent of over $34,000 in respect of advances made to them by the Bank of Hamilton, the indebtedness having been guaranteed to the bank by the defendant Krug and one Ankermann. The plaintiffs also gave the bank security under sec. 88 of the Bank Act, R.S.C. 1906 ch. 29, and by collateral agreements given at the same time. The defendant Krug says that on the 8th September, 1914, he paid the bank $34,711.97 for an assignment of the debt and the securities held by the bank in connection with it. Soon after this, he, through his co-defendant Biehm, acting on his behalf, took possession of the plaintiffs' factory and goods, and proceeded to carry on the business, claiming a right to do so by virtue of the securities so assigned to him.

For present purposes the question of the manner by which possession was obtained, beyond the mere mention that it was against the will of the plaintiffs, and the fact of efforts having been made to bring about a settlement, is not material.

The defendant Krug has continued in possession, and has to some extent at least been carrying on the business; he has also made sales of goods of the plaintiffs. The substantial ground of the application is that Krug had no right or power to take possession; that, even if the bank possessed such power, it was not transferable to Krug. Section 88 extends, in favour of banks, in cases coming within its purview, the right to take the security therein specified without requiring registration, which in certain other cases is necessary to give priority over subsequent purchasers, transferees, mortgagees, etc.; and, being a statutory extension of the powers otherwise possessed by banks, the benefit of such enactment should not be extended beyond what the language of the statute in its strictest interpretation confers. The right of a bank, therefore, to assign these securities which it is so privileged to accept must be only such as sec. 88 expressly gives. The rights and powers given by this section must not be confused with the rights arising under other sections of the Act which deal with securities of a different character, and in respect to which the Act specifically gives the bank powers not expressly

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given in the case of securities taken under sec. 88, and not necessarily incident to the possession of these securities.

The position of the bank holding security under sec. 88 was fully considered by the learned Chief Justice of the King's Bench in *Re Victor Varnish Co.*, 16 O.L.R. 338, in an appeal from the judgment of the Master in Ordinary. It was there held that this security is not assignable by the bank so as to transfer the special lien or security to a third person, and that a guarantor to a bank which holds such a security for the debt guaranteed is not subrogated to the right of the bank in the security on payment of the debt by him.

It was urged by counsel for the defendants that that case has no application here. The facts in the two cases are so nearly identical that I see no such ground of distinction as to justify me in ignoring the conclusion there arrived at, or in refusing to restrain the defendants from holding possession of and operating the plaintiffs' factory and from carrying on their business. This is altogether apart from the admission of debt on the part of the plaintiffs, or the fact that Krug may be entitled to payment from the plaintiffs. I am dealing only with the remedy which at this stage he is entitled to apply. The application should be granted, and the defendants restrained as asked until the trial.

The defendant Krug says, and it is not denied, that he has paid the bank the amount due by the plaintiffs. As a means of protection to him, and without prejudice to any other rights he may have, the plaintiffs, while the defendants are so restrained, should keep an account of the operations of the business, and pay into the bank from time to time to the joint credit of themselves and Krug the proceeds derived from such operations in excess of what is necessary to pay the workmen and employees. This term is, I understand, acceptable to the plaintiffs; and, in view of what appears in the material, it is not an unreasonable one, though not necessarily following from the granting of the injunction.

Costs of the motion reserved to be disposed of by the trial Judge.

Motion granted.

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Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.
October 21, 1914.

1. DAMAGES (§ III A—75)—SALE—FUTURE DELIVERY—NON-ACCEPTANCE—BUYER'S FAILURE TO COMPLETE PURCHASE—QUANTUM.

The damages for non-acceptance of steers on a sale contract for future delivery and under which the seller was meanwhile to feed the steers, is properly estimated on the basis of the difference in the price fixed by the bargain and the market price at the time of the breach.

Statement

APPEAL from the judgment at the trial of Harvey, C.J., dismissing the plaintiff's claim for non-delivery and allowing the defendant's counterclaim for non-acceptance of steers, under a sale contract, the parties being at issue as to whether the contract called for "fat" (or "beef") cattle; the quantum of damages also being involved.

The appeal was dismissed.

O. M. Biggar, K.C., for plaintiff, appellant.
G. B. O'Connor, K.C., for defendant, respondent Watts.
H. H. Parlee, K.C., for defendant, respondent Fraser.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the judgment of the learned Chief Justice at trial without a jury directing that the plaintiff's claim be dismissed with costs and that the defendant Fraser recover on his counterclaim $844.45 with costs. The Court is agreed that the appeal should be dismissed with costs. The claim was for non-delivery of 150 fat steers on account of which the plaintiff had paid $1,000. The counterclaim was for non-acceptance of the steers which were sold at a price lower than the price the plaintiff had agreed to pay. A number of questions of law were discussed upon the argument of the appeal, but it seems to us that our decision depends really upon the question of the correctness of the findings of fact by the trial Judge.

The parties practically agree that a sale of 150 steers out of 153 or 154 was agreed upon between the plaintiff and the defendant Fraser on February 20, for 7½ cents a pound; delivery

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to be made between the 1st and 4th April and weighing to take place at the Vegreville town scales; the defendant to feed the steers in the meantime. The substantial points of fact in dispute are: that the plaintiff claims the steers were to be "fat" or equivalently "beef" cattle when delivered and that when the time for delivery came they were not in that condition, owing to want of proper care and feed on the part of the defendant. The defendant denies that there was any agreement that they were at the time of the sale or were to be at the time of the delivery fat steers, and says that the plaintiff—and this is admittedly so—had knowledge of the condition of the steers at the time of the sale, that the defendant gave them proper care and feed and that at the time fixed for delivery they were in good condition, so good that they in fact fulfilled the description of fat steers. On evidence which was conflicting, though he acquits either side of any intentional mis-statements in their evidence, the learned Judge finds in favour of the defendants. He says that it was no part of the agreement that the steers should be fat at the time of delivery. The learned Judge also finds that the defendant fed and cared for the animals properly. In the absence of an agreement that they should be fat steers at the time of delivery it seems clear enough that the defendant's only obligation was to feed and care for them as a prudent farmer would his own. The finding of the trial Judge is in effect that he fulfilled this obligation.

We see no reason for disturbing these findings and they justify a judgment for the defendant. In addition to this there is evidence which seems to us satisfactory that the price 6½ cents at which the steers were sold immediately after the date of delivery was then the market price for steers in the condition in which these steers were at the time of the bargain. The damages have been properly estimated on the basis of the difference in the price fixed by the bargain and the market price at the time of breach.

Appeal dismissed.

VANCOUVER MACHINERY CO. v. VANCOUVER TIMBER AND TRADING CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. June 2, 1914.

1. DAMAGES (§ III A—70)—QUANTUM—SALES OF PERSONALTY—SELLER'S FAILURE TO DELIVER—NATURAL CONSEQUENCES OF BREACH—CONTEMPLATION OF PARTIES—REMOTENESS.

For delay in delivery of goods under a contract only such damages as were the natural consequences of the breach, or such as might reasonably be supposed to have been in the contemplation of both parties at the time the contract was made, can be awarded, unless the special circumstances which would enhance the damages were communicated to or known to the other party.

[*Vancouver Machinery Co.* v. *Vancouver Timber & Trading Co.*, 17 D.L.R. 575, reversed; *Hadley* v. *Baxendale*, 9 Ex. 341, 23 L.J. Ex. 179, applied.]

2. ESTOPPEL (§ III G—85)—BY LACHES, SILENCE OR ACQUIESCENCE—RECEIVING BILLS FOR RENT OF ENGINES—VERBAL REPUDIATION SUFFICIENT WHEN.

A contract to pay rental for a chattel is not created by the owner's notice to its possessor wrongfully detaining it that if he does not return it by a specified time he will be charged rent for it, unless such proposal is assented to by the latter.

[*Vancouver Machinery Co.* v. *Vancouver Timber & Trading Co.*, 17 D.L.R. 575, reversed; *Smith* v. *Hughes*, L.R. 6 Q.B. 597, 40 L.J.Q.B. 221, referred to.]

Statement

APPEAL from the judgment of Murphy, J., in plaintiff's favour in *Vancouver Machinery Co.* v. *Vancouver Timber and Trading Co.*, 17 D.L.R. 575, an action for the rental of certain engines.

The appeal was allowed, dismissing the action.

Hart-McHarg, for appellant, defendant.

E. Burns, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The evidence sufficiently shews that the defendants received the letter of September 15, 1911, which sets forth the terms of the contract as the respondents understood them. The receipt thereof by the appellants is not specifically admitted, but they do admit receipt of the letter of the 20th of the same month referring to and confirming the letter of the 15th. I think, therefore, it may properly be inferred that the first letter was received.

Now, with these letters before them the appellants took delivery of the new engine and made no objection that the letters

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did not correctly set forth the contract. In these circumstances I think the letter of September 15 must be regarded as setting forth the true and only terms of the contract, and that the appellants' evidence that the respondents' agent Lindsay made promises which go beyond those terms cannot be received because to admit it would be to add to the contract which was reduced to writing. The old engines were to be taken by the respondents at a valuation of $1,000. The transaction was virtually a sale to the appellants of a new engine at the price of $3,600, and the purchase by the respondents of the old engines at the price of $1,000. No time is fixed by the contract for delivery. It must, therefore, be taken that delivery was to be made within a reasonable time.

The respondents' subsequent correspondence shews that October 24, 1911, would be the proper limit of that time. Delivery not having been made of the old engines at that date, respondents, following an alleged interview of their agent Lindsay with appellants and statements made by Lindsay to them, which are inadmissible, made a demand upon the appellants for rentals of $150 per month for the detention of the two engines. This demand was made by letter dated January 11, 1913. There is no evidence of the arrangement suggested therein. On or sometime after the receipt of that demand, the appellants' manager over the telephone repudiated it and claimed that Lindsay had promised that they might retain the engines until they completed the work they were then engaged upon.

I have already intimated that evidence of Lindsay's promise was inadmissible, but that does not affect the question I am now considering, namely, whether the demand for rent of the engines and the failure of the appellants to repudiate in writing their liability to pay rent can be taken as counsel contended to amount to acquiescence and thereby created a contract by estoppel to pay such rent. I think it quite clear that no such contract can be implied from the evidence. If it could, then the judgment below would be right. The case is then reduced to one for damages for breach of the contract to deliver the engines on October 24, and the retention of them until the 18th June following, when they were delivered and accepted.

The salient facts may be briefly summarised as follows: One of the engines was used by appellants during that period. There is no evidence that the engines were not in as good condition when delivered as they were at the date of the sale. One would expect some depreciation by wear and tear, but no evidence was directed to that question. They were promptly disposed of after delivery, whether by sale or by hire does not appear. The testimony of Walkem, the only sworn evidence, indicates that they were disposed of by sale, not by hire. While Walkem says that part of the business of his company was to let engines to hire, there is nothing to shew that the appellants were aware of this when the contract was made. To the appellants the respondents appeared to be vendors of engines, taking old engines in part payment on occasions. What the respondents proposed to do with the old engines the appellants were not apprised of. There was no fall in the market price of old engines during the period of detention. There is no suggestion that a sale was lost by reason of the delay. In short, the respondents' case is that they could have rented these engines at $150 per month had they had them, and they want that sum either as rental or as damages.

On the doctrine of *Hadley* v. *Baxendale* (1854), 9 Ex. 341, 23 L.J. Ex. 179, only such damages as were the natural consequences of the breach, or such as might reasonably be supposed to have been in the contemplation of both parties at the time the contract was made, could be awarded unless the special circumstances which would enhance the damages were communicated to or known to the other party, so as to entitle the Court to say that damages arising therefrom should be deemed to be within his contemplation.

Unless the appellants can be held in damages for the loss of prospective rentals no damages are shewn to have been suffered by the respondents by reason of the late delivery or detention of the goods. The loss of the user of the engines for that purpose—a user of which the appellants had no reason even to suspect—is the only loss the respondents have endeavoured to prove. It cannot, in my opinion, be implied from the evidence that such a loss was in contemplation of either party, and certainly not in

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that of the appellants when the bargain was made. The fact that a demand for rent was made upon them afterwards does not imply that the respondents were in the business of renting engines or that the non-delivery of the engines was depriving the respondents of profits by way of rentals which they might have obtained. In saying this I do not mean to be understood as deciding that such knowledge on the part of the appellants would have rendered them liable in damages for the rentals claimed. That is a matter which I am not called upon to consider. It is sufficient here to say that assuming that would follow, that case has not been made out here.

I would allow the appeal with costs, here and below.

Irving, J.A.

IRVING, J.A.:—The plaintiffs allege an agreement to pay rent, and alternatively, damages for non-delivery or detention from October, 1911, to June, 1912. The agreement, if any, was made on the part of plaintiffs by a Mr. Lindsay, who died in December, 1911, and on the part of defendant by Mr. Buck, who left the defendants' employ in December, 1911.

The learned trial Judge came to the conclusion that an agreement for rent had been made, basing his decision on the defendants' failure to repudiate the statement made in plaintiffs' letter of January 11, 1912, to the following effect:—

> As arranged, we are charging you rent on these two engines until they are delivered to us.

The foundation of his judgment is that the defendants are now estopped by their own negligence from proving the true facts of the case.

With all deference to the learned trial Judge I think if he had kept the collateral issue that there was negligence on the part of the defendants whereby the plaintiffs were induced to alter their position, wholly separate from the main issue, the result would have been different. This I think will be apparent when the evidence as to the main issue is considered.

Of course, if the collateral issue were determined against the defendants, the letter of January 11, 1912, would fix the defendants with responsibility, but the fact that Haswell telephoned the plaintiffs that there was no such agreement seems

to me to prevent the doctrine of estoppel by applying negligent acquiescence. The defendants, I agree, ought to have written; that was the safe and proper way, but there was in fact a repudiation. When that was made is not quite clear. The natural inference would be right after the receipt of the letter. Counsel for plaintiff suggested to Mr. Haswell (p. 39), that it was later, but Mr. Haswell does not accept the suggestion, nor did counsel press the matter further. Mr. Haswell says that on the day of the receipt of that letter, he knew the arrangement that had been made between Buck and Lindsay.

The probabilities are that the telephone message was sent immediately on receipt of the letter. Mr. Haswell says he thinks he spoke to Mr. Walkem, the manager. Mr. Walkem, though called in rebuttal immediately after Haswell's cross-examination, was not asked to deny this statement. It is not at all improbable that on the protest being telephoned it was suggested that the matter should be left open till Mr. Buck, who was then out of town, could be consulted. I do not think there is clear ground upon which the doctrine of estoppel should be based.

Then turning to the main issue, we have the letter of January 11th, 1912, followed up by numerous bills and not objected to. This is certainly evidence by informal admission—such as is acted upon frequently. The defence is an allegation of prompt repudiation by telephone of the suggested agreement, and the denial on oath by Mr. Buck of any such agreement. Unless the learned trial Judge was prepared to say that he could not accept Mr. Buck's testimony, I think the defendants ought to have succeeded. The reasons for judgment do not shew that he formed any such opinion as to Mr. Buck's credibility.

The plaintiff's manager was allowed to give in evidence certain statements made to him by Mr. Lindsay when the latter made his report as to the contract made with Buck. The admissibility of this hearsay evidence was questioned. But without discussing that point, assuming it was admissible — of what weight is it against the sworn testimony of Mr. Buck, who also had made a report to Mr. Haswell? The claim for damages would fail if Mr. Buck's statement had been accepted. I think it should have been accepted. But whether it is accepted or not I do not

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see that the plaintiffs have established their claim for damages. The engines have been returned to them, and no demand was made for their earlier return.

I would allow the appeal.

MARTIN, J.A.:—In my opinion the judgment cannot be supported. There was no arrangement originally to pay rent for the two engines, and a contract to pay rent cannot be built up by an owner of a chattel notifying one who has it in his possession that if he does not return it by a specified time he will be charged rent for it; the owner's remedy for wrongful detention cannot thus be transformed into a right to collect rent.

But the plaintiff's claim is put alternatively as one for the use of the engines since the date of refusal to deliver them up according to agreement, and reliance was placed at the trial (see Appeal Book, *e.g.*, pp. 6, 9, 26) on the written contract contained in the two letters, written at Vancouver where the parties had their offices, on 15th and 20th September, 1911, which after reciting the purchase by the defendant company of a Washington engine says that "you will give us" the two old engines in question which the defendant had in use up at Lake Buntzen. No time or place was fixed for this "giving" and this looseness and uncertainty makes the matter awkward to deal with. The plaintiff delivered the Washington engine in October, 1911, but the two old engines were not "received," as Walkem puts it (A.B., pp. 10, 11), till about June 18, 1912, though he says he "expected" to get delivery of them "within a reasonably short space of time, say, within two weeks," but as he did not get them he sent a bill and letter to the defendant company on 10th-11th January, 1912, for $300 as rent of the two engines from October 24 to December 24, *i.e.*, two months. Haswell, the manager of the defendant company, says that on getting this bill he telephoned to the plaintiff company's office repudiating any liability for rent and saying that the arrangement with Lindsay was that no rent was to be charged for the engines; he thought he says he was speaking to the plaintiffs' manager, but is not certain.

The plaintiff continued to send in bills, without response ex-

cept a letter of May 15, 1912, from the defendant company asking Walkem to call and see Van Alvensleben, who "would like to see you *re* the rental of donkeys (engines) at Lake Buntzen," and Walkem acknowledged it on May 22, and called on Von Alvensleben by appointment, as he says, but he was out, and after waiting an hour went away, so nothing came of it, and after further bills and ineffectual correspondence the action was begun on April 4, 1913.

We were not told where the new engine was delivered to the defendant nor where the plaintiff received the two old ones, and there is no evidence of any demand for delivery or possession of the old ones in October, 1911, after the "reasonable time" of two weeks had expired, nor afterwards, simply the sending in of said bill and letter for rent on January 10, 11, 1912. This three months' delay and silence is a very unsatisfactory circumstance and lends colour to the truth of Haswell's notification that the defendant was to have the use of the engines rent free. I am unable to see upon what principle the plaintiff company can recover in the peculiar circumstances. It simply chose to let its property remain in the defendant's possession on a claim for rent without any foundation therefor, instead of promptly demanding possession, and delivery in Vancouver (if, indeed, it was entitled to that) when it would have been in such a position that at least would have compelled the defendant to have defined its position. The statement in the letter of January 11, 1912, that "as arranged we are charging you rent on those two engines until they are delivered to us" is not only not supported by any evidence, but is denied by Buck and Lindsay, and not only that, but the introduction of that statement and the reliance upon the "arrangement" it sets up permits the defendant company in meeting it to now shew (assuming it could not have done so in relation to the original written contract of 15th-20th September) what the true arrangement was, *viz.*, that which Lindsay made with Buck—that the defendant should have the use of the two engines at the lake rent free till the job on hand there was finished: as was said in *D'Avignon* v. *Jones*, 32 Can. S.C.R. 650, (1902), 9 B.C.R. 359, at 362:—

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> The plaintiff having elected to make this evidence relevant to the issue . . . the defendants were at liberty to contradict it.

If this contention of the defendant is true in fact it would be at once a complete answer to the claim for rent and a justification of possession, and in my opinion the evidence of Buck and Haswell is sufficient to establish said contention, and, therefore, the appeal should be allowed and the judgment set aside.

I need only add, to shew that I have not overlooked the point, that no question in reality arises as to the authority of Lindsay to make the exchange of engines because the plaintiffs have by their actions all through adopted the bargain he made, and also do so now by bringing this action thereupon. And it is clear that the conversation between Lindsay and his managing director as to Lindsay's bargain with the defendant company should not have been admitted in evidence.

Galliher, J.A.

GALLIHER, J.A., agrees in allowing the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal by the defendants (appellants) from the judgment of the Hon. Mr. Justice Murphy—judgment being entered for the sum of $1,008.10.

The action was one brought for the recovery of moneys claimed to be due by the defendants to the plaintiffs for the hire of a roader and yarder from October, 1911, to June 18, 1912, at $150 per month, and alternatively the same amount for conversion of the roader and yarder, and failure on the part of the defendants to deliver them up to the plaintiffs, and a claim for goods sold and delivered, and repairs to an amount of $532.30—a credit of $500 being given—the proceeds of a draft of September 30, 1912—the total claim being $1,203.25.

The learned trial Judge in finding $1,008.10 as being due to the plaintiffs, did not allow the claim in full for the hire of the yarder, it not being used and the amount claimed being deemed excessive, allowing only $25 per month for it, and the full amount claimed for the roader.

The evidence cannot be said to be at all clear, and possibly at the outset of the transaction it was never intended that the roader and yarder should have been retained for the time they

were, it being a term in connection with a sale of an engine by the plaintiffs to the defendants that the roader and yarder should be delivered to the plaintiffs as part of the consideration, and unfortunately owing to the death of Lindsay, an employee of the plaintiffs (a travelling salesman) it is the more difficult to arrive at what the real understanding was as between the parties.

The contract of sale is set out in the letter of September 15, 1911, which reads as follows:—

15th Sept., 1911.

Messrs. Vancouver Timber & Trading Co., City.

Attention Mr. Buck.

Dear Sirs,—We beg to confirm arrangement made with you and our Mr. Lindsay for the purchase of one 11 x 14 Washington Iron Works road engine now at Saturna Island. For this engine you will give us one 10 x 12 Albion Iron Works roader, one 9 x 10 single drum Vancouver Engineering Works yarder, and twenty-six hundred dollars ($2,600), six hundred dollars cash and the balance in three and six months, carried on a three months' note, interest at 7% per annum.

It is understood that the wire rope that is now on this engine goes with it as well as the sled, and the wire rope and sleds on the engines we are getting also goes with them.

Yours truly,

Dict. "G. A. W." G. A. W.

Provided engine is in good working order.

P. W. Lindsay.

There would appear to have been no contest as to the terms of sale of the engine—the whole action in so far as same was contentious revolved around the failure of the defendants to make delivery to the plaintiffs of the roader and yarder referred to in the letter of September 15, above set forth.

It would appear that the delay in making delivery of the roader and yarder was consequent upon the defendants having use for the roader in the logging operations the defendants were carrying on, and it was contended by the defendants that Lindsay, who effected the sale, made an arrangement with Buck, the secretary of the defendants, that the defendants were to keep the roader until the defendants had no further use for it, and that as to the yarder it was worthless to the plaintiffs and could be delivered to the plaintiffs at the same time as the roader would be delivered.

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One circumstance that would seem to indicate that an arrangement such as Mr. Buck asserts was made, arises from the fact that apparently the roader was necessary for a time in the carrying on of the defendants' operations, and it does not seem reasonable that any arrangement should be made which would mean the cessation of the defendants' logging operations.

Further, the letter of September 20, 1911, dealing with the delivery of the newly purchased engine or roader does not deal with the taking delivery of the other roader and yarder—as if they were to be at once delivered to the plaintiffs, why was it not stated therein that at the time of the delivery of the newly purchased engine or roader, delivery would be expected of the roader and yarder referred to in the letter of September 15, which were to be received in part payment. The letter of September 20, 1911, reads as follows:—

Sept. 20th, 1911.

Messrs. Vancouver Timber & Trading Co.,
City.

Dear Sirs,—We beg to confirm arrangement made with you by our Mr. Lindsay as *per* our letter of the 15th inst. We have two other engines at Saturna Island and would like to make arrangements to load them on scow at the same time you are taking delivery of the 11 x 14 roader.

If you will please let us know when you are ready to take delivery of this engine we would be glad to share the expense with you in having them all loaded.

Yours truly,

Dict. "G. A. W." G. A. W.

It is evident that matters were not very clear as to the business transactions entered into by Mr. Lindsay and after his death the managing director of the plaintiffs was endeavouring to, as he says in his letter of January 9, 1912, "collect the threads of the outside business as left by Mr. Lindsay when he died December 31st."

On January 10, 1912, the plaintiffs issued and sent to the defendants that which is called "Invoice No. 5693, our Order No. 5295," reading as follows:—

Vancouver Machinery Depot, Ltd.
Vancouver, B.C., January 10th, 1912.

Sold to Vancouver Timber & Trading Co.
City.

To rent on engines as follows:—

Oct. 24th to Dec. 24th, 1911.

1 10 x 12 Albion engine, 2 months at $100 ..... $200.00
1 9 x 10 single drum engine, 2 months at 850 ..... 100.00
$300.00

This invoice or account and the charge made therein was not in accordance with any agreement between the parties—and all subsequent charges by way of rent have no foundation based upon any agreement.

That there was no agreement is well demonstrated by the letter of the plaintiffs to the defendants of September 25, 1912, reading as follows:—

Vancouver, B.C., September 25th, 1912.

Vancouver Timber & Trading Co.,
744 Hastings Street West,
City.

Attention Mr. Alvensleben.

Gentlemen,—You asked the writer to call and see you about our account of $1,631.70 against you.

We believe your cause of complaint is that there was a single drum donkey which you had of ours, but which you said you could not use, nor could you get it out of the woods, because you could not take it out until you were through with the roader.

We do not know how this concerns us. The circumstances of this transaction were, that we sold you an 11 x 14 road engine, and under the arrangement with your Mr. Buck, we were to take back from you 1 Albion 10 x 12 road engine, and 1 9 x 10 Vancouver single drum yarder. When you got the 11 x 14 road engine up there you decided that it was impossible for you to release the 10 x 12 roader at once, and you kept this machine up there.

It was not our fault that it was impossible for you to get the roader out. Every day you kept these two engines we lost money, as the moment they arrived in Vancouver we overhauled them and rented both of them at the price we charged you.

We are, however, willing, in this particular case, to make you a rebate of one-half the amount of rent we charged you for the 9 x 10 single drum. If this is satisfactory, we will have our accountant write you a credit.

As the end of the month is the end of our financial year, please give this matter your immediate attention.

Yours truly,
For Vancouver Machinery Depot Ltd.
Geo. A. Walkem,
Managing Director.

An agreement to pay rent is in no way established, but the plaintiffs of their own motion attempt to construct that situation which the above letter, it seems to me, completely displaces.

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Then there is evidence that the rental charge first referred to in the letter of January 11, 1912, to the defendants was objected to. Haswell, the manager of the defendants, stating that he telephoned the plaintiffs' office and speaking to some one there (the name of the person is not stated) "I told him that our arrangements had been with Mr. Lindsay that there was no rent to be charged for these engines."

In my opinion the evidence given by Walkem, the managing director of the plaintiffs, of what Lindsay told him, upon which is founded the charge for rent, was not admissible: see Phipson, 5th ed. (1911), at 272:—

> The acts must have been done by the declarant and not by third persons; however, James, L.J., held that the entry must relate not to something said, learned or ascertained by the declarant, but to something done *by* or *to* him, and in *Lyell* v. *Kennedy*, 56 L.T. 647, Bowen, L.J., approved this statement. See also *Sturla Freccia*, 5 App. Cas. 623, 50 L.J. Ch. 86; and *The Henry Coxon*, 3 P.D. 156, 38 L.T. 819.

But even that statement as sworn to by Walkem, if it were admissible, really establishes nothing, as apparently at best it was only Lindsay's instructions—not instructions given by the defendants—upon which the rent was charged. It is not shewn who was seen in the office of the defendants—and any agreement to pay rent upon the part of the defendants is unqualifiedly denied.

Undoubtedly there was an absence of continued denial—to the continued rendering of accounts for rent; but the persistence in an unauthorized claim, to my mind, cannot in law establish the right to moneys never agreed to be paid, and when the inference from all the surrounding facts is against any agreement to pay rent, I know of no principle of law which will impose any obligation to pay that which was never agreed to be paid.

One can understand that very often the sales agent is ready and willing to make all kinds of convenient agreements to effect a sale and perhaps at times it might be said he exceeds his authority—when the indoor management or limitation of authority is shewn—but can that be imposed against a purchaser to whom limitation of authority is not brought home—especially when we

are away from the general rule that a sale by an agent unless otherwise authorized is to be made for cash. Here it was part cash and part the delivery of the roader and yarder, but no time fixed for their delivery. No doubt in the absence of agreement the delivery ought to be within a reasonable time; but that reasonable time must be a reasonable time properly considering the circumstances. The defendants were engaged in logging operations at the time, and the season of the year has also to be taken into consideration. I cannot say that considering all these circumstances the plaintiffs can insist upon the payment of rent unless that contention is satisfactorily made out, not by inference, but by agreement.

Counsel for the respondents cited *Howard* v. *Chapman* (1831), 4 Car. & P. 508-513, 34 R.R. 814. The head-note is:—

> A traveller who receives orders for goods from his employer's customers in the country is authorized to receive payment for them in money, but not in other goods.

This is undoubtedly the law unless there be other authority, but here we have the terms agreed to by the principals evidencing a departure from the rule.

At best the plaintiffs' contention can only be said to be a claim for rent in an alleged case of bailment, and I cannot see that any such case has been made out. In Halsbury's Laws of England, vol. 1, sec. 1119, we have the following as being a statement of the law:—

> The hirer must pay the rent agreed upon for the use of the chattel hired; and if the hiring be for a definite period, he is not discharged from his obligation to pay the price for the full period, by returning the chattel to its owner before the expiration of that period. But if the owner on receiving the chattels back acquiesces in their return as ending the contract, he cannot afterwards maintain an action against the hirer upon the agreement; the voluntary reception amounting to rescission of the contract, unless a fresh agreement to pay for such use as has been enjoyed by the hirer can be implied.

In the present case, in my opinion, there is no sufficient evidence to establish a bailment or agreement to pay rent, and the roader and yarder have been received by the plaintiffs—it is true some nine months after the sale transaction. If, however, these two articles of machinery should have been delivered

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immediately—or within a reasonable time—was it not open to the plaintiffs to have demanded delivery thereof, and failing delivery and wrongful detention thereof an action of replevin might have been brought?

This course was not adopted, but it is attempted to establish a claim for rent, and alternatively by amendment of the statement of claim. A claim for conversion is made after receipt of the goods, the action also being brought after the receipt of the goods.

Smith v. *Hughes*, 40 L.J.Q.B. 221, L.R. 6 Q.B. 597, was cited by counsel for the respondents as supporting the judgment appealed from, but with deference I am of the opinion that it falls far short of lending any support. Blackburn, J., at p. 227, said:

> I apprehend that if one of the parties intends to make a contract, on one set of terms, and the other intends to make a contract on another set of terms, or as it is sometimes expressed, if the parties are not *ad idem*, there is no contract unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke*, 18 L.J. Ex. 114.
>
> If whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief entered into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to that party's terms.

In the present case we have no such conduct as entitles a Court to hold that there was any agreement to pay rent.

If this action were to be looked at as one of trover and detinue—the goods being returned before action brought, which is the fact in the present case, the defendants would be entitled to judgment unless the plaintiffs proved special damage by being deprived of them during the wrongful detention.

In *Heriot* v. *The London and North Western Railway Co.* (1879), 48 L.J.Q.B. (C.A.) 545, there had been a conversion, but in the result what had occurred was equivalent to the return of the goods, and it was held that under the circumstances of that case, although there had been in point of law a conversion, the plaintiffs were entitled to no damages. Bramwell, L.J., at p. 547, said:—

> I take the law to be that you cannot purge a conversion. Therefore if a conversion has been committed the plaintiffs are entitled to some dam-

ages. But a return of the goods might always be proved in mitigation of damages, not only when the owner took the goods back voluntarily, but when they were restored to him against his will. And there was a practice in actions of trover for the defendant to apply to the Court for leave to bring the goods into Court, then the plaintiff could only recover such damages as he had actually sustained, and the action went on at his peril, and if he did not obtain substantial damages he had to pay the costs of the action after the goods were brought into Court. The return of the goods, therefore, would reduce the damages to those actually sustained by the wrongful act.

In my opinion no case of conversion of the goods is made out, but were I in error in this, in view of the goods being returned before action and in view of the facts of the present case there is no evidence of special damage such as the Court would be entitled to enter judgment upon.

It follows that, in my opinion, the appeal should be allowed, the judgment of the learned trial Judge set aside, and the action dismissed with costs both here and in the Court below.

Appeal allowed.

M. Phillips, J.A.

LEIGHTON v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. July 14, 1914.

1. CORPORATIONS AND COMPANIES (§ IV F—101)—LIABILITIES—FOR TORT—STATUTORY EXEMPTION.

Where a power-house for an electric company operating a railway and supplying electricity to the public is constructed and operated under statutory power and no compensation is provided for damage occasioned to neighbouring residential property by noise, vibration or otherwise, no action lies for damages on the part of an adjoining owner in respect of the nuisance caused to him by the non-negligent operation of the power-house, where the enabling statute in effect conferred upon the company absolute discretion of selecting the site for the power-house.

[*Leighton* v. *British Columbia Electric R. Co.*, 17 D.L.R. 117, affirmed; *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L. 171, 38 L.J.Q.B 265, *Metropolitan* v. *Hill*, 6 A.C 208, 50 L.J.Q.B. 353, *London, Brighton & South Coast R. Co.* v. *Truman*, 11 A.C. 45, *Bennett* v. *G.T.P. R. Co.*, 2 O.L.R. 425, and *Fletcher* v. *Birkenhead*, [1907] 1 K.B. 205, 76 L.J.K.B. 218, considered; *C.P.R.* v. *Parke*, [1899] A.C. 535, 68 L.J.P.C. 89, distinguished.]

Statement

APPEAL from the judgment of Macdonald, J., *Leighton* v. *B.C. Electric R. Co.*, 17 D.L.R. 117, dismissing the action which was brought by an adjoining owner against an electric railway

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company in damages and for an injunction for alleged nuisance in erecting and maintaining an electric power house, the defence being statutory authority to maintain and the absence of any statutory right to compensation.

The appeal was dismissed.

W. B. A. Ritchie, K.C., for appellant, plaintiff.

L. G. McPhillips, K.C., for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—After a consideration of this case and all the authorities cited, I remain of the view which I held at the close of the argument that the appeal should be dismissed.

Irving, J.A.

IRVING, J.A.:—There are certain general principles established in dealing with cases of this nature. They fall within the cases of *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L. 171, 38 L.J. Q.B. 265, or *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 208, 50 L.J.Q.B. 353.

The latter was a case founded on permissive legislation. The Act authorized the erection and carrying on of a lunatic asylum if it could be done without creating a nuisance, but there is not to be found any element of compulsion or any indication to interfere with private rights. It was there held that unless compensation is provided in the Act, the presumption is that parliament did not intend that a public body empowered by statute to do certain things, should create a nuisance or otherwise affect private rights: *Hopkin* v. *Hamilton* (1901), 2 O.L.R. 240, C.A. 4 O.L.R. 258; *Guelph* v. *Guelph* (1913), 18 D.L.R. 73, 30 O.L.R. 466; *Parke* v. *C.P.R. Co.*, [1899] A.C. 535; *Chadwick* v. *Toronto* (1914), 6 O.W.N. 167, seem to me to fall within that principle.

In *Hammersmith* v. *Brand*, *supra*, it was declared that the railway Acts authorized the construction and user of the railways whether a nuisance was created thereby or not, as the language of those statutes clearly authorized the nuisance, notwithstanding the omission of parliament to provide for compensation. *London, Brighton & South Coast R. Co.* v. *Truman*, 11 App. Cas. 45; *Bennett* v. *G.T.P. R. Co.* (1901), 2 O.L.R. 425, fall within this last principle.

The *Truman case* is the most instructive for the purposes of the present appeal. The particular nuisance was a cattle yard near the line of the railway. Bowen, L.J., thought that as the company was not confined to a particular area, and could erect its cattle pens where it pleased, it was therefore liable for the nuisance. That, I think, is Mr. Ritchie's contention in the present case. In the House of Lords this opinion was not accepted. The decision of their Lordships turned on the true construction of the railway charter. Sec. 82 conferred on the company power

> to purchase lands, not exceeding fifty acres . . . in such places as the company should deem eligible

so that the choice was left to the company

> for the purpose of making and providing *inter alia* . . . loading and unloading places and conveniences for keeping cattle . . . intended to be conveyed by the railway . . . which the company shall deem requisite.

On this statute it was held that, although the company had an option to select land so that no adjoining landowner should suffer detriment, from the subsequent use of it, the company was not bound to do so.

Now, turning to the defendant's act, we find by sec. 33 the company is empowered to

> construct a street railway . . . and to transport passengers by . . . electricity or such other power as the company may deem expedient . . . and . . . to supply electricity for lighting, heating and other purposes and to maintain and construct all necessary buildings, appliances and conveniences connected therewith.

By sec. 43 the company is authorized

> to erect . . . power houses . . . necessary and proper for the generating of electricity and for transmitting the same to be used by the company as a motive power for the operation. . . .

I paraphrase "of their own motors" or other people's motors.

These sections seem to me to give the company power to do what they are doing and to deprive the plaintiff of any remedy for the nuisance occasioned to her.

I would dismiss the appeal.

MARTIN, J.A.:—After a careful consideration of the authorities cited, and others, I am unable to distinguish this case in

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principle from the decision of the House of Lords in *London Brighton & South Coast R. Co.* v. *Truman*, 11 App. Cas. 45. The powers given the defendant company by the Consolidated Railway and Light Company's Act of 1896, ch. 55, have been exercised in a fashion admittedly free from negligence, and that is sufficient to uphold its action without going into the really irrelevant question of the choice of the present site being justified by the reasonable necessity of the case, because, as Lord Halsbury puts it, p. 51, the company, under the statute, has the "absolute discretion of selecting the site," sec. 43, giving it authority to act

> in such manner as the company shall think fit, necessary or proper for the purpose of carrying out the operations of the company in respect of and incidental to the making, generating or supplying of electricity

as "authorized and empowered" by the earlier part of the section.

The appeal, therefore, should be dismissed.

Galliher, J.
McPhillips, J.A.

GALLIHER and MCPHILLIPS, JJ.A., concur in dismissing appeal.

Appeal dismissed.

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RICHARDS v. TROTTIER.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 8, 1914.

1. COURTS (§ II A—163)—COUNTY COURTS—JURISDICTION—AS DEPENDENT ON AMOUNT—SPECIFIC PERFORMANCE.

An action by the purchaser of lands against the vendor for a return of money paid amounting to less than $500 upon a contract for a price exceeding that sum, and further asking that the agreement of sale be cancelled and declared void, is beyond the competence of a County Court under the County Courts Act, R.S.M. 1913, ch. 44, sec. 57, such an action not being within the general terms of that section, viz., "all actions for legal or equitable claims and demands of debt, account or breach of contract, or covenant or money demand."

Statement

APPEAL from the judgment of a County Court dismissing an action for want of jurisdiction, the question being dependent on amount and no jurisdiction for specific performance being conferred by the statute.

The appeal was dismissed.

W. Hollands, for plaintiff, appellant.

J. A. Beaupre, for defendants, respondents.

HOWELL, C.J.M.:—This is an appeal from the County Court of Winnipeg, the trial Judge having held that he had no jurisdiction.

The plaintiff entered into a contract with the defendants to purchase certain lands in Manitoba for the sum of $1,560, of which $390 was to be paid in cash and the balance was in deferred payments.

She paid the cash instalment and entered into an agreement in writing to pay the balance. She alleges that she was induced to enter into the agreement by the misrepresentation of an agent of the defendants, and asks for the cancellation of the agreement and the return of the money paid.

The case of *Yasne* v. *Kronson*, 17 Man. L.R. 301, decided that in such a case the County Court had no jurisdiction because it had no power to set aside or cancel the contract.

Subsequently the Act was amended by providing, in ch. 44, sec. 57, sub-sec. (*b*), R.S.M. 1913, that the Court shall have jurisdiction to entertain "all actions for legal or equitable claims" when the amount does not exceed $500, and it further gives the trial Judge all the powers which a Judge of the Court of King's Bench would have for the cancellation of contracts on the ground of fraud or misrepresentation, whether claimed by the plaintiff or by the defendant in the dispute note, but the section goes on to provide that no jurisdiction is conferred for specific performance.

In actions like the one before us the common relief or counter relief asked by the defendant is specific performance. If in the County Court such an action is tried, and if the plaintiff is held not entitled to relief, the rights of the defendant to specific performance cannot be entertained, and he is driven to begin another action in the King's Bench. If the County Court has jurisdiction in this case, then a contract for the sale of lands for $100,000 upon which a large cash deposit has been paid can be cancelled by a County Court Judge, the plaintiff merely abandoning any excess of payment over $500. The defendant in such

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a case would thereby be deprived of his right to appeal to the Supreme Court or the Privy Council.

I do not think the legislature intended this. I think the power given to cancel contracts was limited by that sub-section to contracts involving a sum not exceeding $500.

The appeal must be dismissed.

Richards, J.A. Perdue, J.A. Cameron, J.A.

RICHARDS, PERDUE, and CAMERON, JJ.A., concurred with HAGGART, J.A.

Haggart, J.A.

HAGGART, J.A.:—In the County Court of Winnipeg, the plaintiff sues the defendant charging that an agent of the defendants took the plaintiff to Transcona and shewed her certain lots and represented that they could be bought for the sum of $1,560; that, relying upon his representations, she entered into an agreement for their purchase; that the lands described in the agreement were not those shewn to the plaintiff but were lands more remote and of much less value and worth only the sum of $500; that the agent fraudulently made the representations and induced the plaintiff to execute the agreement providing for a consideration of $1,560 and to make the cash payment of $390. The plaintiff claims that the agreement should be cancelled and that she be repaid the $390.

In their dispute note the defendants deny the fraudulent representations and also question the jurisdiction of the County Court.

It appears from the evidence that the agent, Love, admits that he made a mistake and that the lots described in the agreement are not the lots that were shewn to the plaintiff on the ground, and further, that the lots described in the agreement are not of so much value as those which were shewn to her. There is no question that the mistake here is of a material nature and is not incidental, but is of the very essence of the transaction and goes to the root of the matter. This mistake resulted from the ignorance of the defendants' agent and as such the Court will grant relief.

The contract impeached fails to express the intention of the parties and the plaintiff would have a good defence to specific

performance. The evidence, however, does not shew any fraud or misrepresentation. The most that can be said is that the defendants' agent, Love, through his own want of knowledge, or the fault of his principals in not furnishing him with correct information, led the plaintiff to believe that she was buying property other than that which is described in the agreement. The plaintiff relies upon the section of the County Courts Act defining its jurisdiction. Let us see if it is wide enough to include the cause of action sued for.

The County Courts Act, R.S.M. 1913, ch. 44, sec. 57, subsec. (*b*), is as follows:—

> The County Courts shall have jurisdiction in . . . (*b*) all actions for legal or equitable claims and demands of debt, account or breach of contract, or covenant or money demand, whether payable in money or otherwise, when the amount or balance payable does not exceed five hundred dollars; and in any such action the Judge shall have all the powers and jurisdiction which a Judge of the Court of King's Bench would have in case the action had been brought in that Court, including the taking of accounts and the cancellation of contracts on the ground of fraud or misrepresentation, whether at the suit of the plaintiff or when claimed by the defendant in his dispute note, to the end and intent that full relief, legal and equitable, may be given to either party in such action; but nothing herein contained shall be construed to confer jurisdiction upon the County Courts to entertain actions for injunctions specific performance of contracts, foreclosure or sale of mortgaged premises, or for dissolution of partnerships, administration of estates or trusts, or for alimony.

It is to be observed that it provides for the "cancellation of contracts on the ground of fraud and misrepresentation." Here, there is no "fraud" and there was no wilful "misrepresentation," and, in express terms, there is no relief given in matters of "mistake." Giving the statute that reasonably strict construction that is given to statutory Courts I do not think it comes within the general term of "all actions for legal or equitable claims and demands of debt, account, or breach of contract."

Another serious objection arises when we consider the real subject-matter of the suit. It is not sufficient to say that the amount sued for "does not exceed $500." True the plaintiff asks for a return only of the cash payment, $390, but she also asks "that the said agreement be cancelled and declared null

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and void." Now the agreement is for the payment of $1,560 and the decision in this suit would determine whether the plaintiff would be relieved from liability to pay some $1,200 or whether the defendants would be entitled to collect the deferred payments under the agreement, amounting to that sum or thereabouts, and further, would determine, as between the parties to this suit, incidentally, yet effectually, the respective rights, interest and title of the plaintiff and defendants in and to the land referred to in the pleadings.

If the real question is the validity of the agreement, and a verdict was given for the defendants, would it not in effect be decreeing specific performance of the impeached agreement? This remedy is excepted from the above sub-section.

If an "action of ejectment or for the recovery of land" was brought between the same parties in respect of these same lots, the question to be decided and the issue to be tried would be practically the same as in this suit, namely, the validity of the agreement, and jurisdiction is expressly withheld in these cases by sec. 56 of the County Courts Act.

I would dismiss the appeal.

Appeal dismissed.

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NORTHERN TRUST CO. v. COLDWELL.

Manitoba King's Bench, Mathers, C.J. June 10, 1914.

1. DEBT (§ I—1)—LIFE INSURANCE GIFT TO CREDITOR—EFFECT ON RIGHT OF ACTION FOR CREDITOR'S DEBT.

The intention with which the life insurance was effected and made payable to the assured's mother is to be considered in deciding whether or not the insurance money is applicable in reduction of a debt from the assured to his mother; the mother's estate is entitled to both the debt and the insurance where the debt was payable only at her death and where this and other circumstances, having regard to the sufficiency of the estate, rebut any presumption of intention that the insurance money should apply on the debt.

2. INTEREST (§ I B—20)—ON DEBTS, LOANS AND ADVANCES—TESTS AS TO WHEN RECOVERABLE—"DEMAND" IN STATEMENT OF CLAIM ONLY—EFFECT OF.

Where there is no agreement, express or implied, to pay interest on an indebtedness nor any writing whereby the debt was payable at any certain time, the statement of claim in an action for recovery of both

debt and interest, is not a sufficient demand under 3 & 4 Wm. & M., ch. 42, sec. 28, of interest thereafter.

[*Rhymney* v. *Rhymney*, 25 Q.B.D. 146; *Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q.B. 674, and *McKenzie* v. *Champion*, 4 Man. L.R. 158, followed.]

ACTION by executors against the personal representatives of an alleged deceased debtor for the recovery of the debt claimed, the defence being satisfaction of the debt by the admitted payment of certain insurance moneys on the debtor's life; the right to recover interest on the debt was also involved in the action.

Statement

Judgment was given for the plaintiffs without interest.

J. A. M. Aikins, K.C., and *A. C. Ferguson*, for plaintiffs.

C. P. Wilson, K.C., and *W. C. Hamilton*, for defendants.

MATHERS, C.J.K.B.:—The plaintiffs are the executors of the estate of Mary Ann Inman, who died on September 11, 1908. The defendants are the executors of her son, Herbert Inman, who died on November 17, 1904. By a policy dated June 23, 1898, the deceased, Herbert Inman, insured his life in the Odd Fellows Relief Association of Canada for $2,000, payable to his mother, Mary Inman. At the date of the policy, and for about two years prior thereto, there existed an indebtedness of $4,000 from Herbert Inman to his mother. After Herbert Inman's death Mary A. Inman received on or about March 16, 1905, the proceeds of said policy, amounting to $2,000. Mathers, C.J.

By his will, dated September 1, 1904, Herbert Inman directed that out of the income from his estate his executors should pay to his mother annually on November 1, during her life $280, being interest at 7% on $4,000. This sum of $280 was paid by Herbert Inman's executors to Mary A. Inman on November 1 in each of the years 1905, 1906, and 1907. She died before the payment for 1908 fell due. On March 18, 1909, the defendants paid to the plaintiff the sum of $2,000 as part of the said $4,000 indebtedness from Herbert Inman to his mother.

The plaintiffs' claim in this action is for $2,000, being the balance of the said indebtedness of $4,000. They also claim interest at 7% on $4,000 from November 1, 1907, the date on which the last payment of $280 provided by the will of Herbert Inman

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was paid until March 18, 1909, when the sum of $2,000 was paid by the defendants. From March 18, 1909, interest at 7% is claimed on $2,000 until judgment. The plaintiff alleges that the $4,000 debt by agreement bore interest at 7%, but that allegation is denied by the defendants. There is nothing in any of the admissions or evidence from which an agreement, express or implied, to pay interest can be inferred. Neither is there anything to shew that the debt was payable by virtue of a written instrument at a certain time or that any demand was made which gave notice to the debtor that interest would be claimed so as to entitle the plaintiff to interest under 3 & 4 Wm. & M. ch. 42, sec. 28. Under these circumstances, *McKenzie* v. *Champion*, 4 Man. L.R. 158, decides that interest is not recoverable.

It is contended, however, that the statement of claim is a sufficient demand within the statute. The contrary was decided by the English Court of Appeal in *Rhymney* v. *Rhymney*, 25 Q.B.D. 146; *Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q.B. 674, 680. This disposes of the claim for interest to judgment, and leaves only the question of the plaintiffs' right to recover $2,000 balance of the $4,000 indebtedness. The defendants' contention is that Herbert Inman's debt of $4,000 was reduced to $2,000 by the receipt of the insurance money, and that it was entirely extinguished by the subsequent payment of $2,000 on March 18, 1909. This contention is based upon the equitable doctrine of performance expressed in the maxim "equity imputes an intention to fulfil an obligation." According to this doctrine a man under an obligation, who does an act which is suitable to be the means of performing the obligation, will be presumed in equity to have done the act with that intention. It is said that the son being under an obligation to pay his mother $4,000 provides $2,000 by insurance, which she receives, and that his obligation was, therefore, to that extent performed. Before deciding whether or not the insurance was effected in fulfilment *pro tanto* of an obligation, it is necessary to enquire what Herbert Inman's obligation with respect to the $4,000 really was. That a debt to that amount existed is admitted, but nothing is said about its due date or when the obligation to pay was to be fulfilled. If it accrued due during the lifetime of Herbert Inman,

a provision for payment at or after his death could not be regarded as a performance of the obligation to pay at an earlier date. It is stated in 13 Hals. 141, that

> the principle (*i.e.*, of performance) does not apply where the money has become due in the covenantor's life, so that an action could have been brought for breach of covenant.

Citing *Lee* v. *D'Aranda*, 3 Atk. 419, 26 E.R. 1042. In the absence of direct evidence the due date can only be inferred from the circumstances. Two circumstances alone have any bearing on the question, and these indicate that the obligation did not mature during his life or even at his death, but at the death of his mother. The first of these circumstances is that as a fact the money was not demanded, so far as can be gathered, during Mrs. Inman's life, and the other is that, by his will, he provided for payment of interest upon the debt annually during her life. He evidently thought the debt did not mature at an earlier date. I find, then, as a fact, that Herbert Inman's obligation was to pay to his mother's representatives $4,000 after her death.

This event might occur, and in fact did occur, several years after his own death. Can it then be presumed that he intended this insurance which was payable at his death to be a performance *pro tanto* of an obligation that might not accrue for years afterwards. The fact that he made no provision for an abatement of interest after his death and the payment of the insurance money, would indicate that he had no such intention. This view is much strengthened by the memorandum in his handwriting put in evidence. From that memorandum it appears that the insurance money was to be given to his mother not in part performance of an obligation, but to be by her distributed amongst the members of his family. It could hardly be contended that he was directing her to distribute among his family money which he had given her in payment in part of a debt due to her, and which was, therefore, her own money. The memorandum tells his mother that he is making a new will and after referring to a provision for his wife proceeds:—

> The balance I leave to you to be divided amongst the family at my death if you survive me. It consists of insurance in the Odd Fellows, $2,000, the Block property, the farm property and other farms, value

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about $20,000. I wish you to have the full benefit as long as you live, you to help the family as you see fit, and as they might require it.

His intention with respect to the $2,000 insurance, so far as it can be gathered from this document, is inconsistent with an intention that it should be received by her in part performance of his obligation. If he was, by means of this insurance, discharging a liability, one would hardly expect to find him giving directions for its subsequent disposition. After considering the whole matter, I have arrived at the conclusion that the circumstances rebut the presumption of an intention that the insurance moneys should be applied in liquidation *pro tanto* of the son's debt to his mother. The difference between performance and satisfaction is that whereas the former does not, the latter does, depend upon intention. The insurance in question was not a legacy, but bore some analogy to a legacy. I would hesitate before holding that all the minute and subtle rules applicable to the ascertainment of the intention with which a testator leaves a legacy to a creditor are applicable to a case like this, but nevertheless I think the result must depend upon the intention with which the insurance was effected, to be gathered from all the circumstances. This is not the case of a double portion against which the Court leans. No other provision was made for his mother's benefit.

Then, it is said that it must be presumed the son intended to be just before being generous, and not that he intended to make her a gift while he remained her debtor to a large amount. There would be force in that contention if it appeared that his estate was insufficient for the payment of his debts without having recourse to this insurance money. The fact, however, appears to have been otherwise, and that the estate was ample for both purposes. The conclusion I have come to is that the insurance was a gift from Herbert Inman to his mother, and that she was entitled to receive and retain the proceeds of the insurance, and also collect the full amount of the debt of $4,000 due from him to her.

There will be judgment for the plaintiffs against the defendants for $2,000 and costs of suit.

Judgment for plaintiffs.

Re VAN HORNE and WINNIPEG & NORTHERN R. CO.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. July 6, 1914.

1. RAILWAYS (§ I—8)—FRANCHISES AND RIGHTS—CONSOLIDATION—AMALGAMATION OF TWO RAILWAYS—EFFECT ON CONSTITUENT COMPANIES AS CORPORATE ENTITIES—RAILWAY ACT (CAN.), SEC. 362.

Upon an agreement for the amalgamation of two railway companies being sanctioned by Order in Council under sec. 361 of the Railway Act (Can.), the amalgamated company becomes a new corporation with the rights and liabilities of the constituent companies, and the latter cease to exist as corporate entities; and it is not competent for one of the constituent companies thereafter to prosecute an appeal from an award made against it prior to the amalgamation.

Statement

APPEAL from decision of Galt, J., *Re Van Horne and Winnipeg & Northern R. Co.*, 14 D.L.R. 897. The ground of appeal is that the railway company having, pending the proceedings, amalgamated with another company, thereby ceased to exist as a corporate entity and in the absence of the amalgamated company had no status before the lower Court.

The appeal was allowed.

C. P. Fullerton, K.C., for Van Horne.

O. H. Clark, K.C., for Winnipeg and Northern Railway Co.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—The Winnipeg & Northern R. Co. was incorporated under an Act of the Legislature of Manitoba, being 5 & 6 Edw. VII. ch. 122. The company having taken for the purposes of its railway certain lands belonging to Sir William Van Horne, whom I shall call the owner, proceedings for arbitration were taken under the Manitoba Expropriation Act arbitrators were appointed, and an award was made and published by them on August 1, 1913. While the arbitration was pending, the Winnipeg & Northern R. Co., which I shall hereafter call the Manitoba Co., entered into an agreement with the C.N.R. Co., a company incorporated under Acts of the Parliament of Canada, for the amalgamation of the two companies into one corporation, to be known as "The Canadian Northern Railway Co." This agreement was dated May 12, 1913, and on June 2, 1913, an Order-in-Council was passed, pursuant to sec. 361 of the Dominion Railway Act, sanctioning the agreement. The greater part of

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the evidence relating to the matters in question in the arbitration was taken after the passing of the Order-in-Council, and the award itself was made some two months thereafter.

On or about August 28, 1913, the owner was served with a notice of appeal against the award. This notice was signed by Messrs. Clark & Macdonald, as "solicitors for Winnipeg Canadian Northern Railway." The appeal was heard before Mr. Justice Galt in Chambers, pursuant to the provisions relating to appeals contained in the Manitoba Expropriation Act, and an order was made by him on November 29, 1913, referring the award back to the arbitrators for their reconsideration and re-determination, in order that the arbitrators might shew on the face of the award or otherwise the mode in which the amount awarded was arrived at. The recital to this order shews that the appeal was brought by the Winnipeg and Northern R. Co. The name of the C.N.R. Co. does not appear in the proceedings, and that company was not a party to them. No mention of the amalgamation was made during the progress of the arbitration or on the appeal therefrom, and the fact of the amalgamation appears only to have come to the knowledge of the owner or of his solicitors long after the above order had been made, and after the appeal from the order had been brought before this Court. Objection is now taken by counsel for the owner that by reason of the amalgamation, and the formation of a new company which is subject to the operation of the Dominion Railway Act, Mr. Justice Galt had no jurisdiction to entertain an appeal from the award, for the reason, as it is argued, that the provisions for appeal contained in the Manitoba Expropriation Act cannot affect the amalgamated company.

The agreement made between the two companies declares that the C.N.R. Co. and the Winnipeg & Northern R. Co. are amalgamated into one company under the name of "The Canadian Northern Railway Company." The amount of capital stock is declared and each shareholder in each company receives one share in the amalgamated company for each share he held in one or other of the original companies. The head office of the amalgamated company is fixed at Toronto, the first board of directors is named, and the by-laws and regulations of the former C.N.R. Co. are adopted so far as applicable.

Section 362 of the Dominion Railway Act declares that:

> Upon any agreement for amalgamation coming into effect, as provided in the last preceding section, the companies, parties to such agreement, shall, subject to the provisions of this Act and the Special Act authorizing such agreement to be entered into, be deemed to be amalgamated, and shall form one company, under the name, and upon the terms and conditions in such agreement provided; and the amalgamated company shall possess and be vested with all the railways and undertakings and all other the powers, rights, privileges, franchises, assets, effects and properties, real, personal and mixed, belonging to, possessed by, or vested in the companies, parties to such agreement, or to which they, or any or either of them, may be or become entitled.

Power to amalgamate with another railway company was given to each of the amalgamating companies by the incorporating Acts. It is clear that by the agreement, which had been sanctioned by the Order-in-Council, and by the effect of secs. 361 and 362 of the Railway Act, the amalgamated company became a new corporation vested with all the properties, rights, powers, etc., of both of the constituent companies, and liable for their debts and obligations of all kinds, and that after the amalgamation the Manitoba Company ceased to exist as an actual corporate entity.

The proceeding by way of appeal from the award under sec. 42 of the Expropriation Act, R.S.M. 1902, ch. 61, was instituted after the amalgamation had been effected, and after the Manitoba company had been merged in the new corporation. Its assets, rights and powers were vested in the amalgamated company, which became liable for all its debts, obligations, etc., including the claim of the owner for compensation for the land taken. The only corporation which was interested in any way in moving against or setting aside the award was the amalgamated company. No step has been taken by the amalgamated company to appeal from the award. No application was made to Mr. Justice Galt by the amalgamated company as the party appealing, to treat the notice of appeal as given on its behalf, and that company was not a party to the appeal. I express no opinion as to whether, in the circumstances, an appeal would lie under the Expropriation Act of this Province even at the instance of the amalgamated company.

Section 42 of the Expropriation Act provides that any party to the arbitration may, within a month after notice of the award,

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appeal therefrom. On the passing of the Order-in-Council on June 2, 1913, the only party interested in the award, except the owner, was the new company. This Court is not called upon at this stage to pronounce upon the validity or invalidity of the award. The point now to be determined is the question as to the jurisdiction of the learned Judge to make the order appealed from. It appears to me that he had no power to entertain an application to set aside the award made on behalf of the corporation whose interest in the arbitration had ceased. A company whose corporate existence is at an end cannot, any more than a dead man, remain a party to the arbitration and give a notice of appeal from the award. If all the facts had been known to the Judge, I do not think that he would have made the order. The order as made refers the award back to the arbitrators for their re-consideration and re-determination. It appears to me that the learned Judge had no power so to order, in the absence of the amalgamated company, which is liable, and is alone liable, to pay the compensation to be awarded to the owner.

I think the order of Galt, J., appealed from, should be set aside and the motion made to him be dismissed.

Appeal allowed.

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CARTER DEWAR CROWE CO. v. COLUMBIA BITULITHIC.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 2, 1914.

1. CORPORATIONS AND COMPANIES (§ IV D—81)—RIGHT TO SET UP ULTRA VIRES AS DEFENCE—RIGHT OF CORPORATION—CORPORATE OBJECTS.

Where a company incorporated to carry on a general contracting business and having no specific power in its memorandum of association either to guarantee the payment of the obligations of others or to undertake primary liability therefor, without consideration gives its promissory note for the debt of another company at the request of the payee, the transaction will be held *ultra vires* as between the original parties where no circumstances are shewn which would make the transaction a "necessary or convenient" one as regards the corporate objects mentioned in the memorandum of association; and in like manner the company's endorsement of another note given in renewal thereof by the debtor company creates no cause of action in favour of the payee who is not a holder for value.

[*Ashbury* v. *Riche*, L.R. 7 H.L. 653; *Atty.-Genl.* v. *Great Eastern*, 5 A.C. 473; *A. R. Williams Co.* v. *Crawford*, 16 O.L.R. 245, referred to; *Ex parte Booker*, 14 Ch.D. 317, distinguished.]

Statement

APPEAL from the judgment of His Honour Judge Schultz, of the County Court, dated February 7, 1914, in favour of the

plaintiff, in an action on a promissory note against the defendant company, the defence being that the transaction was *ultra vires* of the company, not being "necessary or convenient" as within its corporate objects.

The appeal was allowed.

Ritchie, K.C., for appellant, defendant.
Hanson, for respondent, plaintiff.

MACDONALD, C.J.A.:—The plaintiff respondent supplied goods to the Scott Goldie Quarry, Ltd. Thomas Scott was president of that company and president and manager of the defendant company. He was requested by plaintiff to guarantee the payment on said goods, and did so in the form of a promissory note which he and the secretary signed in their official capacity on behalf of the defendant and in favour of the plaintiff. The Scott Goldie Quarry, Ltd., made a payment on account of the note, and it is for the balance thereof that judgment was entered in the Court below in favour of the plaintiff. The grounds of appeal are (1) that the transaction was *ultra vires* of the defendant; and (2) that the note was made without consideration. The latter rests on the fact that the goods were sold and delivered before the note was given, but there is some evidence that the promise to guarantee the account was made before the goods were delivered. This branch of the case need not be considered if the first ground of appeal be well taken.

Macdonald, C.J.A.

Carter, a witness for the plaintiff, and its manager, appears to have had a very nice appreciation of the difference in law between a promise to answer for the debt of another and one to pay it. It appears to me, however, to be immaterial in the result of this case whether the transaction was a guarantee or an undertaking to become primarily liable for the account, because if the one transaction was *ultra vires* of the defendant, the other was also.

The defendants were incorporated to carry on a general contracting business, its activities being principally directed to street paving; its objects, as defined in its memorandum of association, did not specifically include power to guarantee the payment of the obligations of others or to undertake primary liability therefor. The law governing this case is well settled by *Ashbury* v. *Riche*

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(1875), L.R. 7 H.L. 653, followed and approved of in a number of subsequent cases, in one of which, *Atty.-Genl.* v. *Great Eastern R. Co.* (1880), 5 A.C. 473, Lord Selborne, speaking of the doctrine of *Ashbury* v. *Riche*, said:—

> I agree with Lord Justice James that this doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized should not (unless expressly prohibited) be held, by judicial construction, to be *ultra vires*.

That reasonable application of the doctrine was made by Malins, V.C., in *Ex parte Booker* (1880), 14 Ch.D. 317, the case relied upon by Mr. Housser in support of his contention that the assumption of the liability aforesaid by the defendant was in its own interests, and might not unreasonably be held to be incidental to those objects specifically defined in its charter. *Ex parte Booker* is, in my opinion, distinguishable from this case. There the guarantee of the bank was supported on the ground that the securities guaranteed being the property of the bank were accepted by the person to whom the guarantee was given only because of such guarantee, the result being to enable the bank to dispose of the securities. It was held to be a banking transaction, and hence incidental to the objects of the banking company. The most that can be said in support of the case at bar is that the defendant was the owner of shares in the Quarry Co., which it had power to acquire; that it was a creditor of the defendant and the mortgagee of its effects; that it expected in the ordinary course of business to obtain stone from the Quarry Co. for use in its business. For these reasons, it was argued, it had a substantial interest in the success of the Quarry Co.

Assuming that in these circumstances the defendant's interests would be served by the giving of the note, how can that affect the question? Directors and managers of companies might frequently find it in the interests of their companies to engage in transactions outside their offices. If such considerations could be allowed to prevail, the enumeration of a company's objects in the memorandum of association would be an idle form.

I would allow the appeal.

Martin, J.A.

MARTIN, J.A., concurs with MCPHILLIPS, J.A.

IRVING, J.A.:—The decision of a strong Court, Boyd, C., and Anglin and Mabee, JJ., in *A. R. Williams Machinery Co.* v. *Crawford Tug Co.* (1908), 16 O.L.R. 245, seems to me to be a decisive authority in favour of the appellant.

I would allow the appeal.

Irving, J.A.

GALLIHER, J.A.:—I think the note sued upon was a guarantee of the debt of the Scott Goldie Quarry, Ltd., which the officers of the defendant company were not empowered to give, and is not such a transaction as falls within the general words "necessary or convenient" in their memorandum of association: see *A. R. Williams Machine Co.* v. *Crawford*, 16 O.L.R. 245.

Galliher, J.A.

McPHILLIPS, J.A.:—This is an action brought in the County Court of Vancouver and is an appeal by the defendant company from the judgment of His Honour Samuel D. Schultz, Junior Judge of the Court, wherein he directed judgment to be entered for the plaintiff (the respondent) against the defendant for the sum of $700, being the balance due in respect of a promissory note for $1,100 made by the defendant in favour of the plaintiff, dated August 27, 1913, payable 3 months after date.

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It would appear that when the promissory note fell due, the company which had been supplied with the goods by the plaintiff company (the promissory note representing the purchase price thereof) the Scott Goldie Quarry, Ltd., issued its cheque under date December 1, to the plaintiff company for $420.05, and executed a promissory note to the plaintiff for the balance remaining due, *viz.*, $700, payable in one month, which promissory note was endorsed by the defendant company, and fell due on January 4, 1914, and remains unpaid.

It is clear upon the evidence that the defendant company was in no way indebted to the plaintiff company, and the promissory note sued upon was given without consideration, the plaintiff company preferring to have the note of the defendant company; no doubt intimate business relations existed between the defendant company and the Scott Goldie Quarry, Ltd., but that does not create legal liability. The companies must be looked upon as distinct one from the other: *Salomon* v. *Salomon*, [1897] A.C. 22, 66 L.J.Ch. 35; Lord Herschell, at pp. 45-57.

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When the renewal promissory note for $700 was given the defendant company endorsed it, but without consideration, the plaintiff company well knowing the situation of matters, desirous, however, of getting what was considered to be the additional security of the defendant company's endorsement; in fact, what was attempted was the obtaining of a guarantee from the defendant company for the due payment by the Scott Goldie Quarry, Ltd., of the moneys due by that company to the plaintiff company.

In my opinion the promissory note sued upon is not binding upon the defendant company, and the making of same and the endorsement of the renewal note of $700 was without the corporate powers of the defendant company—it not being shewn that under the circumstances at the time existing the giving of the promissory note or the endorsement of the renewal thereof was necessary or within the ordinary business or corporate powers of the company; and the plaintiff company is in no way a holder for value, and the action being one between the original parties, the plaintiff company was not entitled to judgment.

It therefore follows that in my opinion the appeal should be allowed, the judgment of the learned trial Judge set aside, and the action dismissed with costs here and in the Court below.

In arriving at the conclusion which I have in the present case, it has only been after the consideration of the following authorities: *Re Cunningham & Co., Simpson's Claim* (1887), 57 L.J. Ch. 169; *Ashbury Ry.* v. *Riche* (1875), 44 L.J.Ex. (H.L.) 185; *Amalgamated Soc. of Ry. Servants* v. *Osborne*, [1910] A.C. 87, 79 L.J. Ch. 87; *Colman* v. *Eastern Counties R. Co.* (1846), 10 Beav. 1-19, 16 L.J.Ch. 73; *Atty.-Gen.* v. *Great Eastern R. Co.* (1880), 5 App. Cas. 473, 49 L.J.Ch. 545; *Foster* v. *London, Chatham and Dover R. Co.*, [1895] 1 Q.B. 711, 64 L.J.Q.B. 65; *Burland* v. *Earle*, [1902] A.C. 88, 71 L.J.P.C. 1, at 5; *Great North-West Central R.* v. *Charlebois*, [1899] A.C. 114, 68 L.J.P.C. 25.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 2, 1914.

1. SALE (§ IV—90)—RESCISSION—BULK SALES—"ENTIRE CROP" OF POTATOES—ESTIMATED QUANTITY—EFFECT OF.

A contract for the sale of "the entire crop of merchantable potatoes" to be raised on a specified ranch in a season at market price for September, is not restricted as to the quantity affected by a statement in the contract that the vendor "estimates" the yield at "600 tons more or less"; the purchaser is bound to take the entire crop, although it amounted to double the estimate.

[*Gwillim* v. *Daniel*, 2 Cr. M. & R. 61, 4 L.J. Ex. 174; *Embree* v. *McKee*, 14 B.C.R. 45; *Cross* v. *Eglin*, 2 B. & Ad. 106, and *McConnel* v. *Murphy*, L.R. 5 P.C. 203, referred to.]

Statement

APPEAL from the judgment of His Honour Judge Calder of the County Court, dismissing an action in damages for defendant's refusal to accept some of the potatoes under contract of sale covering the plaintiff's "entire crop" estimated by the contract at "600 tons more or less," where the production was double the estimate, the case hinging on whether the words "600 tons more or less" were words of contract or merely an estimate.

The appeal was allowed, MACDONALD, C.J.A., and MARTIN, J.A., dissenting.

James Murphy, for appellant, plaintiff.

S. S. Taylor, K.C., for respondent, defendant.

Macdonald, C.J.A. (dissenting)

MACDONALD, C.J.A.:—I agree with the learned trial Judge in thinking that, under the contract between the plaintiff and defendants, no liability is cast upon the defendants to make good the loss for which the plaintiff claims. The defendants agreed to act as commission agents for the sale of the plaintiff's crop of potatoes. They agreed to handle the whole crop which the plaintiff estimated at the time the contract was made, and which estimate is set forth in the contract itself at 600 tons. It turned out that the entire crop exceeded 1,200 tons, or more than double the plaintiff's estimate. The defendants disposed of 1,140 tons, leaving the plaintiff at the end of the season with a balance on his hands of 90 tons. The price of potatoes dropped, and the plaintiff brought this action for the difference between the price realized for those sold and the market price at a later date. The

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learned County Court Judge dismissed the action on the ground that the defendants had more than fulfilled their contract; that the estimate of 600 tons must be taken as a substantial part of the contract, and that having sold 1,140 tons, the defendants had covered any reasonable margin allowable by the term "estimated at 600 tons more or less."

Had the potatoes been *in esse*, and been seen by the defendants at the date of the contract, or had even the proposed acreage been known to them, there might be some warrant for saying that the estimate might be disregarded, but the estimate was that of the seller to the persons who are not shewn to have had any conception of the quantity of potatoes plaintiff intended to grow, and who had no other guide than the plaintiff's estimate, and, hence, I think, must be taken to have contracted in reliance thereon.

Irving, J.A.

IRVING, J.A.:—I would allow the appeal, and enter judgment for the plaintiff on the basis that he had elected in September to sell the whole of his crop, at September prices. The general rule is that *primâ facie* words of quantity inserted after the term "cargo" "all the steel," etc., represent only an anticipated estimate of what the cargo, steel, etc., will amount to. They are not a term of a contract unless made so. If it were intended that the specified quantity should govern, it would be unnecessary to introduce the term "cargo" "all the steel," etc., at all.

In *Gwillim* v. *Daniel* (1835), 2 C. M. & R. 61; 4 L.J.Ex. 174, the defendant agreed to sell all the naptha that he might make during the term of two years "say from 100 to 2,000 gallons per month." The Court thought that these words amounted merely to "a sort of understanding of the parties at the time that that quantity might be expected to be the produce." In *Leeming* v. *Snaith* (1851), 16 Q.B. 275; 20 L.J.Q.B. 164, the words were "say *not* less than." That case is distinguishable. The insertion of the negative expression was to fix a minimum, and therefore it was to be regarded as a term of the contract.

By the contract, the plaintiff was bound to sell to the defendants, or their nominee, at least 66 2/3rds of his entire crop, at

the September prices, and such sale was subject to future delivery.

MARTIN, J.A.:—This is not an easy case to decide because, as was said by their Lordships of the Privy Council in the similar one of *McConnel* v. *Murphy* (1893), L.R. 5 P.C. 203, at 219,

> There are no questions upon which Courts differ more frequently than upon this class of cases

Different views may well be taken as to the meaning of the agreement before us, the wording of which should be closely scanned and weighed, as very little would serve to turn the scale where the dividing line between words of expectation and of contract is so fine. The case differs from all those that have been cited to us, or that I have been able to find, in this important particular, viz., that it is one dealing with a subject-matter which depends on two things, the future yield of a crop and the area to be planted to obtain it. Each of these elements is more or less in the control of the grower, the first not so much because no husbandman can wholly foresee the ordinary course of nature, yet, nevertheless, to a considerable extent he may greatly assist her and achieve the best possible results by proper tillage, care, and cultivation (including irrigation in the "dry belt" if necessary and available) according to the needs of the locality; the second, is absolutely so because in this case he might plant an area of one acre or one hundred acres, according to his sole discretion, for the number of acres to be planted on the farm is left blank in the space provided for that purpose in the agreement. Such being the case, and it being left to the power of the grower (if his "entire crop," saving the seed potatoes specially reserved, can be forced upon his agent) to plant an unlimited number of acres and, as is contended, compel his agent to take ten or even ten thousand tons thereof, we must see if there is no indication of some restraint contemplated by the parties and provided for by the document upon such an obviously unreasonable bargain. It can be found, I think, bearing the above situation in mind, in the words "and the yield of potatoes being estimated by the said principal at 600 tons more or less." It will be observed that not only the amount of

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the acreage is left to the principal but also the making of the estimate; it is his decision as to the extent of his own planting, and his estimate of the result of his own decision, based upon a proper course of husbandry, that the agent was relying on, and therefore in these exceptional circumstances much more weight should be attached to this sole estimate than to a joint one made with respect to goods which were before the parties and could be estimated sufficiently closely, if they chose to spend the necessary time to do so, instead, *e.g.*, "of guessing" about a heap of iron in a yard as the Court found was done in the instructive case of *McLay* v. *Perry* (1881), 44 L.T. 152, wherein the plaintiffs claimed they had bought "about 150 tons" of iron in a heap in the defendant's yard, but as it turned out there were only 44 tons in it, the plaintiffs unsuccessfully sued the defendants for damages for the 106 tons short. As was said in *Morris* v. *Levison* (1876), L.R. 1 C.P.D. 155 at 159, "the nature of the subject-matter must be considered in determining what meaning is to be attributed to such expressions."

The case of *McConnel* v. *Murphy, supra,* does not assist the plaintiff, the facts being very different, and relating to a purchase of spars which as their Lordships point out at p. 218, "were to be paid for at so much for each spar, not in a round sum. . . ." Their Lordships go on to say, p. 219, that the interpretation they put upon the contract (viz., that the words therein were really words of expectation and estimate) was the "one that the contract reasonably bears, and that is the true meaning which ought to be placed upon it." Likewise, in this case, I think that the interpretation, on the special facts, that this "contract reasonably bears" is that the estimate placed by the grower "amounts to an undertaking" (p. 218 *supra*) that he will not exceed his estimate by an amount greater either way than would be considered a "reasonable margin in the circumstances." In other words he should be allowed that "margin for a moderate excess in, or diminution of the quantity" that Lord Justice Thesiger refers to in *Reuter* v. *Sala* (1879), L.R. 4 C.P. D. 239 at 244, wherein the contract was for the sale of "about 25 tons (more or less) Penang black pepper." In the case at bar while, doubtless, a liberal construction to meet the special

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circumstances would be given to the expression "margin for a moderate excess, . . . etc.," yet it could not possibly be extended to such a length as to enable the plaintiff to maintain this action, which, with every respect for contrary views, I think should be dismissed, because unless we do so, then we must be prepared to hold that the plaintiff could have forced the defendant to take the absolutely unlimited crop of potatoes which he arbitrarily chose to grow on his farm, for the reason that the expression "entire crop" if given effect to as proposed, has no half-way house, whereat the principle of construction can halt between 600 tons and 6,000 tons. Therefore, I think, the learned Judge below arrived at the right conclusion and his decision should be affirmed.

Gallihier, J.A.

GALLIHER, J.A.:—I regard the words "the entire crop" as being the governing words, or words of contract, and the 600 tons more or less as merely an estimate. The defendants who were dealing in potatoes in a large way obtained the exclusive right to dispose of the entire crop grown by the plaintiff during the season of 1912 on the Basque Ranch. In accordance with par. 5 of the contract (A.B. p. 17), the defendants quoted a price of from $14 to $15 per ton. The plaintiff might have retained one-third of his entire crop (being bound to deliver two-thirds under his contract at this price) until April 1, 1913, but instead of so doing he notified the defendant that he would sell all at that price—delivery to be made as provided in the contract.

From the time of such notification the plaintiff merely held the potatoes subject to the order of the defendants as to dates and manner of shipping. In accordance with orders received, the plaintiff started to ship the potatoes and continued to do so until stopped by the defendants. At the time this stoppage took place there was some 90 tons of the crop sold still to be shipped, and as to what then took place between the parties there is a conflict of testimony. The learned trial Judge has not dealt with this, basing his judgment on the ground that the words "600 tons more or less" were words of contract, and that

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defendants had fulfilled their contract. On this conflict of testimony I think I must hold in plaintiff's favour, especially as if the view I take of the contract is right, it was the duty of the defendants to keep themselves advised as to the quantity still unshipped, and the 90 tons remaining over were being held by the plaintiff in the same way as the whole crop was after acceptance of the offer in September, and before any was shipped.

Supposing, say within a week after the offer was accepted and before any potatoes had been shipped, the price had gone up, could the plaintiff have refused to deliver at the price agreed upon, and would that have to depend upon whether the defendants had contracted with others for sale at that price? I think to hold so would be to leave dealings of this nature on rather a precarious footing. Bearing in mind that the defendants had obligated themselves to sell and dispose of the plaintiff's crop, I think they were more than mere agents, and it seems to me that when the offer was received and accepted the relation of the parties was such that the plaintiff from that time on held the potatoes subject to the order of the defendants at the price agreed upon, and could not himself have further dealt with them.

The offer of $5 per ton for the 90 tons in March, 1913, as it was made by defendants while disclaiming any responsibility, and as for potatoes held over by the plaintiffs for himself, and not on account of defendants, should not, I think, be taken into account as reducing plaintiff's claim, as in my view of the case the defendants should have had the potatoes shipped paying the price quoted in September. As to storage claimed, I think this should be disallowed, so that the judgment should be for $1,000 less $225 storage, and $180 for unused sacks. It follows that the appeal should be allowed with costs.

McPhillips, J.A.

McPHILLIPS, J.A.:—The action is one brought to recover $1,000, being the damages claimed for the non-acceptance or refusal to take delivery of 90 tons of potatoes and the storage thereof—the potatoes rotting in the cellars of the plaintiff—the action being brought in the County Court of Cariboo holden

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at Ashcroft, and the plaintiff (appellant) appeals from the judgment of Calder, Co.J., dismissing the action after trial without a jury.

The agreement between the plaintiff and the defendants (respondents) is in writing and of date April 1, 1912, the plaintiff being referred to therein as the principal and the defendants as the agents—the agreement may be said to be somewhat peculiar in that the defendants are appointed sole and exclusive agents of the plaintiff to sell, ship and dispose of the entire crop of merchantable potatoes grown during the year 1912 (except a fair and reasonable amount required by the plaintiff for seed potatoes for the next ensuing season) estimated by the plaintiff at 600 tons more or less—but apart from this agency it was in the agreement contemplated that, on or before September 15, 1912, the defendants advising the plaintiff of the Vancouver market ruling price, then the plaintiff might sell—as I interpret the contract—to the defendants his entire crop, or at least 66 2/3 per cent. thereof, and upon the facts as they present themselves to me, a sale of the entire crop was made to the defendants at the then ruling price, which was between $14 and $15 per ton—the defendants receiving a 15 per cent. commission on the gross price, the net price to the plaintiff being $12.33 per ton, f.o.b. Basque, B.C., the point from which all the potatoes were to be shipped.

The plaintiff shipped altogether 1,140 tons; in the early part of the month of November, 1912, the defendants notified the plaintiff to cease shipping potatoes—that there was no market, and the plaintiff stopped shipping, and in the month of March, 1913, the plaintiff demanded of the defendants to take delivery of the balance left over, viz., 90 tons—the quantity sued for—the defendants refused to take them at $12.33 per ton but offered $5 per ton, which the plaintiff refused, and suit was brought on August 22, 1913.

It is a matter for remark and for consideration that the estimated quantity of potatoes was greatly exceeded—the crop was a very large one; however, that which was under contract was the entire crop for the season of 1912 grown on the Basque

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Ranch of the plaintiff, situate in Yale district—and from the evidence it is clear that the defendants were large operators—dealers in and purchasers of potatoes—and were desirous of obtaining the total crop grown by the plaintiff; and, in my opinion, the plaintiff was under contractual obligation under the terms of the agreement to hold for and deliver to the defendants his whole crop—save only such quantity as he was entitled to retain for seed potatoes. This being the legal position, it was not within the power of the plaintiff to otherwise dispose of the potatoes until the defendants refused to take delivery of the remaining 90 tons, the subject-matter of the action.

The learned trial Judge in his judgment went upon the words of the agreement "estimated by the said principal (the plaintiff) at 600 tons more or less"—and the concluding part of his reasons for judgment reads as follows:—

> There are many cases dealing with the meaning of the words "more or less," "about," and "say," which shew that the quantity is not restricted to the exact amount or number specified, but that certain reasonable latitude is to be allowed in performance. I do not think that the cases yield any certain rules as to the value of such words, but their weight in most cases appears to be governed by circumstances extrinsic to the written contract such as conditions and customs peculiar to the trade with which the contract deals. In the case of *Morris* v. *Levison* (1876), 1 C.P.D. 155, a charter provided that the ship load a full and complete cargo, say, about 1,100 tons. The charterer provided a cargo of 1,080 tons. The actual capacity of the ship was 1,210 tons. It was held that the words "say about 1,100 tons" were words of contract, and must have been intended as a guide to the charterer with regard to the amount of cargo which he would have to provide. That he was, therefore, not bound to load a full and complete cargo of 1,210 tons, but was bound to provide a reasonable margin over 1,100 tons; and that 30% being such a reasonable margin he ought to have loaded 1,133 tons. So here I believe that the words "being estimated at 600 tons 'more or less'" are words of contract, and must have been intended as a guide to the defendants with regard to the amount of potatoes they would have to "sell and dispose of" and that they were bound to sell and dispose of a reasonable margin over and above 600 tons; and further that when the defendants had already sold and disposed of 540 tons over and above an estimate of 600 tons more or less they had liberally fulfilled their reasonable obligations under their contract. A nonsuit must follow accordingly with costs.

Unquestionably in this case the excess over the estimated quantity was very great—being over twice the estimated quan-

tity—yet it is clear that it was the "entire crop" which was being dealt with in the agreement, and it is so stated therein, and the necessity for parol evidence—to establish what was intended—does not arise.

In *Embree* v. *McKee* (1908), 14 B.C.R. 45, the facts shewed that what was in the mind of the parties was "all the hay in Brown's barn except 30 tons"—the supposition was that the barn contained 100 tons; it was proved, however, to contain 122 tons—and the learned County Court Judge held that the defendant was entitled to all the hay less only the 30 tons—upon appeal to the then Full Court of the Supreme Court of British Columbia, my brother Irving (then a Judge of that Court) said, at p. 46 (Morrison and Clement, JJ., concurring:—

> We are all of opinion that this appeal should be dismissed. The rule of construction with reference to reducing an agreement to writing is applicable where the writing is required by law. There you cannot vary the matter, but where there is an informal agreement, such as it seems to me this was, and where, as in the receipt in question here, there is embodied the informal statement of the contract, then you can go into parol evidence to shew what the parties were dealing with. Here the parties were dealing for all the hay in Brown's barn, with the exception of about 30 tons, and the belief was that there were about 100 tons or a little over. I think the Judge was right in letting in parol evidence, and that the judgment should be affirmed.

The words "more or less" were considered in *Cross* v. *Eglin* (1831), 2 B. & Ad. 106-112 (36 R.R. 498). There the plaintiffs sued for the recovery of money paid on account of a purchase of 300 quarters of foreign rye—they having refused to take delivery of 350 quarters, it being insisted upon that they should take the 350 quarters, the purchase being of "about 300 quarters more or less." Lord Tenterden, C.J., at 109, said:—

> It is for the Court to put their construction on the contract; and my opinion is that the excess of quantity in this case was greater than the terms of the agreement warranted.

It is to be observed that it is for the Court to put their construction upon the contract, and in the present case, in my opinion, there can be no difficulty in construing the contract—it was the entire crop, and who could guage the bounty of the potato crop?

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In *McConnel* v. *Murphy* (1873), L.R. 5 P.C. 203, the words under consideration were "say about 600 red pine spars," and Sir Montague E. Smith, at 215, said: "The whole question turns upon the construction of the agreement."

At p. 217 he said . . .:—

> The words used are "say about 600 red pine spars." The same words may have different meanings according to the context in different contracts, but looking at the way in which the words are used here, "say about 600 red pine spars," the words "say about" appear to be thrown in for the purpose of guarding the vendor against being supposed to have made an absolute condition as to quantity. There is not merely the word "about" which in itself creates some uncertainty, but "say about." These two words used together seem to be employed for the purpose of shewing that nothing absolute or definite in the way of allegation of quantity was intended on the part of the vendor.

At p. 218 he said:—

> Their Lordships think that in this case the words "say about 600" were really words of expectation and estimate only, and did not amount to an undertaking that the quantity should be so much. The measurement was to be future, the spars were to be paid for at so much for each spar, not in a round sum, and the natural construction of the words appears to be that the quantity expected to come up to the average is about 600 spars. No fraud or intentional deception being charged against the plaintiff, their Lordships think that the defendant was bound to accept the quantity which was offered to him, and that the plaintiff has substantially performed the agreement which he entered into, and is entitled to damages for the breach of it.

In the present case, adopting the language of Sir Montague E. Smith, "to sell, ship and dispose of the entire crop of merchantable potatoes (except a fair and reasonable amount that the said principal may require for seed potatoes for the next ensuing season) of the said principal grown during the year 1912 by the said principal on his farm, being on the Basque Ranch in the Yale Division of the District of British Columbia the said crop of potatoes being grown on — acres of said farm and the yield of potatoes being estimated by the said principal at 600 tons more or less"—being the words of the agreement "were really words of expectation and estimate only"—but that it was all the potato crop which was being dealt with, in my opinion, there can be no doubt.

In the present case, as in *McConnel* v. *Murphy*, *supra*, no

fraud or intentional deception is charged; in fact, upon the evidence and upon consideration of all the attendant and surrounding circumstances, that which was contracted for was the entire potato crop. It therefore follows that, in my opinion, the plaintiff is entitled to recover as damages the difference between the contract price and the market or current price at the time of the refusal to accept the 90 tons, which difference is to be arrived at by deducting $5 per ton from $12.33 per ton (as at the time the plaintiff refused to accept the potatoes in March, 1913, save at $5 per ton, it may be assumed that that was the market price) leaving $7.33, and 90 tons at $7.33 per ton amounts to $659.70, from which is to be deducted the credit given to the defendants in the statement of claim of the plaintiff, viz., $180, the balance that then remains is $479.70. The plaintiff is not entitled to the $225 claimed for storage of the potatoes.

In my opinion, the appeal should be allowed and the plaintiff is entitled to damages against the defendants to the amount of $479.70, and the judgment of the learned trial Judge should be set aside and judgment entered for the plaintiff accordingly, with costs here and in the Court below.

Appeal allowed.

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Yukon Territorial Court, Macaulay, J. July 6, 1914.

1. BAIL AND RECOGNIZANCE (§ I—30)—NOTICE TO SURETIES—DEFAULT OF APPEARANCE—CRIMINAL LAW.

No preliminary notice to the sureties is required in the Yukon Territory, under the English Crown Rules or otherwise on estreating bail given for appearance before justices in the event of default of appearance by the accused.

[*R. v. Creelman*, 25 N.S.R. 404; *Re Barrett's bail*, 7 Can. Cr. Cas. 1, 36 N.S.R. 135, and *Re Burns' bail*, 17 Can. Cr. Cas. 292, considered.]

2. BAIL AND RECOGNIZANCE (§ I—35)—ADJOURNMENT OF PRELIMINARY ENQUIRY BY CONSENT FOR MORE THAN EIGHT DAYS—WAIVER.

The sureties to a recognizance of bail expressly given for an adjournment of a preliminary enquiry by consent, for longer than the eight days provided by Code sec. 679, are not released for non-conformity with the statutory direction that adjournments shall not be for more than eight days, that being a matter of procedure only which it was competent for the parties to waive, if indeed the statutory direction applies at all where bail is given.

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[*Re Burns' bail*, 17 Can. Cr. Cas. 292, and *R. v. Hazen*, 20 A.R. (Ont.) 663, applied; *Dick v. The King*, 19 Can. Cr. Cas. 44, considered.]

3. BAIL AND RECOGNIZANCE (§ I—11)—ENFORCEMENT AND ESTREAT OF RECOGNIZANCE—CALLING THE BAIL—CERTIFICATE OF DEFAULT.

Where bail was given for the accused's appearance on a fixed date and he defaulted, failure to call the bondsmen three times within and three times without the court-room, will not invalidate a certificate of default and the subsequent estreat of the recognizance, where it was shewn that the bondsmen were not in court on the date fixed for appearance.

MOTION to estreat a recognizance.

The application was granted.

J. P. Smith, for clerk of Territorial Court and the Crown.

C. W. C. Tabor, for the sureties.

Macaulay, J.

MACAULAY, J.:—This is an application made on behalf of the Clerk of the Territorial Court of the Yukon Territory and on behalf of the Crown, before the Court at its sittings for the trial of criminal cases at the court house, Dawson, on the 1st day of June, 1914, and enlarged from time to time until the 29th day of June, 1914, when argument was heard, for an Order estreating the recognizance entered into by the accused Daniel Sullivan as principal and P. R. McGill and Daniel J. Cronin as sureties dated the 20th day of April, 1914, taken and acknowledged before E. Telford, a Justice of the Peace for the Yukon Territory, the said Daniel Sullivan having been charged before a Justice of the Peace for the Yukon Territory on the 20th day of April, 1914, with having on the 17th day of April, 1914, unlawfully assaulted one Patrick Duggan by stabbing him on the arm with a knife thereby causing grievous bodily harm. The condition of the said recognizance was for the appearance of the said Daniel Sullivan on the 27th day of April, 1914, at the Police Court, Dawson, to answer to the said charge, and to be further dealt with according to law, and not to depart from the said Court without leave, and to further appear before the said Justice or such other Justice or Justices of the Peace as should then be there from time to time thereafter and at such time and such place to which the hearing of the said charge and examination of witnesses in that behalf might be further adjourned,

then the said recognizance to be void, otherwise to stand in full force and virtue.

The grounds for the above application are, that on the 11th day of May, 1914, a day and date to which the hearing of the said charge was duly adjourned, the said charge having been called for hearing by John Douglas Moodie, a commissioned officer of the Royal North West Mounted Police having, possessing and exercising all the powers of two justices of the peace within the Yukon Territory, who was then sitting in the said capacity in the police Court at Dawson for the hearing of charges to be heard in said Court, and when the said charge was called for hearing the accused, Daniel Sullivan, failed to appear before the said Justice, and the said Justice endorsed on the recognizance of bail herein the certificate prescribed by the Criminal Code of Canada in such case, namely: the certificate prescribed by form 73 of the said Criminal Code.

The material filed on the application, amongst other things, shews the certificate endorsed on the recognizance as prescribed by the form 73 of the Criminal Code; the transmission of the recognizance to the clerk of the Territorial Court of the Yukon Territory by John Douglas Moodie, the justice presiding in the said Court, and a return made by the clerk of the said Police Court and the said John Douglas Moodie, the justice presiding in said Court, to the clerk of the Territorial Court, the proper officer in the Yukon Territory to whom such return is required to be made.

Objections were taken on behalf of the sureties that:—

1. No rules were made in the Yukon Territory under the provisions of section 576 of the Criminal Code, and no officer appointed under section 1097 of the said Code:

2. That no notice of estreating the bail was delivered to the sureties:

3. That there was no evidence of the accused nor the bail having been called three times in the Court room and three times without the Court room:

4. That an adjournment was taken of the case from the 27th of April until the 11th of May, which was more than eight days

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as provided by section 679 of the Criminal Code, and consequently bail could not be enforced and the sureties should be discharged:

5. That no notice was given under the English Crown Rules which are in force in this Territory in the absence of rules in our own Court:

6. That the recognizance was not read over to the sureties and that the evidence of the sureties filed on this application shows that they were not aware that the recognizance was to bind them beyond the 27th day of April, the date to which the charge against the accused had first been adjourned, and consequently the recognizance was entered into by them by a mistake and should not be enforced.

Sections 1097, 1098, 1099 and 1100 of the Criminal Code of Canada provide for the manner in which proceedings may be taken for the estreatment of bail when default is made by a person under recognizance.

It has been the custom in this territory to transmit recognizances to the clerk of the Territorial Court as provided in subsection 2 of section 1099; and section 1104 prescribes that the clerk of the Territorial Court in the Yukon Tertitory is the proper officer with whom the roll is to be filed.

No rules have been made by this Court as provided by section 576 of the Criminal Code and I am of opinion that no rules are necessary to be made for carrying on such proceedings as the estreatment of recognizances, as they are already provided for by the sections of the Criminal Code above mentioned, and consequently the English Crown Rules do not apply in proceedings such as I am now considering.

In *The Queen* v. *Creelman*, 25 Nova Scotia Reports, p. 404, the majority of the Court held that the Crown Rules of the province applied to proceedings for estreating recognizances, and that consequently notice to the sureties should be given, as provided by the Rules, before forfeiture of the recognizance, but this case has not been followed by the later authorities. See *Re Frederick Barrett's Bail*, 7 Can. Cr. Cas. 1; *Re Burns' Bail*, 17 Can. Cr. Cas. 292; *Regina* v. *Schram*, 2 U.C.Q.B., 91; *Re Talbot's Bail*, 23

O.R. 65; also *Re McArthur's Bail*, 3 Can. Cr. Cas. 195,—where it was held that the Crown Rules did not apply and consequently that notice was not necessary before estreating the bail.

As to the question of adjournment for more than eight days. The adjournment was made and the bail furnished to the extended day with the consent and at the request of the accused; and upon the authority of *Re Burns' Bail*, 17 Can. Cr. Cas. 292, and *Regina* v. *Hazen*, 20 Ont. App. R. 663, it was a matter of procedure and when waived by the defendant, when he consented to an adjournment for more than eight days, the sureties were not discharged. See also the case of *Dick* v. *The King*, 19 Can. Cr. Cas. 44, where it was held that the delay of eight days which must not be exceeded between two remands upon a preliminary inquiry, does not apply to the case of an accused who is held on bail, and consequently an adjournment for more than eight days is regular where bail is granted.

On the question of calling the accused and the bail three times within and without the Court room, there is no evidence that the accused was not called three times. The Justice of the Peace who sat on the case says he remembers calling the accused on the 11th of May last, when he sat for the adjourned hearing of the case, but does not remember if he called him three times. This is the only evidence on the point. He says he did not call the bail as he thought that the bail were represented by counsel for the accused.

In Bowen-Rowlands Criminal Proceedings at p. 70, it appears to be the custom in England to call the accused three times within and three times without the Court. If he does not then surrender his bail is called upon in like manner to produce him. It is not stated that the failure to make said calls would release the bail from their contract with the Crown.

In the case before me the bail was for an extended time, and the evidence shews that the bondsmen were not in Court on the said 11th day of May when the case was called, and I am of the opinion that the failure to call upon the bail to produce the accused does not release the sureties.

As to the question of the recognizance not having been read over to the sureties. The evidence of the Justice of the Peace

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before whom the recognizance was taken is, that before he took the said recognizance he read it down to the place for signatures and where it is signed, and then said to the bondsmen, who came to him to take the recognizance in company with the counsel for the accused, "I don't suppose it is necessary for me to read this over to you as all understand what it is," and one of the sureties answered "No," and that the recognizance was then executed.

Both the sureties McGill and Cronin say the recognizance was not read to them, and that they do not remember that the Justice asked them if they understood the recognizance; but both say that they were not aware that the recognizance was to bind them beyond the 27th day of April, 1914.

Neither of the sureties made any inquiries in regard to the matter, although they knew that the case was adjourned to the 11th day of May from the 27th day of April, and they also knew that the accused Sullivan was at large.

Both McGill and Cronin executed the bond and made no request to have it read to them, although the justice says he asked if they understood it.

In *R.* v. *Bole*, 9 Can. Cr. Cas. 500, it was held by Boyd, Chancellor, that on a motion to vacate an estreat of bail the Court should not interfere on matters extrinsic to the record, and in which affidavits filed on the motion were conflicting.

The sureties in this case have executed the bond in proper form. They had the opportunity to read it before it was executed, but did not do so. The justice before whom it was executed says they left upon him the impression that they understood what they were doing, and I am of the opinion that there is no such mistake shewn here as in law would release the sureties from the obligation they undertook, and that having executed the bond they must be bound by their own act and are not entitled to be relieved of their obligation on the ground of mistake.

For the above reasons I am of opinion that the Crown is entitled to succeed in the motion now before the Court.

Order for estreat.

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Quebec King's Bench (Crown Side), Cross, J. December 19, 1913.

1. COURTS (§ II A—6)—JURISDICTION—CRIMINAL COURTS—STATUS OF POLICE MAGISTRATE—"SESSIONS" COURTS AT MONTREAL.

The court of general sessions of the peace at Montreal, sometimes called the court of quarter sessions, has power to hear and determine all matters relating to the preservation of the peace, and its jurisdiction may be exercised by the other court known as the "Court of the Sessions of the Peace" established by article 3259 R.S. Q.; there is in strictness no "police magistrate's court," the acts of the magistrate are not acts of "a court" although the place of hearing is by Code sec. 714 to be deemed an open court.

2. BAIL AND RECOGNIZANCE (§ I—9)—SURETIES TO KEEP THE PEACE — BREACH OF CONDITION.

The certificate of the magistrate before whom a recognizance to keep the peace had been taken that the condition of such recognizance had been broken is conclusive evidence of breach and forfeiture in the Province of Quebec under Code secs. 1113 and 1114.

3. BAIL AND RECOGNIZANCE (§ I—10)—ESTREAT—SURETIES FOR THE PEACE UNDER JUSTICE'S ORDER.

Where a person under recognizance to keep the peace ordered by a justice under Code sec. 748 (2) on complaint of threats made, is afterwards guilty of a breach of the peace, though towards a person other than the complainant, the recognizance may be forfeited, and the same justice may give the certificate of default after written notice to the defendant and his sureties to shew cause, although the second conviction was before the court of sessions not presided over by the justice who ordered the recognizance.

4. BAIL AND RECOGNIZANCE (§ I—20)—FINDING — SURETIES TO KEEP THE PEACE — THREATS — ENFORCEMENT OF RECOGNIZANCE—PARTIES TO PROCEEDINGS.

Proceedings for the forfeiture and estreat of a recognizance to keep the peace which had been required on proof of threats under subsection (2) of Code sec. 748 may in the province of Quebec, be taken at the instance of another individual than the first complaining party or the party threatened, as the case may be; and this without the intervention of any public authority or Crown officer.

[*R.* v. *Young*, 4 Can. Cr. Cas. 580, distinguished.]

5. EVIDENCE (§ IV E—412)—JUDGMENT IN CRIMINAL CASE AS EVIDENCE—BREACH OF RECOGNIZANCE.

While the general rule is that a conviction in a criminal case is not proof, in civil proceedings, of the acts upon which the conviction may be grounded, it is still evidence of the particular fact which it recites; and, where it is for an assault, the conviction is admissible as proof on application before another tribunal for forfeiture and estreat of a recognizance there given by the defendant to keep the peace and be of good behaviour.

[*Re Crippen* (1911), 27 Times L.R. 258, referred to.]

6. ESTOPPEL (§ III J—130)—PRIOR INCREASED PUNISHMENT BECAUSE OF BREACH OF RECOGNIZANCE—ENFORCEMENT OF RECOGNIZANCE.

The fact that a court trying a charge of assault doubled the fine which it was about to impose on getting information that the defendant was at the time under recognizance to keep the peace given on complaint of threats to another party unconnected with the subse-

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quent assault, will not bar the estreating of the recognizance; binding to good behaviour is not by way of punishment and the increase in the fine and the subsequent estreat of the recognizance are not two punishments for the same thing.

[*R. v. Rogers*, 7 Mod. 29 applied.]

APPEAL on stated case from the order of a magistrate declaring estreated the appellant's recognizance to keep the peace.

The appeal was dismissed.

Wilson, K.C., for appellant.

No one for respondent.

CROSS, J.

CROSS, J.:—This is an appeal by way of stated case under Code sections 761-769.

It appears in the stated case that the charge against Walker, the appellant, is that he violated the condition of a recognizance to keep the peace into which he had entered before the Police Magistrate; that a trial of that charge was had before the same magistrate, and that an order was made declaring that the appellant had violated the condition of his recognizance by having committed an assault upon one Wassen and directing that the recognizance be extracted from the record and sent to the Superior Court.

It was upon complaint of the respondent Miller that the recognizance had been required by the Police Magistrate to be entered into in the first place. It was upon complaint of another person, namely, Wassen, that the appellant was tried and convicted of assault, and the conviction for assault was made by the Judge of Sessions and not by the Police Magistrate. It is that assault which in this case has been held to have been a breach of the recognizance.

It further appears in the stated case that, having convicted the appellant, the Judge of Sessions had intimated that he would fine the appellant $5, but that, having been made aware of the existence of the recognizance, he fined the appellant $10; that is to say, he made the punishment heavier because of the recognizance.

In this state of facts, eight questions are set out in the reserved case. Of these, questions numbers one and two are as follows:—

1. La forfaiture d'un cautionnement de garder la paix pouvait-elle être déclarée par un autre juge que l'honorable juge Bazin qui a entendue la plainte du nommé Frank Wassen contre l'accusé le 6 mars 1913?

2. La Cour de Magistrat de Police de la cité et du district de Montréal présidée par M. Ulric Lafontaine, pouvait-elle entendre d'une plainte portée par le poursuivant Miller contre l'accusé, pour faire déclarer forfait le cautionnement donné par l'accusé le 11 octobre 1912, à raison de la conviction du 6 mars 1913?

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It may be opportune, for the sake of clearness, to point out that, in terms of the law by which Courts are constituted in this province, one of the Courts established is "the Court of the Sessions of the Peace": Art. 3259, R.S.Q.

Another Court is "the Court of General Sessions of the Peace," sometimes called "Court of Quarter Sessions": Arts. 3239 *et* 3240, R.S.Q. The last mentioned Court has power to hear and determine all matters relating to the preservation of the peace, but its jurisdiction may be exercised by the Court of the Sessions of the Peace: Art. 3277, R.S.Q. The last mentioned Court has a clerk who is keeper of its records.

As regards Police Magistrates, it is to be observed that there is no police magistrate's Court. The acts of the magistrate are his acts, but not acts of a Court. He himself keeps minutes of the proceedings had before him. He has the powers of a justice of the peace.

It may be useful to observe that, though section 714 of the Code provides that the room or place in which the justice sits to hear or try a complaint shall be deemed an open and public Court, it does not follow that the acts or sittings of a magistrate or of two or more justices are acts or sittings of a Court.

In the matter now before me, I am brought to consider the effect of the recognizance as an act entered into before a justice of the peace, in relation to the mode of procedure to be adopted for an estreat, and the judicial functionary competent to order an estreat.

The authority of the Police Magistrate to order and take this recognizance is declared in clause 2 of section 748 of the Code.

Now, as regards the power to order forfeiture and estreat, it can readily be understood that there may be a difference between

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a bond to appear and a bond to keep the peace, arising from the difference in the kinds of obligation.

When the default consists in a default to appear at an indicated time and place, it is made clear in section 1097 that "the justice who took the recognizance, or any justice who is there present," is the authority competent to certify to the breach, but it is argued for the appellant that that provision does not apply to articles of the peace.

It is true that the rule of section 1097 applies only to recognizances to appear and to recognizances to prosecute an appeal upon stated case, but farther on we have section 1100, which reads:—

1100. All recognizances taken or entered into under any provision of this Act, which are forfeited or in respect to which the conditions of such recognizances, or any of them, have not been complied with, shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the Court before which the principal party thereto was bound to appear.

We have consequently to see how estreat is operated in the case of a recognizance to appear. That brings us first to section 1113 wherein it is provided that, in the Province of Quebec, whenever default has been made in the condition of any recognizance lawfully entered into in any criminal matter, the recognizance shall be estreated or withdrawn from the record, and in the next place to section 1114 which reads as follows:—

1114. Such recognizance, certificate or minute as the case may be shall be transmitted by the Court, recorder, justice, magistrate, or other functionary before whom the cognizor . . . was bound to appear, or to do that by his default to do which the condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purposes, with the certificate of the Court, recorder, justice . . . as aforesaid, of the breach of the condition of such recognizance, of which, and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence.

I consider that it results from these provisions that the certificate of the magistrate before whom the cognizor was bound is conclusive evidence of breach and forfeiture.

I find that the Police Magistrate who took the recognizance was not required, by any enactment operative in the Province of Quebec, to transmit the instrument to the Court of the Ses-

sions of the Peace, and I consider that the circumstance that the cognizor was tried for the assault on Wassen did not of itself clothe the Court of the Sessions with authority to certify the breach, though the result of that trial might have afforded the Court of the Sessions a ground upon which on public grounds, it could have ordered the giving of new recognizances. Harris Criminal Law, 10th ed., 297.

The first question is, therefore, to be answered in the affirmative, and, from what has been said, it will be seen to follow that an application to have a breach of the condition certified could appropriately be made to Mr. Lafontaine, the Police Magistrate. In the matter here in question, that application was made by way of complaint, alleging the breach, and summons. That was a suitable mode of procedure though possibly not in strictness necessary.

Thus, in the case of recognizances after conviction to come up for judgment and in the meanwhile to keep the peace, there is a practice to proceed upon a written notice to the defendant and to the sureties. Bowen-Rowlands, Criminal Proc., 2nd ed., 277.

In relation to the nature of articles of the peace and the jurisdiction of justices in respect of them, it may be useful to quote the following summary from the Encyclopedia of the Laws of England, title "Articles of the Peace," 2nd ed., p. 523:—

> The procedure is of a special or exceptional character, being what has been termed a branch of preventive justice (4 Black. Com. c. 18) in the nature of a *quia timet* suit in a criminal case, to obtain security against future breaches of the peace.
>
> Jurisdiction of justices of the peace, to require sureties to keep the peace rests upon immemorial usage, as established by judicial decisions (see *R.* v. *Justices of Queen's County* (1882), 19 L.R. Ir. 294, 301). Its origin is variously assigned to (1) the powers inherited from conservators of the peace; (2) the statutes 34 Edw. III., C. 1, and 3 Hen. VII., C. 2; and (3) the commission of the peace, which may perhaps be read as a contemporary or traditional exposition of the Act of Edw. III.

The case of *R.* v. *Trueman*, 29 Times L.R. 599, may also be referred to, again, as indicating what is referred to as the "former practice" it is said in Archbold Cr. Pleading and Evid., 23rd ed., at p. 117: "The Court of Exchequer had jurisdiction

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over recognizances forfeited before justices of the peace in or out of sessions."

In ampler terms it is said in Burn's Justice, vol. 5, p. 8, that by 3 Henry VII., ch. 1:—

> The justices shall certify their recognizances for keeping the peace to the next sessions, that the party may be called; and if he make default the default shall be recorded and this recognizance, with the record of the default, shall be sent and certified into the Chancery, King's Bench or Exchequer.

Afterwards, by virtue of 42-43 Vict., ch. 49, sec. 9, Courts of summary jurisdiction were empowered to forfeit recognizances conditioned to appear or do other matters in proceedings before them, instead of certifying the recognizances to Quarter Sessions for enforcement as was the old practice under 3 Henry VII. ch. 2, and 16-17 Vict. ch. 30, sec. 2, but, at the date at which *R. v. JJ. of West Riding*, 7 A. & E. 583, cited in Paley (note at p. 348), and referred to at the hearing, was decided, it appeared that the enactment providing for transmission of recognizances to the Quarter Sessions did not apply to articles of the peace, and it was decided that, as regards these, the old procedure of *scire facias* should be resorted to.

That was corrected by the summary jurisdiction Act, 1879 (42-43 Vict. ch. 49), and thereafter in England a recognizance to keep the peace could be declared by the Court before whom it was entered into to be forfeited, upon proof of the conviction of the person bound as principal of any offence which is in law a breach of the condition of the recognizance.

Counsel for the appellant say that this enactment did not extend to this Dominion or colonies and that the learned magistrate erred in having referred to it as authority, but that point ceases to be of importance when it is seen, as I think is above demonstrated, that our Criminal Code in the sections above cited, establishes the same result and effect.

It may also be opportune to add that the wording of art. 3351, R.S.Q., is such as to imply that the old common law powers of justices of the peace are preserved, and are to be taken as conferred upon them by the fact of their appointment, and to point out, in so far as the provincial power to constitute Courts may

be considered to be in question, that articles 3394 and 3395, R.S.Q., reproduce section 1113 and 1114 of the Criminal Code or perhaps, I should say, have the same wording.

I think that what has been said suffices to enable the proper answers to be given to question number 2 and that it should be said, in answer to that question, that the Police Magistrate could hear Miller's application for forfeiture and estreat, in view of the conviction for assault in the Court of the Sessions and notwithstanding the trial and conviction had in that Court.

Questions numbers 3 and 4 raise the contention that Miller had no standing to prosecute the forfeiture and estreat, and that that could be accompanied only at the instance of the Crown (Ministère Public). The effect of what I have said is to place the matter upon the same footing as other proceedings before a magistrate. As in other matters of criminal and penal practice under our English law system, so in a matter such as that here in question it is left to the individual person cognizant of the facts to set the machinery of the Courts in motion. There are special cases in which it is required by statute that proceedings should be commenced by some specified officer or upon leave obtained, but I find no such requirement in this matter.

Questions numbers 3 and 4 are, therefore, to be answered, the former in the negative and the latter in the affirmative, by saying that the intervention of the public authority was not necessary in proceedings for forfeiture and estreat, and that such proceedings could be had on application of Miller.

The case of *R.* v. *Young*, 4 Can. Cr. Cas. 580, was relied upon for the appellant, but in that case the recognizance had been taken after trial and verdict upon indictment. It is clear that different considerations would enter into the matter in such a case.

A more difficult question is raised in number 5, which is as follows:—

Cette cour (the police magistrate) ainsi prés'dée pouvait-elle, sur une simple production de conviction, déclarer forfait le cautionnement fourni par l'accusé?

Otherwise stated, the question is, did production of the conviction for assault accompanied by proof of the recognizance and

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of identity of the defendant, constitute proof of a breach of the peace by the defendant?

The purport of the Imperial Act of 1879 would make it suffice as proof in England, but our Code or statute law does not in terms so enact, and the general rule is that a conviction in a criminal or penal case is not proof, in another case, of the acts upon which the conviction may be grounded. Neither is a conviction of one person evidence against another person on another charge grounded on the same facts: *Taylor* v. *Wilson*, 28 Times L.R. 97.

The reason generally assigned for that rule is that the principle of *res judicata* applies only between the same parties, and that the parties to a criminal proceeding and the parties to a civil action arising out of the offence are not the same. In the matter here in question, that ground of distinction cannot apply. The parties in the assault case were The King against Walker and these were also the parties in the proceedings for forfeiture and estreat, whatever names may happen to have been put into the papers as names of prosecutors. It is clear that in neither case was any private satisfaction or adjudication sought or awarded to the person who for convenience is called the "complainant."

But I consider that it may further be said that, though a conviction does not make proof in another action of the doing of the acts on which it is grounded, it is still evidence of the particular fact which it recites, and that proof of the conviction for assault does amount to proof of a breach of the peace and consequently of a violation of the condition of the recognizance. Reference may be made to Broom's Maxims, 341, and to the reasoning in *Re Crippen* (1911), 27 Times L.R. 258.

I, therefore, conclude that question number 5 is to be answered in the affirmative.

In question number 6 it is asked whether the Police Magistrate—I take it that that is to be held to be what is meant, though the expression "la présente Court" is made use of—could take cognizance of the proceeding for forfeiture, seeing that the Court of the Sessions had refrained from certifying the breach and ordering estreat.

In view of what has been already said, it is to be answered that the Police Magistrate was an authority competent to certify to the breach and order estreat, and that the Court of the Sessions was not shewn to have been seized of any proceeding to that end.

The remaining questions (numbers 7 and 8) relate to the circumstance that the Judge of Sessions was about to impose a fine of $5 upon the appellant, but that, upon being made aware of the recognizance, changed his mind and imposed a fine of $10. In these circumstances, it is argued that the appellant, by the order of forfeiture and estreat, has been punished a second time for the same matter, and can plead *autrefois convict*. The question, in reality amounts to a question of fact. The appellant was fined $10 for having broken the peace. His breach of the peace was of a more serious character because of the outstanding recognizance. But for the recognizance, the fine would have been $5 only.

It is to be observed that the fine of $10 was imposed for commission of a specified offence. The recognizance had been ordered as a measure of preventive justice in the exercise of this power of the magistrate as a conservator of the peace.

It happens that the assault on Wasson, besides being a punishable offence, constituted a breach of the recognizance. The same act may sometimes constitute two or more penal offences. Here it constitutes an offence and is evidence of breach of a bond. The increase in the amount of the fine imposed in the Court of Sessions and the subsequent forfeiture and estreat of a recognizance are not two punishments for the same thing. It was said by Holt, C.J., in *R.* v. *Rogers* (1702), 7 Mod. 29, quoted in Archbold, Quarter Sessions, 6th ed., p. 222, that

> binding to good behaviour is not by way of punishment, but it is to shew that when one has broke the good behaviour he is not to be any more trusted.

Questions 7 and 8 are formulated upon the assumption of a second punishment for the same offence. They are not in accord with the facts as recited by the magistrate in the statement of case, and consequently need not be further answered.

The certificate of forfeiture and order of estreat are consequently affirmed with costs and the appeal is dismissed.

Appeal dismissed.

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REX v. HELLIWELL.

Ontario Supreme Court (Appellate Division), Sir William R. Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Lennox, J. February 23, 1914.

1. GAMING (§ I—4)—POOL SELLING—BETTING—JURISDICTION OF POLICE MAGISTRATE.

A person charged before a Police Magistrate with a contravention of sec. 235 of the Criminal Code (as re-enacted by 9 & 10 Edw. VII. ch. 10, sec. 3), dealing with betting, wagering, pool-selling, etc., has the right to elect to be tried by a jury, and cannot without his consent be tried summarily by the Police Magistrate.

2. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—CONSENT.

The jurisdiction to try summarily conferred by Code sec. 773 as to certain indictable offences, is expressly subject to the subsequent provisions of Part XVI., and depends upon the consent of the accused as to all of the offences mentioned in the section, except those as to which, and the cases in which, it is expressly provided that jurisdiction does not depend upon the consent of the person charged.

Statement

CASE stated by R. E. Kingsford, Esquire, one of the Police Magistrates for the City of Toronto, under sec. 1014 of the Criminal Code, R.S.C. 1906, ch. 146.

The accused was charged before the Police Magistrate with a contravention of sec. 235 of the Criminal Code, dealing with betting, wagering, pool-selling, etc., and asked leave to elect to be tried by a jury, which was refused because, in the opinion of the Police Magistrate, his jurisdiction to try the accused was absolute without the consent of the accused.

The questions reserved for the opinion of the Court were whether the Police Magistrate had: (1) the right to refuse to allow the accused to elect to be tried by a jury and to try him summarily without his consent; (2) power to inflict a penalty of six months' imprisonment and a fine of $500 and in default of the payment of the fine of $500 a further term of six months; (3) power to inflict a heavier penalty than six months' imprisonment and a fine of $200, as provided by sec. 781 of the Criminal Code, as amended by 3 & 4 Geo. V. ch. 13, sec. 27.

Argument

H. E. Rose, K.C., for the accused, argued that the accused had a right of election as to whether he would be tried by a jury or by the magistrate: Criminal Code, R.S.C. 1906, ch. 146, sec. 235, as re-enacted by 9 & 10 Edw. VII. ch. 10, sec. 3. On the question of the magistrate's jurisdiction to dispose of the

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case summarily and his right to impose a sentence of $500 and six months' imprisonment and in default of payment of the fine, an additional six months' imprisonment, see secs. 773(*g*), 776, 777, 778, amended by 8 & 9 Edw. VII. ch. 9, schedules at pp. 114, 115. Sections 774 and 775 are particular exceptions to 773. See *Rex* v. *Lee Guey* (1907), 15 O.L.R. 235, at pp. 236, 244.

E. Bayly, K.C., for the Crown, argued that sec. 773 of the Code confers a summary jurisdiction upon magistrates: see Bouvier's Law Dictionary, tit. "Summary Jurisdiction." Sections 780 and 781 of the Code follow sec. 773, giving the sentences that may be imposed; "absolute" must be distinguished from "summary." Section 780 of the Code cannot be reconciled with the prisoner's contention, and a magistrate trying an accused under sec. 773 is limited in his sentences by sec. 781. *Rex* v. *Lee Guey*, 15 O.L.R. 235, is upon a different question. If a prisoner is tried with his own consent, he should be tried under sec. 777; if not, secs. 780 and 781 apply. See *Rex* v. *Smith* (1905), 9 Can. Crim. Cas. 338.

Rose, in reply, referred to the inconsistency between secs. 773 and 777; sec. 771 defines "magistrate." Section 777 is applicable; it applies to more serious offences than are dealt with in secs. 780 and 781.

Judgment was given in favour of the accused on the questions submitted; a new trial was granted.

Meredith, C.J.O.

February 23. The judgment of the Court was delivered by MEREDITH, C.J.O. (after stating the case as above):—The first question must, in my opinion, be answered in the negative.

The jurisdiction to try summarily conferred by sec. 773 is, by the terms of the section, "subject to the subsequent provisions of this Part," one of which (sec. 778 (2)) is:—

"If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused—

"(a) that he is charged with the offence, describing it;

"(b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the

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ordinary way by the Court having criminal jurisdiction" (8 & 9 Edw. VII. ch. 9, schedule, p. 114).

It is clear, therefore, that the ruling of the Police Magistrate was erroneous unless the charge against the accused is "one that can be tried summarily without the consent of the accused," within the meaning of sub-sec. 2 of sec. 778.

The reference in the sub-section is, I think, plainly to a charge for which, under the provisions of Part XVI. or of some other enactment, jurisdiction to try summarily without the consent of the accused is conferred. Such provisions are found in sec. 774, as enacted by 8 & 9 Edw. VII. ch. 9, sec. 2 (schedule, p. 113); in secs. 774 and 775; and in sub-sec. 5 of sec. 777, as enacted by 8 & 9 Edw. VII. ch. 9, sec. 2; but nowhere in Part XVI. or elsewhere, as far as I have been able to discover, is jurisdiction to try summarily without the consent of the accused, in the case of the offence with which the accused is in this case charged, conferred on the magistrate, except in the case of seafaring persons as provided by sec. 775.

As I understand Mr. Bayly's argument, it is, that sec. 773 confers jurisdiction to try summarily without the consent of the accused for any of the offences mentioned in the section, and that the qualifying words of it have reference to the provisions as to the punishment that may be inflicted, which is less than might be imposed if the accused had been convicted after trial in the ordinary way; and that the object of the provisions making the jurisdiction absolute without the consent of the accused, as to certain of the offences, was to empower the magistrate in those cases to impose the heavier punishments that might have been imposed if the accused had been convicted after trial in the ordinary way.

The construction contended for is not, I think, the natural one, and would lead to the anomalous result that the graver offences mentioned in clauses (*c*), (*d*), (*e*), and (*g*), might be more lightly punished than the less grave ones mentioned in clauses (*a*) and (*f*).

The word "absolute" is used, I think, in the sense of "unconditional," that is to say, not dependent upon the conditions pre-

cedent to the right to exercise the jurisdiction which are prescribed by the Act having been complied with, and the words referring to the consent of the accused were added *ex abundanti cautelâ*. A striking instance of this caution is to be found in sec. 775, which provides not only that the jurisdiction is absolute and does not depend on the consent of the person charged to be tried by the magistrate, but also that such person shall not "be asked whether he consents to be so tried."

In my opinion, the jurisdiction of the magistrate to try summarily, so far as it depends upon any of the provisions of Part XVI., depends upon the consent of the accused as to all of the offences mentioned in sec. 773, except those as to which, and the cases in which, it is expressly provided that jurisdiction does not depend upon the consent of the person charged.

Having come to the conclusion that the first question should be answered in the negative, it is unnecessary to answer the second and third questions.

The result is, that a new trial must be granted, in order that the case may be dealt with as provided by sec. 778, and in accordance with the answer to the first question.

New trial granted.

REX v. MORTON.

Saskatchewan Supreme Court, Haultain, C.J. October 6, 1913.

1. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—JURISDICTION ABSOLUTE IN CERTAIN PROVINCES.

Two justices have absolute jurisdiction in Saskatchewan under Cr. Code, sec. 776, to summarily try a charge of inflicting grievous bodily harm.

[*R. v. Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363, followed.]

2. CRIMINAL LAW (§ IV B 111)—SENTENCE AND IMPRISONMENT — HARD LABOUR.

Where both fine and imprisonment are imposed on a summary trial for an offence within Cr. Code sec. 781 (amendment of 1913), hard labour may be imposed at the discretion of the justices as an incident to the imprisonment.

[*R. v. Burtress*, 3 Can. Cr. Cas. 536, referred to.]

Statement

MOTION to quash a conviction on summary trial before two justices under Cr. Code sec. 773.

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The accused was tried and convicted before two justices of the peace for having inflicted grievous bodily harm, and was by them sentenced to two months' imprisonment with hard labour, and to pay a fine of fifty dollars and costs. A motion was made by his solicitors for the quashing of the conviction upon two grounds:—

(*a*) That the justices had no jurisdiction to hear the case.

(*b*) That in any event the sentence was in excess of their jurisdiction.

The conviction was affirmed.

Allan, Gordon, Bryant, & Gordon, solicitors for the accused.

H. E. Sampson, for the Crown.

Haultain, C.J.

HAULTAIN, C.J.:—Following *R.* v. *Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363, and *R.* v. *Zyla*, 17 W.L.R. 258, I hold that the magistrates had jurisdiction under sec. 773, Criminal Code, to try the offence charged.

As to the punishment the magistrates, under sec. 781 Criminal Code (amendment of 1913), may impose imprisonment with or without hard labour for a term not exceeding six months or a fine not exceeding, with costs, two hundred dollars or "both fine and imprisonment, not exceeding the said sum and term."

The objection is taken that where both fine and imprisonment are imposed, the imprisonment must be without hard labour. In my opinion "imprisonment not exceeding the said term" means imprisonment of the same character as is mentioned in the earlier part of the section, that is imprisonment with or without hard labour. *R.* v. *Burtress*, 3 Can. Cr. Cas. 536. In any event, section 1057 of the Criminal Code gives absolute discretion as to hard labour or not in the case of convictions under part XVI. of the Code.

The application must therefore be refused and the conviction will stand. There will be no costs.

Conviction affirmed.

CHAMPION v. WORLD BUILDING.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. July 14, 1914.

1. CONTRACTS (§ IV D—362)—CONDITION—CERTIFICATE OF PERFORMANCE—NECESSITY OF ARCHITECT'S CERTIFICATE—BUILDING CONTRACT.

Under a building contract which provides that the price shall be paid the contractor in instalments as certified by the architect from time to time according to the progress of the work, failure to pay the amount of the first certificate does not dispense with the necessity of obtaining further certificates before bringing action for the additional work or for the entire price; the refusal to pay the amount of the first certificate is not a repudiation by the owner of the architect's authority to certify.

2. MECHANICS' LIENS (§ II—5)—THE RIGHT—WHEN LIEN EXISTS—ACTION TO "REALIZE A LIEN"—CONDITIONS—MECHANICS' LIEN ACT, B.C.

An action to realize a lien under the Mechanics' Lien Act, B.C., can be brought only when the money sought to be recovered has become payable and within thirty days after the filing of the lien; no action lies for the purpose of keeping the lien *in esse* where the due date is deferred beyond the time which is limited by the Act for actions to enforce a mechanics' lien, such cases not being provided for in the Act.

Statement

APPEAL from the judgment of His Honour Judge Grant of the County Court, dismissing the plaintiffs' claim for a certain balance of a building contract because not certified by the architect as stipulated.

The appeal was dismissed.

R. M. Macdonald, for appellants, plaintiffs.

E. C. Mayers, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—By the contract between the appellants and the World Building Ltd., the price was to be paid to the appellants upon the production of architect's certificates from time to time as the work progressed. They obtained one certificate entitling them to the payment of $6,000 which the World Building Ltd. neglected to pay. Thereafter the appellants made no application to the architect for further certificates, but completed the building, as they allege, and filed claims under the Mechanics' Lien Act, and brought two actions to enforce payment and realization of their liens, which actions were consolidated and tried before His Honour Judge Grant in the County Court. He gave judgment against the World Building Ltd. for the $6,000 above mentioned, and for realization upon the liens to that extent, but disallowed the claim for the bal-

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ance of the contract moneys for which the certificates had not been obtained. From that judgment the plaintiffs in the action appealed, and the defendants the Coughlans, mortgagees of the property in question, cross-appealed.

The reason alleged by the plaintiffs for their neglect to obtain certificates of the architect was that because the owners or the mortgagees who were supplying the moneys for the erection of the building neglected or refused to pay the amount called for by the certificate actually obtained, they had thereby repudiated the authority of the architect and dispensed with the necessity for obtaining his certificates. That contention is, in my opinion, untenable. When these actions were commenced the $6,000 only was due and payable.

Assuming it to have been proved that the appellants were entitled to a lien or liens, and that they complied with the provisions of sec. 19 of the Mechanics' Lien Act requiring the filing of a claim within the time there specified, the rights thereby obtained could only be preserved by the taking of legal proceedings within thirty days thereafter to realize their lien which in this case took the form of the actions in which this appeal is taken. In said actions they prayed for judgment against the defendants not only for the $6,000 but for the balance of the contract price with respect to which they have not obtained architect's certificates, and for the enforcement of their lien by sale of the property.

In my opinion, an action to enforce, or to use the words of the Act, "to realize the lien," cannot be brought until the money sought to be recovered by such proceedings has become payable. Neither a personal judgment, nor a judgment affecting the property, could be given in such an action; no relief of any kind could be given. The suggestion of appellants' counsel is that the actions could properly have been brought for the purpose of keeping the lien *in esse*, but he was unable to cite any authority to support that submission, indeed, I should have been surprised had he been able to find any such authority grounded on legislation similar to ours. The argument advanced that great hardship might ensue to lien holders where the due date,

whether by agreement or by reason of circumstances such as we find here, should be deferred beyond the time within which action is to be brought, might very well be directed to the legislature which could remedy what I think is a *casus omissus*, but hardship cannot be ground for extending by judicial construction the operation of statutory laws.

This conclusion renders it unnecessary to consider the other matters raised in the plaintiffs' appeal, for if my view be the correct one, the actions as to all matters outside the claim founded on the $6,000 certificate could not be maintained, and were therefore as to those matters rightly dismissed. This dismissal should not, of course, preclude the plaintiffs from suing again if and when they have obtained a proper status to do so.

This leaves the cross-appeal of the defendants, the Coughlans, to be dealt with. This raises a question which has already been decided in this Court against these appellants' contention in *Irvin v. Victoria Home Construction and Investment Company* (1913), 18 B.C.R. 318, 12 D.L.R. 637.

Both appeals should be dismissed with costs.

IRVING, J.A.:—I concur in the opinion of the Chief Justice. Irving, J.A.

MARTIN, J.A.:—In my opinion the learned trial Judge was right in refusing to enter judgment for the plaintiffs for an amount greater than was certified to by the architect's first certificate for $6,000. It is admitted that he was never even asked for another one, and also that there was no reason to suppose he would have refused it, if asked, and no attack was or is made upon his *bonâ fides* or otherwise. The excuse advanced by the plaintiff's manager for this strange conduct is simply and solely that because the said first certificate was not paid it would be "a mere farce" to get others "as they would not honour the one we had." It is hard to treat seriously such a lame excuse for failure to comply with the express condition of a contract upon which alone payment can be obtained; it is sufficient to say that if people will act in such a petulant manner they must be prepared to go without payment. It was sought to avoid the consequences of the absence of a certificate by setting up the estab- Martin, J.A.

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lishment of a trust that the money to be raised on the security of the property should be paid out for the complete construction of the whole building, but suffice it to say that I am unable to take that view of the facts.

Then as to the contention that the plaintiff can nevertheless acquire a lien for a greater amount than he can maintain an action for; I should have expected some authority in support of such a contention, but we have been referred to none, either in the statute or otherwise; on the contrary, sec. 7 expressly says that "the amount of such lien shall not exceed the sum actually owing to the person entitled to the lien . . ." and sec. 19 in pursuance thereof, requires the affidavit to state "(*d*) The sum claimed to be owing, and when due." So assuming that the lien may primarily attach for the full amount yet it is only enforceable for "the sum actually owing." The lien becomes merged in the action which is brought under sec. 23 to "realize" it, and judgment can only be given to the extent that such action is maintainable under sec. 7, *i.e.*, for "the sum actually owing" to the claimant.

It follows, therefore, that the appeal should be dismissed.

With respect to the cross-appeal founded on the payroll, sec. 15, that should also be dismissed. *Cf. Turner* v. *Fuller* (1913), 18 B.C.R. 69, 12 D.L.R. 255.

Galliher, J.A.

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

McPhillips, J.A.

MCPHILLIPS, J.A., concurs with MACDONALD, C.J.A.

Appeal and cross-appeal dismissed.

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WHITCOMB v. ST. JOHN & QUEBEC R. CO.

New Brunswick Supreme Court (Chancery Division), White, J. June 5, 1914.

1. RAILWAYS (§ II B—21)—PRIVATE OR FARM CROSSINGS—CULVERT FOR FRESHETS—SPECIFIC PERFORMANCE—DAMAGES.

An agreement by a railway company with the land owner from whom it purchased a right of way and as part consideration therefor to build a culvert so as not to obstruct freshet overflows which benefited his land, may be the subject of a decree for specific performance and the landowner's remedy is not one in damages only if the location and character of the culvert required are capable of precise ascertainment.

[*Sanderson* v. *Cockermouth & Workington R. Co.*, 11 Beav. 497, 19 L.J. Ch. 503, and *Clowes* v. *Staffordshire*, L.R. 8 Ch. 125, referred to.]

2. RAILWAYS (§ II B—21)—CULVERTS AT FARM CROSSINGS—RELEASE AS TO DAMAGES FROM "CONSTRUCTION, MAINTENANCE AND OPERATION"—EFFECT AS TO CULVERTS.

A verbal agreement to construct a culvert so as not to obstruct a freshet overflow which was of benefit to the party conveying the right of way may be shewn notwithstanding a release contained in the conveyance of all claims for severance and depreciation arising out of the taking or out of the "construction, maintenance and operation" of the railway; such release does not absolve the railway from liability in respect of its failure to use such means to prevent damage to the landowner as are reasonably possible consistently with the proper construction, maintenance and operation of the railway.

[*R.* v. *Wycombe R. Co.*, L.R. 2 Q.B. 310; *London and N.W. R. Co.* v. *Ogwen Council*, 80 L.T. 401, 63 J.P. 295, referred to.]

ACTION against the defendant railway company for specific performance of an alleged agreement for the placing of a culvert for freshet overflows affecting the adjoining land of the plaintiffs. Statement

Judgment was given for the plaintiffs for specific performance or (at the defendants' option) the payment of a fixed sum, $1,000.

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

Percy A. Guthrie, for defendants.

WHITE, J.:—The facts in this case are as follows: The female plaintiff is the owner of a farm situate in the parish of Gagetown, and fronting on the west bank of the St. John River. The farm comprises some two hundred acres, of which about fifty are intervale. Prior to the construction of the defendant's railway this intervale was overflowed in seasons of ordinary freshet to a depth, varying according to the elevation of the soil, of from a few inches to seven feet. As the freshet rises the water first comes over the river bank near to and at a short distance above the upper side line of the plaintiff's farm, when, following depressions in the soil, it spreads over the plaintiff's intervale. At about the same or a slightly higher rise of freshet the water enters Hartt's Lake through its outlet (which is something over a mile below the plaintiff's farm), and diffusing itself over this lake (which has an area, as I judge from the plans in evidence, of between one and two square miles) flows thence back through White, J.

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a creek, and lowlands adjoining, into Coy Lake. This last mentioned lake lies in part on, and in the rear of, the plaintiff's land, and comprises from a half mile to a mile in area. Thence through a channel or depression in the soil the freshet finds its way on to the plaintiff's intervale. When the freshet has attained its full usual height the water from the river flows unchecked over practically the whole of the plaintiff's intervale.

The effect of this overflow is to fertilize and enrich the soil by the deposit thereon of silt. With the exception of probably one year in ten on an average this freshet overflow occurs every spring.

The defendants' railway crosses the plaintiffs' land from three hundred to four hundred feet back from the river bank, to which it runs almost, but not quite, parallel. The railway right of way takes about four acres of the plaintiffs' land, and the track is carried on an embankment above high freshet level. The effect of this embankment, if constructed without a bridge or a culvert to permit the overflow of freshet from the river upon the plaintiffs' intervale, would be to deprive that part of the intervale lying back of the railway of any overflow save that which would reach it by way of Hartt's Lake, as already described. Water coming in that way would have little fertilizing value as compared with an overflow directly from the river, as before it reached the plaintiffs' land the most of the silt which it originally carried from the river would have been deposited.

During the summer of 1912 the defendant company having failed, after some negotiations, to reach an agreement with the plaintiffs for purchase of the right of way, served notice of intention to expropriate under ch. 91 of the Consolidated Statutes of 1903. The plaintiff, Eugene P. Whitcomb, thereupon went to Fredericton, and in the defendants' office at that city had a conversation with Mr. Howard, who was the agent of the defendant company authorized to agree upon terms for the purchase of rights of way. During this conversation, or as a result of it, both parties came to a verbal agreement that the plaintiffs would convey to the defendant company the right of way defined in the notice, upon certain specified terms and conditions. In his evi-

dence Mr. Whitcomb does not state this conversation, or the terms therein agreed upon, in any well connected or defined order, being as I inferred from his testimony, and the manner of his giving it, an honest witness, but one unskilled in the use of language. But his testimony taken as a whole, convinces me that an agreement was come to between the plaintiffs, acting through Mr. Whitcomb, and the defendants, acting through Mr. Howard, as follows, that is to say: That the expropriation proceedings would be abandoned and that the plaintiffs would execute to the defendants a deed of the right of way across the plaintiffs' lands upon being paid by the defendants on the execution of said deed the sum of $500; and that in consideration thereof the defendant company would construct on the plaintiffs' land a culvert in the railway embankment at a place on the plaintiffs' land to be indicated by Mr. Whitcomb, and to be staked out by Mr. Howard when the latter visited the farm, which he promised to do as soon as he could find opportunity. Nothing was then said as to the kind of culvert to be constructed, save that it was to be "big enough to let the water through." As Mr. Whitcomb demanded $1,500 for the right of way if no culvert was to be constructed, and agreed to accept $500 if one was placed on the embankment where he wanted it located, it is quite evident both parties understood the culvert was to be of such size and character as would permit the freshet from the river to freely overflow the plaintiffs' intervale. Some days later, Mr. Howard and Mr. Spencer—who was an engineer in the defendants' employ—visited the plaintiffs' farm, and Mr. Whitcomb then pointed out to them where he wanted the culvert placed and they said "all right," and set stakes, one on each side of the place thus indicated, leaving a space between of about twenty feet in width, measured along the right of way. Some talk then occurred as to the kind of culvert, and Mr. Howard said they would put in galvanized iron pipes. To this Mr. Whitcomb replied that "I told him I thought it would take quite a number to let that water through, but as long as you get it there that is all I care about." He added, "I think another culvert would be better, a regular culvert, and Mr. Spencer says, 'We could put

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in a rail culvert,' and he explained to me that they could build up on each side a sort of cement, and then put steel and iron rails in, and put the railroad on that, which would not be so expensive, and I said, 'I don't care what it is so long as you put it in and do as you agreed.' ''

Some time after this Mr. Dunn, acting as the defendants' solicitor, brought to the plaintiffs the deed of the right of way, which the latter duly executed, and Mr. Dunn thereupon paid them the $500 as agreed. The consideration stated in the deed is $1.

The stakes mentioned were set out, before the deed was executed, and the defendants afterwards constructed their railway embankment up to these stakes, but left the space between the stakes open, and it now remains open, save that the defendants have erected a temporary trestle there to carry over this open space their line of rails so as to afford passage for construction trains.

In the following summer—the summer of 1913—Mr. Whitcomb having heard that the defendant company proposed filling in this open space with a solid earth embankment, went to Fredericton, and there saw Mr. Thompson, the defendants' Chief Engineer, who had been present during part of the negotiations referred to between Mr. Howard and Mr. Whitcomb, which culminated in the agreement stated. Mr. Whitcomb says Mr. Thompson was not present when the agreement was finally come to, but that Mr. Howard, before the agreement was finally reached, went across the hall to see Mr. Thompson, and on coming back said the company would agree.

Mr. Whitcomb states that when he saw Mr. Thompson on the occasion stated, during the summer of 1913, a conversation between them took place, part of which is as follows:—

> I asked him (Thompson) if it were true that they were going to fill it up. He said it was. I asked him what kind of a way that would be to keep his word, and he went on saying it was for my benefit to shut it up. . . . I said, You break your word with me if you shut it up, or words to that effect. I know the words he used to me. Q. What did he say? A. He says, "I know we promised to put it in, but I don't think it would be as well for you as it would be to shut the place up."

Mr. George McKnight, an engineer, gave evidence on behalf of the defendant. He had taken levels, and made measurements upon the land with a view of shewing the manner in which, and the channels by which, the freshet got upon the plaintiffs' land and how it would be affected by the filling in solidly of the embankment. The result of this survey he embodied in a plan, which is in evidence. This evidence was adduced in the attempt to prove that inasmuch as the plaintiffs' intervale was flooded in freshet time by the back flow from Hartt's Lake, the building of a solid embankment, as proposed by the defendant, would cause the plaintiffs no injury. I cannot accept that view, for the reason already intimated, that the overflow directly from the river would carry to, and deposit upon, the land much more silt and fertilizing sediment than would such an overflow reaching the intervale by the roundabout way to Hartt's Lake. Mr. McKnight also testified that it was usual for an opening such as that between the stakes mentioned to be left during the construction, at places where the company had reason to think they might require a culvert for purposes of drainage; and on cross examination he said that if an agreement was made to put in a watercourse either by a bridge, pipes, or culvert, the opening referred to was such as would be left for the purpose of constructing such work.

Mr. Howard was called by the defendants, and denied having made any agreement with the plaintiffs as alleged by Mr. Whitcomb. Neither Mr. Spencer nor Mr. Thompson gave evidence. It was explained by defendants' counsel that Mr. Spencer was out of the province and could not be found, but no reason was given why Mr. Thompson was not called.

I believe and accept the evidence of Mr. Whitcomb, and find as a fact that the contract with the defendant was made as stated by him. It does not appear that in making this contract anything was expressly mentioned as to the defendant agreeing to continue the culvert during the existence of the embankment, but I think it clear that both parties understood it to be part of the agreement that the culvert stipulated for was to be continuously maintained by the defendant. This appears to me to be a necessary inference from what was said.

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No question was raised, or defence made upon the Statute of Frauds. It is not disputed that, unless otherwise ordered by the Court, the defendant refuses to construct the culvert in question and proposes to fill in the gap left in the embankment. Under these circumstances I think the plaintiffs are entitled to relief.

The plaintiffs' claim as stated in the pleadings is:—

1. For specific performance of the agreement. 2. For an injunction to restrain the defendant from filling up the gap mentioned. 3. For a mandatory injunction to compel the placing of such culverts, waterways or opening for the water to flow through. 4. For damages.

The defence was based on the following grounds:—

(a) A denial of the alleged contract. (b) Claim that the construction of the culvert according to the contract alleged would be of no benefit to the plaintiffs. (c) As to specific performance or injunction, that damages would be an adequate remedy. (d) The contract is too uncertain to enable the Court to decree specific performance.

Mr. Guthrie upon the argument further claimed that by a clause in their deed of the right of way the plaintiffs released the defendants from any claim arising, or which might arise from obstruction by the railway of the flow of the freshet upon the plaintiffs' lands. The claim thus relied upon reads as follows:—

And the grantors further release the railway company from all claims and demands for severance and depreciation arising out of the taking or expropriation by the railway company of the said lands and the construction, maintenance and operation thereon of a line of railway and other works.

but I do not think this clause has the effect the defendant contends it has. It does not, in my opinion, absolve the defendant from liability where the company fails to use such means to prevent damage to the plaintiff as are reasonably possible, consistently with the proper construction, maintenance and operation of their railway. Our Act differs in its language from the English Railways Clauses Consolidations Act, and possibly fails to define as clearly and fully as does the English statute the powers of the company in respect to the acquisition and user of its lands. But reading the provisions of our Act, and especially sub-secs. 2, 5, and 7 of sec. 7 I think the legislature evidently intended on the one hand to give the company certain specified powers essential to the construction, maintenance and operation

of this road, and on the other to protect as far as possible consistently with such first mentioned purposes the rights of owners of adjacent lands. I cannot think it was ever intended to authorize the company in the exercise of its franchise to do any act injurious to adjacent owners where the doing of such act was not reasonably necessary for the construction, maintenance or operation of the road. Save in so far as it is expressly authorized by the Legislature, the company is subject, like any other property owner, to the law crystallized in the maxim "*Sic utere tuo ut alienum non ladas.*" See *Reg.* v. *Wycombe R. Co.*, L.R. 2 Q.B. 310, cited and followed, *London and N.W. R. Co.* v. *Ogwen District Council*, 80 L.T. 401, 63 J.P. 295. The effect of the clause in question is I think to release the defendant from any claim in respect to damages arising from acts which the defendant is authorized to perform, and it cannot be construed as a grant of authority to the company to do unnecessary damage. It does not override the verbal agreement made by the defendant to construct and maintain the culvert, but on the contrary is quite consistent with such agreement. That the filling in by an embankment of the gap left between the stakes referred to is not reasonably necessary under the circumstances is, I think, apparent from the evidence of Mr. McKnight, and from the fact that the defendant agreed to place and maintain a culvert there.

As to the question of uncertainty in the agreement I confess that upon the hearing I entertained considerable doubt as to whether the contract was sufficiently definite as to the size and character of the culvert to be constructed to enable me to decree its performance. But on further reflection, and after a consultation of authorities, I am now satisfied that the agreement is sufficiently certain. It is clear that the culvert agreed upon is not to be wider than the space between the stakes mentioned. Manifestly it need not be higher than the high water mark, which McKnight's evidence shews is easily ascertainable from the marks left on the land by previous freshets. Between these limits the culvert is to be of such size as to permit free passage of the freshet from the river on to the intervale back of the railway.

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The size required for such purpose is, I think, easily ascertainable—*certum est quod certum reddi potest*. The character of the culvert, apart from its size, is immaterial, provided the opening is so made and maintained as to permit free passage of the water. Upon the question of certainty see Fry on Specific Performance, p. 49, and cases there cited, particularly *Sanderson* v. *Cockermouth & Workington R. Co.*, 11 Beav. 497, 19 L.J. Ch. 503, also Brown & Theobald on Railways, p. 111, and cases cited.

I do not think that in this case I could give adequate relief to the plaintiffs by awarding damages. Up to this time the opening left as mentioned in the embankment remains unobstructed. The plaintiffs, therefore, have as yet suffered no damage. Should the opening be closed it is impossible to forecast how long the defendant will leave it so. Again, the quantity of silt and sediment carried by the freshet varies from year to year. Upon this question of damages see *Clowes* v. *Staffordshire Potteries Waterworks Co.*, L.R. 8 Ch. 125 at 142-3.

But while I cannot give damages in lieu of specific performance I can I think give the defendant the option of paying to the plaintiffs the sum of $1,000 in substitution for performance of contract; and this for the reason that the plaintiffs themselves, prior to, and at the time of, the making of the contract offered to take $1,500 for the right of way, and for all injury they would sustain by reason of the filling in of the embankment. The plaintiffs have received $500 for the right of way, and they cannot object if in lieu of the culvert stipulated for they receive all they asked as compensation in case no culvert were to be constructed. It appears only right to give the defendant this option, because it would seem that when the company agreed to build the culvert it was in contemplation to build one of corrugated iron, similar to others then in use on their railway. The government, however, now refuse to allow culverts of that character. The result is that to construct a culvert that will fulfil the contract and at the same time meet the government requirements will cost a much larger sum than the defendants contemplated when they made their agreement with the plaintiffs. This, of course, does not justify the defendant company in breaking their contract; but

the circumstances, I think, warrant me in giving them the option to pay the sum of $1,000 as substitution for specific performance. But whether or not I am right in thinking the facts would give me such power, there can be no question about it in this case because the plaintiffs by their counsel during the argument expressly consented that I should, if I saw fit, give the defendant such option.

Neither do I think I should decree specific performance by the building of a culvert if the defendant preferred to leave the opening between the stakes mentioned free and unobstructed, or to place a bridge there which would serve all the purposes of a culvert.

In addition to claiming upon the grounds mentioned the plaintiffs further claim that, failing to obtain relief by way of specific performance, they are entitled by law, and apart from any agreement, to an injunction restraining the defendant from obstructing the flow of freshet water over their intervale. They claim this on the ground, that while by their deed of the right of way they must be taken to have given to the defendant the right to build all embankments and works necessary to the construction and maintenance of the railway upon such right of way, yet this does not authorize the company to obstruct the accustomed flow of freshet over the plaintiff's intervale unless such obstruction is necessarily incident to the proper construction or maintenance of the railway; and as proof that a solid embankment is not necessary for such purpose they point to the evidence of Mr. McKnight that when it is desirable so to do for purposes of drainage the company of its own motion leaves openings in its railway embankments such as the plaintiffs ask to have maintained on their land. Mr. Teed referred on this point to the New Brunswick Railway Act (Consolidated Statutes, 1903, ch. 91, sec. 7 (4) and (5)) and cited *Reg* v. *Wycombe*, L.R. 2 Q.B. 310; *Brisco* v. *Great Eastern R. Co.*, L.R. 16 Eq. 636; *Pugh* v. *Golden Valley R. Co.*, 15 Ch. D. 330; *Van Horn* v. *Grand Trunk R. Co.*, 9 U.C.C.P. 264. I should perhaps say that at the close of the hearing at Fredericton it was arranged that in order to avoid prolongation of the case into another day counsel on

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both sides would submit to me in writing any further argument which they wished to make, at the same time furnishing the other party with a copy of the same, and it is in that way Mr. Teed submitted argument upon the ground last mentioned.

As I have reached the conclusion that the plaintiffs are entitled to relief by way of specific performance it is not necessary that I should deal with this last contention. Should I prove to be in error in the conclusion I have arrived at upon the first branch of the plaintiffs' case, the facts I have found in that connection will, I trust, enable the Court on appeal to deal with the alternative claim, which I have not decided. The decree will be according to the following minutes:—

Declare that the defendant company having given notice of expropriation proceedings instituted to acquire a right of way for the defendants' railway across the land of the female plaintiff situate in Queen's County, an agreement was thereupon entered into between the plaintiff and defendant that the plaintiff should execute and deliver to the defendant company a deed conveying to the defendant company the lands required for said right of way and that in consideration therefor the defendant would, on receipt of said deed, pay to the plaintiffs the sum of $500 and would place and maintain upon the land so conveyed a culvert through the embankment of said railway of sufficient width and height to permit the freshet waters from the St. John River to flow as heretofore upon the intervale of the plaintiffs lying north of and adjoining said right of way, and that said expropriation proceedings should be discontinued.

And it appearing that pursuant to said agreement the plaintiff did on November 7, 1912, execute and deliver to said defendant company said deed conveying to the defendant said right of way as aforesaid, and that the defendant company on receiving said deed paid the plaintiff said sum of $500 and that said expropriation proceedings were discontinued.

And it further appearing that in pursuance of said agreement and prior to the delivery of said deed the plaintiffs and defendant company agreed upon the location for said culvert, and that the defendant company thereupon with the assent of

the plaintiff fixed on the line of said right of way two stakes about 20 ft. apart marking and defining said location so agreed upon, and that the defendant has, since said stakes were so fixed, built the embankment of said railway up to said stakes and has left the space between said stakes open and unobstructed by said embankment, and as the land there originally was when said stakes were so fixed.

And it further appearing that since the delivery of said deed the defendant company has informed the plaintiffs that the defendant does not intend to construct such culvert as aforesaid, but proposes to fill in the said space left between said stakes with a continuation of said embankment.

And it further appearing that prior to the entering into said agreement the plaintiffs offered to the defendant to execute and deliver said deed to the defendant without any stipulation on the part of the defendant to construct and maintain such culvert, and relieving the defendant from any liability to construct or maintain the same, if the defendant would pay the plaintiffs the sum of $1,500 for said right of way and as full compensation and satisfaction for all damages or injury the plaintiffs may hereafter sustain by reason of the shutting off by the railway embankment of said flow of freshet water, which last mentioned offer the defendant declined to accept; and it appearing that at the time the said agreement was entered into the defendant then may reasonably have expected to have been able to construct the culvert as agreed upon much more cheaply than may now be possible owing to the government having since imposed more stringent and onerous regulations as to the kinds of culvert permitted on said railway than were then in force; and the plaintiffs having consented that the defendant shall have the option of paying $1,000 as herein authorized in substitution for specific performance of said agreement and that plaintiff will accept the same if so paid in full satisfaction for all damages the plaintiff shall or may hereafter sustain by reason of the construction or maintenance of the railway embankment without any such culvert therein as aforesaid.

Declare that the said agreement to construct said culvert ought to be specifically performed by the defendant.

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That the defendant is bound to construct and maintain through its said embankment on its said right of way upon the said lands so conveyed by the plaintiffs to the defendant and at the place so located and agreed upon between the plaintiffs and defendant, being the space in the said embankment so left unfilled and so defined by the said two stakes, and being about 20 feet wide, a culvert of sufficient height and width to permit the freshet waters from the River St. John to flow as heretofore upon the intervale lands of the plaintiff lying north of and adjoining the said right of way, but let the defendant company be at liberty within 20 days from the settlement of this decree to pay into Court the sum of $1,000 in substitution for such specific performance and in full satisfaction of all injury or damages which the plaintiff may sustain at any time hereafter by reason of the nonconstruction of such culvert in the railway embankment, and upon said payment into Court of said sum of $1,000 and notice thereof to the plaintiff's solicitor the same shall be allowed and accepted in substitution for specific performance of said agreement.

Let the defendant, its servants, contractors and agents be restrained by injunction from filling in or maintaining an embankment or from otherwise obstructing the flow of freshet water from the St. John River over or through the space designated as aforesaid by and between said two stakes, save only by an embankment in which is placed and maintained a culvert in specific performance of said agreement as hereinbefore declared and unless the said sum of $1,000 be paid into Court for the purposes aforesaid within the time aforesaid allowed for payment thereof, and notice thereof be given to the plaintiff's solicitor as aforesaid let such injunction be perpetual, but upon such payment into Court of said sum of $1,000 let such injunction cease and terminate. Let such sum if so paid into Court be retained in Court until this suit and any appeal herein is finally determined and at an end, and be then paid to the plaintiffs unless in the meantime the Court shall otherwise order.

Let the defendant company have the right to serve upon the plaintiffs' solicitor a plan of the culvert the defendant proposes

to construct in specific performance of said agreement, and if the plaintiffs fail within ten days after such service to serve upon the defendant's solicitor a notice specifying objections to said plan and the culvert thereby proposed to be constructed, then a culvert constructed by said defendant in accordance with said plan shall be deemed to be constructed in specific performance of said agreement. In the event of any dispute between the parties as to the work done or to be done in specific performance of said agreement, or its sufficiency, let either party have leave to apply to the Court. Let the defendant pay the costs of this suit. It is adjudged and ordered accordingly.

Judgment for plaintiffs.

REGINA PUBLIC SCHOOL v. GRATTON SEPARATE SCHOOL AND CITY OF REGINA.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. July 15, 1914.

1. SCHOOLS (§ I—1)—SEPARATE SCHOOLS—SEC. 17 OF SASKATCHEWAN ACT—WHOSE "RIGHTS AND PRIVILEGES" ARE PRESERVED THEREBY.

Sec. 17 of the Saskatchewan Act which preserved any right or privilege with respect to separate schools which any class of persons had at the date of passing the Act operates only in favour of the minority in any school district; the majority in a district had no "rights or privileges" with respect to separate schools because the school of the majority whether Protestant or Roman Catholic is in Saskatchewan always the "public school."

[*Winnipeg* v. *Barrett*, 7 Man. L.R. 273, [1892] A.C. 443; *Campbell* v. *Spottiswoode*, 3 B. & S. 769, referred to.]

2. STATUTES (§ I—1)—ENACTMENT—VALIDITY—SASKATCHEWAN SCHOOL ASSESSMENT ACT—SEPARATE SCHOOLS—TAXES—COMPANIES.

Sec. 93*a* of the School Assessment Act, R.S.S. ch. 101, as added by Sask. statutes of 1912-13, ch. 36, whereby in default of notice being given by a company under sec. 93 for an apportionment of its school taxes after notice from a separate school board, such taxes shall be divided between the public and separate schools on the basis of the ratio of non-corporate assessments to each, is within the legislative power of the Saskatchewan Legislature.

[*Regina Public School* v. *Gratton Separate School and City of Regina*, reported herewith, 18 D.L.R. 572, affirmed.]

3. SCHOOLS (§ IV—74)—TAXATION—COMPANIES — SEPARATE SCHOOLS — SCHOOL ASSESSMENT ACT, R.S.S. CH. 101.

Sec. 93*a* of the School Assessment Act, R.S.S. ch. 101, as added by Sask. stat. 1912-13, ch. 36, applies to all companies assessed in a school district and is not limited to companies which had shareholders of the religious faith of the separate school; the basis of distribution

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is the entire assessable property of the company in the district and not merely its real estate as under sec. 93.

[*Regina Public School* v. *Gratton Separate School and City of Regina*, reported herewith, 18 D.L.R. 572, affirmed; *The Duke of Buccleuch*, 15 P.D. 86, applied.]

STATED case for the opinion of the Court (by way of appeal from the judgment of Brown, J., dated May 16, 1914) as to jurisdiction of the Saskatchewan legislature to enact sec. 93*a* of School Assessment Act (sec. 3, ch. 36, 1912-13 Sask.), and upon the effect of the section as to the right of Separate Schools to taxes from certain companies omitting to give notice under sec. 93 of School Assessment Act, R.S.S. ch. 101.

The appeal was dismissed sustaining sec. 93*a* and (NEWLANDS, J., dissenting) also affirming the trial Judge as to the effect of the section.

G. H. Barr, for plaintiff, appellant.

H. Y. MacDonald, K.C., for defendant, respondent.

G. F. Blair, for the applicant, the City of Regina.

Brown, J.

The judgment appealed from was in effect as follows rendered by BROWN, J.:—

This is an interpleader issue which comes before me by way of a "special case," and involves the determination of the respective rights of the plaintiffs and the defendants to certain school taxes collected by the applicants.

The Grattan separate school is a Roman Catholic separate school established in the Regina public school district. All the assessable property of some 159 companies (the word "company" includes corporation) which is within the limits of the plaintiff's school district was entered, rated and assessed for the year 1913 upon the assessment roll of the applicants for such school district, and the taxes have been or are being collected as payable to the plaintiff school district. In no case has any of the companies referred to given a notice requiring any part of its property to be entered, rated or assessed for the purposes of the said separate school, and each of the said companies has been duly served with the notice prescribed by sec. 93*a* of the School Assessment Act. The plaintiffs claim to be entitled to the whole of the said taxes, whereas the defendants claim to be entitled to a portion thereof.

In order to understand the point at issue, it is necessary to consider the following legislation: sec. 93 of the School Assessment Act, being ch. 101 R.S.S.; sec. 93*a*, which is an amendment to the aforesaid Act, and was enacted by sec. 3, ch. 36, of the statutes of Saskatchewan, 1912-13, and became effective January 11, 1913; and sec. 93*b*, which is a further amend-

ment and was enacted by sec. 14, ch. 50 of the statutes of Saskatchewan, 1913, and became effective December 19, 1913.

Sec. 93*b* did not come into force until after the matters in question in this action arose, and therefore is only referred to by way of illumination. The defendants base their claim to a share of the taxes on sec. 93*a*. The admission of facts that is made in the special case shews that all conditions necessary to make 93*a* fully apply to the taxes in question had been fully performed, and therefore, if effect is to be given to that section at all, it seems clear that the defendants must succeed.

The plaintiffs contend, however, that sec. 93*a* should not be given effect to, and for two reasons: (1) it is meaningless, and therefore a nullity, and (2) it is *ultra vires* the legislature.

As to the first objection: the trustees of a separate school district can only take advantage of sec. 93*a* "in the event of any company failing to give a notice as provided in sec. 93," and it is contended that sec. 93*a* thus contemplates that every company has the power, under sec. 93, and within the limitations of that section, to decide how its property shall be assessed, and that in so deciding shall give a notice, whereas in reality, under sec. 93, if a company decides that all its property is to be assessed for public school purposes no notice whatever is required or contemplated. That section requires a notice only in the case of a company that wishes to contribute a portion or the whole of its taxes for separate school purposes. It is argued that it is meaningless to speak in sec. 93*a* of a company "failing to give a notice" when as a matter of law the company is not required or expected to give any notice. It may be that the wording of sec. 93*a* is somewhat defective in this respect, and that there is in consequence some ground for the argument advanced; but it is the duty of Courts to avoid if possible such a construction as would render a statute a nullity. I have no doubt, from the language used, that the legislature intended that every company which gave a notice in accordance with the provisions of section 93 should be exempt from the provisions of 93*a* and that, as to all other companies, they should be amenable to the provisions of sec. 93*a*. Such a construction does not require any straining of the language used, nor any stretch of the imagination, but may, I think, be fairly said to be the sensible meaning of the language used.

As to the second objection: it is contended that the legislation prejudicially affects the plaintiffs and every public school district and every public school supporter in the province, and that in consequence it is *ultra vires* the legislature. Prior to the enactment of sec. 93*a*, all the taxes recoverable by municipalities or school districts from companies for school purposes were available for the public school except as otherwise provided by sec. 93. This sec. 93, or one similarly worded, has been in force for a great many years. I have traced it as far back as 1896, where it appears as sec. 125 of the School Ordinances of the North-West Territories of that year. Under and by virtue of the provisions of sec. 93, any company desirous of having any portion of its property assessed for separate school purposes was required to give a notice to that effect, and, in view of the proviso to that section, no company could give such notice unless one or more of its shareholders were of the separate school religious faith. Companies whose

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property would be liable to assessment may be divided into three classes—class A, where all the shareholders are of the Protestant faith; class B, where all the shareholders are of the Roman Catholic faith; class C, where some of the shareholders are of one faith and some of the other. In applying the provisions of sec. 93 to the case at bar, where the separate school district is Roman Catholic, a company belonging to class A could not give notice under sec. 93 for the simple reason that none of its shareholders are of the Roman Catholic faith, and in consequence all the taxes payable by such company would be available for public school purposes; a company belonging to class B could give a notice requiring all its property to be assessed for separate school purposes, but if it did not give such notice then all the taxes payable by it would be available for public school purposes; a company belonging to class C could give a notice requiring a portion of its property to be assessed for separate school purposes, and such portion would be dependent upon the amount of stock held by Roman Catholic shareholders in the company as compared with that held by Protestant shareholders, and here again, in the event of the company not giving a notice, the whole of the taxes would be available for public school purposes. It is therefore to be noted that in the event of a company not giving a notice, all the taxes payable by the company would be available for the public school, and this would be the result irrespective of which one of the classes, as aforesaid, the company belonged to. It was urged, and, I think, fairly urged, that it is only an exceptional case when a company will give any such notice, and for two reasons. The very existence of the separate school has been brought about and continued by the recognition of and in deference to a religious conviction upon the part of its supporters, but a company as such has no religious convictions, and can have none; no more has it any children to educate, nor can it have any. So, that, while a company may be very much interested in not paying any more taxes than it is compelled to pay, it may, for the reasons aforesaid, be said to be disinterested as to the use made of the taxes which it is compelled to pay. And again, a company, for business reasons alone, apart from anything else, is not likely to introduce religious questions into the conduct of its business affairs. For these reasons the chances of a company giving any notice under section 93 are comparatively slight. That this is so is perhaps best illustrated by the case at bar. Of the 159 companies whose taxes are in question, not one has given any notice, and, except for and apart from the provisions of sec. 93*a*, all the taxes of all these companies would be available for public school purposes. Sec. 17 of the Saskatchewan Act, to which I shall have reason to refer more particularly further on in this judgment, while it secures the rights and privileges to the separate school as to the matters in question, does not in any way extend the same. And so it may be said that, until the enactment of sec. 93*a*, it has always been the policy and effect of the law to give the public schools the benefit of practically all the taxes collected in that way from companies. It now becomes necessary to consider in what way this law is affected by sec. 93*a*, and in doing so I think it well to also consider sec. 93*b*, which very materially modifies the effect of sec. 93*a*. Briefly, the changes thus brought about may be said to be: (1) A company whose share-

holders are all public school supporters may, by filing a statement duly verified, require all its taxes to be devoted to public school purposes; (2) A company that can shew that it is practically impossible, owing to the number of its shareholders and their wide distribution in point of residence to ascertain the proportions of the stock of the company held by Protestants and Roman Catholics respectively, may require its taxes to be applied as it sees fit; (3) Any company which does not take steps to indicate how its taxes are to be applied shall be amenable to the provisions of sec. 93*a*, and liable, under the provisions of that section, to have its taxes applied partly for separate school purposes and partly for public school purposes, the division being made in the ratio which the total assessed value of assessable property assessed to persons other than companies for separate school purposes bear to the total assessed value of assessable property assessed to persons other than companies for public school purposes. The most striking change thus brought about, and the one most likely to prove prejudicial to the public school and the public school supporter, is that, whereas, under the previous law, in the event of a company taking no action in the matter, all the taxes payable by it went to the support of the public school, now, under the amended law, in the event of the company taking no action, these taxes are divided between the public and the separate schools in the proportion above indicated; and, as the chances are against companies taking any action, for reasons already given, so *ipso facto* are the chances in favour of the separate school sharing these taxes with the public school. I am prepared, therefore, to admit the contention made by the learned counsel for the plaintiffs that the plaintiffs and every public school district and every public school supporter (that is, where a separate school district exists) are prejudicially affected by the legislation complained of. Having reached the conclusion aforesaid, must the legislation on that account be held to be *ultra vires* the legislature? I am of the contrary opinion. Counsel for the plaintiff bases his argument on sub-sec. (1) of sec. 17 of the Saskatchewan Act. That section, when embodied in the B.N.A. Act as applied to this province, reads as follows: In and for the Province of Saskatchewan the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories passed in the year 1901 or with respect to religious instruction in any public or separate school as provided for in the said Ordinances."

This section does not mean that no legislation shall be enacted in the interests of separate schools which prejudicially affects the public school or the public school supporter; it means, rather, that no legislation shall be passed which shall in any way curtail the rights or privileges which any class of persons have to or in separate schools. In other words, it is separate school protective legislation, affording protection for, but not protection against, separate schools. In view of this section, the legislature may not deprive the separate school of its rights and privileges, but there

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is nothing in the section which curtails the power of the legislature in extending these rights and privileges, even though, in doing so, the public school and public school supporter may be prejudicially affected. If any authority other than the wording of the section itself were necessary to shew this to be the correct view, I might refer to the following cases: the *City of Winnipeg* v. *Barrett* and *City of Winnipeg* v. *Logan*, [1892] A.C. 445; *Brophy* v. *Atty.-Gen. of Manitoba*, [1895] A.C. 202. The Lord Chancellor, in giving the judgment of the Privy Council in the latter case, is reported at p. 215 as follows:—

"It was not doubted that the object of the 1st sub-section of sec. 22 was to afford protection to denominational schools."

And this statement of the Lord Chancellor, which was made with reference to sub-sec. (1) of sec. 22 of the Manitoba Act, would be equally applicable to sub-sec. (1) of sec. 17 of the Saskatchewan Act. So that the very reasons which Mr. Barr urges in favour of his contention that sec. 93*a* is *ultra vires* the legislature are, in my opinion, reasons for holding that it is *intra vires*.

Mr. Barr raised some other objections to the legislation which I think I can dismiss by the mere statement that they appear to me to be simply objections of policy. I have nothing to do with the policy or impolicy of the legislation; that is entirely for the legislature. In the result I would answer questions (*a*) and (*c*) in the affirmative. The plaintiffs must pay the costs of both the defendants and the applicants.

Haultain, C.J.

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

Newlands, J.

NEWLANDS, J. (dissenting in part):—The above named parties have stated a case for the opinion of this Court, setting out that certain companies, a list of which is attached to the said case, have not given a notice under sec. 93, of the School Assessment Act, ch. 101, R.S.S., requiring part of their property to be assessed for the benefit of the Gratton Separate School, that the notice specified in sec. 93*a*, being sec. 3, of ch. 36, of the Acts of 1912-13, amending said Act has been served by said Gratton Separate School District and ask this Court to answer the following questions:—

(*a*) Had the Saskatchewan Legislature jurisdiction to enact sec. 93*a* of the School Assessment Act, being sec. 3, ch. 36, of the statutes of Saskatchewan, 1912-13? (*b*) If question (*a*) be answered in the negative, has the defendant the right it claims to a portion of said taxes? (*c*) If question (*a*) be answered in the affirmative has the defendant the right it claims to a portion of the said taxes?

As to questions (*a*) and (*b*) I will only say that I am of the opinion that sec. 93*a* is within the powers of the local legisla-

ture. Question (*a*) should, therefore, be answered "yes," and, having given that answer, question (*b*) does not require an answer. In order to answer question (*c*) it is necessary to consider the meaning of sec. 93*a*. This section is an amendment of the School Assessment Act. In construing this Act I am guided by the rules for the construction of statutes laid down in *Salkeld* v. *Johnston*, 2 Ex. 256, 272:—

> We propose (said the Court) to construe the Act, according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which we are to read in their ordinary sense, and only to modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further. It is proper also to consider: (1) the state of the law which it proposes or purports to alter; (2) the mischief which existed and which it was intended to remedy; and (3) the nature of the remedy provided, and then to look at the statutes *in pari materia* as a means of explaining the statute. These are the proper modes of ascertaining the intentions of the legislature.

First, then, what is the law which sec. 93*a* proposes to alter. This law is contained in sec. 93, of the School Assessment Act, and may be briefly stated as follows:—

> Where a separate school exists within a municipality a company may, by notice, require any part of the real or personal property of which it is the owner or occupant to be entered, rated or assessed for the benefit of the separate school. Provided that the part of the company's property to be assessed to the separate school shall bear the same ratio to the whole of the company's property assessed within the municipality as the proportion of the shares of the company held by persons who are Protestants or Roman Catholics, as the case may be, bears to the whole amount of the shares of the company.

The meaning of this section is quite clear. Where a company is doing business in a municipality where there is a Public School District and a Separate School District and where some of the shareholders of the company are of the religious faith of the Separate School, then that company, may, by notice, require a part of their taxes assessed for school purposes, to be paid to the Separate School.

The next question to be considered is what was the mischief which existed and which it was intended to remedy. It was conceded on the argument, and is, in my opinion, not open to doubt, that a company, none of whose shareholders were of the re-

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ligious faith of the Separate School District, was not required to give any notice, it follows, therefore, that the only mischief that the Act could have been intended to remedy was that some companies, some of whose shareholders were of the religious faith of the Separate School, did not give a notice under sec. 93, and the Separate School would, therefore, lose taxes which they would otherwise be entitled to get. If that was the mischief, then what is the remedy provided.

Sec. 93*a* provides that:—

> In the event of any company failing to give a notice as provided in sec. 93 hereof the board of trustees of the Separate School District may give to the company a notice in writing in the following form or to the like effect.

This notice is to the effect that unless and until the company gives a notice as provided by sec. 93, the taxes payable by the company will be divided between the Public School and Separate School in shares corresponding with the total assessed value of the property of persons other than corporations assessed for Public School purposes and Separate School purposes respectively. Sub-sec. (2) of sec. 93*a*, gives effect to this notice in practically the same terms. Bearing in mind that, under the law as it stood before the passing of sec. 93*a*, a company which had no shareholders of the religious faith of the Separate School was neither required nor could give the notice specified in sec. 93, the words "any company failing to give a notice as provided in sec. 93 hereof" can only refer to such companies as could give such a notice and failed to do so, that is, companies, some of whose shareholders were of the religious faith of the Separate School. These words cannot, in my opinion, be properly applied to a company that could not give a notice under that section. No such company could be said to have failed to give notice, nor would it be proper to apply to such a company the words of sub-sec. (2) of sec. 93*a*: "unless and until any company gives a notice as provided in sec. 93," such language, in my opinion, being only applicable to a company that can give the notice provided in sec. 93.

I am, therefore, unable to agree with the finding of the learned trial Judge "that the legislature intended that every

company which gave a notice in accordance with the provisions of sec. 93, should be exempt from the provisions of sec. 93*a*, and that as to all other companies, they should be amenable to the provisions of sec. 93*a*." In my opinion, the intention of the legislature, as expressed in sec. 93*a*, is that any company which could give the notice provided for in sec. 93, but which omitted to do so could be compelled to pay a part of their taxes to the Separate School District in the proportion stated until they gave the notice provided for by sec. 93.

I would, therefore, answer question (*c*) that all companies having shareholders of the religious faith of the Separate School could be compelled to pay a part of their taxes to that school.

LAMONT, J.:—This appeal raises two questions for consideration:— Lamont, J.

(1) Had the Saskatchewan legislature jurisdiction to enact sec. 93*a* of the School Assessment Act; and (2) If so, what is the effect of that section?

The section in question deals with the distribution of the taxes levied in respect of the property of companies between the public and separate schools. The jurisdiction of the legislature to enact the section depends upon sec. 93 of the B.N.A. Act, 1867, and sec. 17 of the Saskatchewan Act.

Sec. 93 of the B.N.A. Act reads as follows:—

93. In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.

Sec. 17 of the Saskatchewan Act is as follows:—

17. Sec. 93 of the B.N.A. Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said sec. 93, of the following paragraph:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

(2) In the appropriation by the legislature or distribution by the

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government of the province of any moneys for the support of schools organized and carried on in accordance with the said ch. 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said ch. 29.

Under these two sections the provincial legislature has exclusive jurisdiction over education, with this limitation, that it cannot deprive any class of persons who, at the date of the passing of the Saskatchewan Act had any right or privilege with respect to separate schools of such right or privilege; nor can it take away from any school the right to religious instruction provided for in the ordinances referred to; nor, in the appropriation of public moneys for the support of schools, can it discriminate between the public and the separate schools.

Sec. 93*a*, the validity of which is impeached, deals with the subject of education. It is therefore within the legislative competence of the legislature, unless it prejudicially affects a right or privilege with respect to separate schools which a class of persons had at the passing of the Saskatchewan Act. A right or privilege with respect to separate schools is some special right or claim belonging to or immunity, benefit, or advantage enjoyed by a person or class of persons with reference to separate schools, over and above those rights enjoyed at common law or under statutory enactment by the inhabitants of the province at large. It is some private or peculiar right or privilege as opposed to the rights possessed by the community. Clement's Canadian Constitution, 1904, p. 318; *Winnipeg* v. *Barrett*, 7 Man. L.R. 273; [1892] A.C. 445; *Campbell* v. *Spottiswoode*, 3 B. & S. 769. It follows, therefore, that the only classes of persons who can have rights or privileges with respect to separate schools are those who, at the date of the passing of the Saskatchewan Act had the right, under the ordinances, of establishing separate schools, that is, the minority in any school district. The majority in a district under the ordinances had no rights with respect to separate schools, because the school of the majority, whether Protestant or Catholic, in any district is always the public school. The power of the legislature, therefore, is absolute in dealing with education unless its legislation prejudicially affects the minority, whether Protestant or Cath-

olic, in any school district. Sec. 93*a*, instead of affecting prejudicially the minority in the Regina school district, affects it beneficially. The limitation, therefore, placed by sec. 17 of the Saskatchewan Act on the absolute jurisdiction of the legislature over education does not apply to this case; and the section impeached is, in my opinion, within the legislative competence of the legislature.

The Act being *intra vires*, what is its effect? Apart from secs. 93 and 93*a*, the property of companies in every school district would be assessed as for public school purposes. Sec. 93 provides that a company may, by notice to the municipality, require any part of its real property to be assessed for the purposes of the separate school, provided that the share of the property of the company assessed for separate school purposes shall bear the same ratio to the whole assessable property of the company in the school district as the shares or stock of the company held by persons who are Protestants or Roman Catholics, as the case may be, bears to the whole amount of the stock of the company. In the stated case it is admitted that none of the 159 companies the disposition of whose taxes is affected by this action had ever given notice under sec. 93. The companies not giving notice, the legislature enacted 93*a* which came into effect on January 11, 1913, and which reads as follows:—

> 93*a*. In the event of any company failing to give a notice as provided in sec. 93 hereof, the board of trustees of the separate school district may give to the company a notice in writing in the following form or to the like effect, that is to say:—
>
> The board of trustees of separate school district No. of Saskatchewan hereby give notice that unless and until your company gives a notice as provided by sec. 93 of the School Assessment Act, the school taxes payable by your company in respect of assessable property lying within the limits of the school district No. of Saskatchewan (naming the public school district in relation to which the separate school is established) will be divided between the said public school district and the said separate school district in shares corresponding with the total assessed value of assessable property assessed to persons other than corporations for public school purposes and the total assessed value of the assessable property assessed to persons other than corporations for separate school purposes respectively.

And sub-sec. (2) provides that after such notice is given to any company, the taxes of such company shall be divided be-

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tween the public and separate schools on the basis set out in the notice, unless and until the company give a notice as provided in sec. 93.

In determining the effect of this legislation, the fundamental rule of construction is that the words used are to be construed according to their plain, literal and grammatical meaning. Applying this rule of construction, the words "any company" in the first line of sec. 93*a*, unless their meaning is otherwise restricted by the text, mean and include any and every company having assessable property in the district. Is this meaning restricted by the context? It is contended that it is. It is argued that, under sec. 93 only those companies who had shareholders of the religious faith of the separate schools in any district could give a notice requiring a certain portion of their real property to be assessed for separate school purposes, and that where all the shareholders of a company were of the faith of the majority they could not give the notice required by sec. 93; and from this the conclusion was drawn that where the legislature said, "in the event of any company failing to give a notice as provided in sec. 93," it must have referred to only such companies as under sec. 93 could give the notice. I do not think this follows. The legislature had full authority to declare, either expressly or by necessary implication, that any company who did not give a notice by which its property would be assessed between the two schools on the basis set out in sec. 93 should have its taxes divided upon the basis set out in sec. 93*a*. In my opinion, the interpretation put upon the section by the defendant, namely, that the intention of the legislature was to give the separate schools the right to give notice to each and every company who failed ("omitted," I think, would be the better word) to give a notice is more consistent with the language used, and more in harmony with providing a remedy for the defect found to exist in the working out of sec. 93. The defect that sec. 93*a* sought to remedy was this—that although, under sec. 93, companies having shareholders of the religious faith of the separate schools might give a notice, in practice they never took the trouble to do so, with the result that the separate schools were

deprived of a share of the taxes of companies to which they believed themselves rightly entitled. The remedy provided was that where a company omitted to give a notice requiring a portion of its taxes to go to the separate school, the board of trustees of the separate school might give to the company a notice, and if, after receipt of that notice, the company does not itself make a division of its assessable property between the two schools on the basis set out in sec. 93, the taxes levied on such property will be divided upon the basis set out in 93*a*. If the legislature had intended that sec. 93*a* should apply only to such companies as had shareholders of the religious faith of the separate school, one would have expected provision would have been made by which it could be ascertained what companies had and what companies had not shareholders belonging to such religious faith. No such provision is found. Without such provision, sec. 93*a*, limited to certain companies only, would provide no remedy and would be useless. It would provide that the taxes of those companies having shareholders of the faith of the separate school should be divided on a certain basis, without any way having been provided by which the municipality could determine which companies they were. The municipality has on hand the taxes of all companies; but how is it going to determine whether or not any of the shareholders of a particular company belong to the religious faith of the separate school? Yet, if there were companies with such shareholders, it is the duty of the municipality to make a division of the taxes. An interpretation should not be given to a statute which renders it of no effect, unless no other reasonable interpretation can be given to it. In *The Duke of Buccleuch*, 15 P.D. 86 at 96, Lord Justice Lindley puts the rule thus:—

> You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the legislature, in this case any more than any other case, a meaning that would not only not carry out its object, but produce consequences which, to the ordinary intelligence, are absurd. You must give it such a meaning as will carry out its objects.

If we construe the section as applying to all companies whatsoever, we are giving to it an interpretation consistent with the

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literal meaning of the words "any company" in the first line of the section, and an interpretation which remedies the defects found in the prior legislation, and which provides an easy working basis by which the municipality can distribute the taxes. That the section was intended to be beneficial to the separate schools is clear. Under sec. 93 it was only with respect to its real property that a company could direct a portion to be assessed for separate schools. Sec. 93*a* alters the basis of distribution, and applies to all assessable property of a company. The whole scope of the legislation seems to me to be an application by the legislature, in matters over which it has absolute jurisdiction, of the principle laid down in sub-sec. (2) of sec. 17 of the Saskatchewan Act as to the appropriation of public moneys, namely, that as between the two classes of schools recognized by the constitution of the province there shall be no discrimination. That sec. 93*a* is not well drawn cannot be denied. But, although the matter is not free from doubt, I think that, from the language used in the section and a consideration of the evil sought to be remedied, an intention that it should be applied to all companies is sufficiently indicated.

I am, therefore, of opinion that the judgment of my brother Brown is right, and should be affirmed.

Elwood, J.

ELWOOD, J., concurred with LAMONT, J.

Appeal dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. June 2, 1914.

1. CONVERSION (§ II—26)—WHAT CONSTITUTES—WHO LIABLE GENERALLY—CARTAGE COMPANY HOLDING ITSELF OUT AS AUTHORIZED TO TAKE DELIVERY FOR ALLEGED BUYER—GOOD FAITH NO DEFENCE WHEN.

Where a carter held himself out to a merchant as authorized to take delivery of goods for a firm in whose name a fraudulent order had been sent to the merchant and the carter while on his way with the goods to the alleged buyer's address was intercepted by the perpetrator of the fraud and delivered the goods elsewhere on the false representation of the party giving the directions that he represented the purchaser, the carter is liable in conversion to the merchant for the value of the goods which were stolen by means of the fraud, where there was in fact no order by the party whose name was given as the buyer

and possession was parted with only on the faith of the carter's representation of authority to take delivery; such result follows notwithstanding the circumstance that the carter acted in good faith and was himself imposed upon by the fraud of the thief.

[*Bank of England* v. *Cutler*, [1908] 2 K.B. 208, 77 L.J.K.B. 889; *Starkey* v. *Bank of England*, [1903] A.C. 114, 88 L.T. 244; *Yonge* v. *Toynbee*, [1910] 1 K.B. 215, 102 L.T. 57; *Austin* v. *Real Estate Exchange*, 2 D.L.R. 324, 17 B.C.R. 177, applied; *McKeown* v. *McIver*, 40 L.J. Ex. 30, distinguished.]

APPEAL from the judgment of His Honour Judge Grant of the County Court in plaintiff's favour in an action for conversion of a quantity of crushed oats wrongly delivered by the defendant company which had erroneously held itself out as authorized to take delivery for an alleged buyer. Statement

The appeal was dismissed.

W. C. Brown, for appellant, plaintiff.

Arnold, for respondent.

MACDONALD, C.J.A.:—I think the judgment appealed from should not be disturbed. It is a hard case, but it appears to me to be clear that the defendant must suffer the loss. They sent their servant to take delivery of oats, and that servant stated to the plaintiffs' shipper that the oats were for Currie Bros. As a consequence of that representation delivery of the oats was made to him, and hence as between these parties the oats ought to have been delivered to Currie Bros. before the defendants could be held to have discharged their duty to the plaintiffs to make such delivery. I do not think this case is distinguishable in principle from *Bank of England* v. *Cutler*, [1908] 2 K.B. 208, 77 L.J.K.B. 889. Macdonald, C.J.A.

It follows that the appeal should be dismissed.

IRVING, J.A.:—In my opinion as there was no sale by the plaintiffs until the defendants' driver took the goods the plaintiffs are entitled to recover. The case of *Austin* v. *Real Estate Listing Exchange* (1912), 17 B.C.R. 177, 2 D.L.R. 324, is in point. Irving, J.A.

As a rule no damages can be obtained for innocent misrepresentation: see Lord Moulton's decision in *Heilbut Symons & Co.* v. *Buckleton*, [1913] A.C. 30, but there are exceptions to that rule, and one is where an agent in good faith assumes an auth-

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ority which he does not possess, and induces another to deal with him in the belief that he has the authority which he assumes. On this principle *Collen* v. *Wright*, 8 El. & Bl. 647, 27 L.J.Q.B. 215, a decision of the Exchequer Chamber, proceeded. In that case Wright professing to act as land agent for G. made an agreement with Collen for a lease of one of G.'s farms. He had in fact no authority from G. Wright was held liable because he impliedly, if not expressly, represented that the authority, which he professed to have, did in fact exist: there was an assumed authority to enter into a contract.

In *Starkey* v. *Bank of England*, [1903] A.C. 114, 88 L.T. 244, a broker, acting *bonâ fide*, induced the bank to transfer certain shares upon the faith of a forged power of attorney, and was held liable to indemnify the bank.

In *Yonge* v. *Toynbee*, [1910] 1 K.B. 215, 102 L.T. 57, a solicitor in ignorance of the fact that his client had been found of unsound mind, carried on a law suit, right down to trial. He was ordered personally to pay the costs of the action; and in *Simmons* v. *Liberal Opinion*, [1911] 1 K.B. 966, Dunn, a solicitor who entered an appearance for a non-existing company, was ordered to pay all the costs of the proceedings.

The effect of the conversation in the plaintiff's office was this: "Yes, I am here from Messrs. Currie Bros. to take delivery of the stuff." That, in my opinion, was a warranty. It was a statement by a person who was bound to give information in answer to a question put by the vendor to determine the solvency of the purchaser.

Martin, J.A.

MARTIN, J.A.:—If a firm of grocers were to get the following written order, apparently genuine:—

To Brown & Co.,
Grocers.

Please supply me with 10 doz. boxes of soda biscuits which the City Express Co. will call for this morning.

Yours faithfully,
John Smith.

and if in pursuance of it the Express Co. called and took away the goods, who would be liable for them if it turned out that the

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order was a forgery? The Express Co. clearly, because it had, in calling for them on behalf of the customer, represented and held itself out to be his agent and having obtained possession of the goods in that capacity and on that representation, it was its duty to immediately return them to their owner from whom it had taken them by innocent deception upon the discovery of the fraud; and if it were not able to return them because of a further fraud which was perpetrated upon itself, then it must recoup the owner in cash for their value.

I have put this illustration in writing so as to make it as clear and strong as possible in favour of the defendant company since some confusion of principle has been strangely introduced because the order was given verbally over the telephone, and because after the delivery of the goods by the owner to the defendant Cartage Co. further fraudulent directions were given to their driver by the thief (for that is what he was) or his agent as to their delivery. Both plaintiff and defendant were deceived by the thief, but that deception does not justify the defendant in carrying off the plaintiff's property, as the innocent and deluded agent of the thief, and there are no facts found here by the learned trial Judge, either as regards any negligence on the part of the plaintiff or otherwise, which would take the case out of the above principle, and, therefore, the judgment should be affirmed and the appeal dismissed.

GALLIHER, J.A.:—I think this appeal must be dismissed: see *Yonge* v. *Toynbee*, 79 L.J.K.B. 208; *Starkey* v. *Bank of England* (1903), 72 L.J. Ch. 402; *McKean* v. *McIver* (1870), 40 L.J. Ex. 30, does not apply—there, specific addresses were written on the packages to be delivered, and they were delivered by the carrier at those addresses. Galliher, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the judgment of His Honour Judge Grant (County Court of Vancouver), judgment being entered for $137.50, the value of crushed oats wrongly delivered, the contention of the plaintiffs (respondents) being that the oats were to be delivered to Currie Bros. of Cambridge St., Vancouver. Undoubtedly on the facts as dis- McPhillips, J.A.

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closed in the case a fraud was perpetrated—the oats being delivered not at Currie Bros. on Cambridge St., but owing to the servants of the defendants taking the direction of a man not acting for Currie Bros., or in their employ—who perpetrated the fraud—coming up to the motor truck upon which the oats were loaded, and following his directions—the oats were delivered at a barn—on the lane corner on Nelson St.—between Richards and Seymour Sts.—supposedly where Currie Bros. wished delivery to be made.

The learned trial Judge has found as a fact that the plaintiffs delivered the oats to the defendants for the purpose of being delivered to Currie Bros. near the corner of Cambridge and Clinton Sts.

In effect, what the learned County Court Judge has held is that there was misdelivery, and that there was negligence upon the part of the defendants. The representation as to who was the purchaser of the five tons of oats was a representation made by the defendants to the plaintiffs, and the receipt given by the defendants was for oats to be delivered to Currie Bros.

The learned counsel for the appellants most ingeniously and quite ably endeavoured to establish that the defendants were only in the position of carriers, and that they had proceeded quite in accordance with the instructions of the plaintiffs, and in the ordinary course of business. This position is not borne out by the evidence, and in fact may be said to be absolutely displaced by the evidence.

Whatever may have been the inception of things relative to the delivery of the oats, when the transaction came to be carried out it was undoubtedly upon the suggestion that Currie Bros. had ordered five tons of oats, and the defendants communicate that fact to the plaintiffs and accept delivery of the oats for carriage to Currie Bros., but fail in making the delivery, being imposed upon by a man who appears on the scene when the oats are in course of transit, who represents he is acting for Currie Bros., and following his directions make delivery not to Currie Bros., but at another place, with consequent loss.

McKean v. *McIver* (1870), 40 L.J. Ex. 30, was referred to by

counsel for the appellants, and whilst it does not support the case of the appellants, considering the view I take of the evidence, it very clearly states the law, and is conclusive against the appellants in my opinion. Martin, B., at p. 31, said:—

It seems to me the question is whether or not the defendants acted with regard to these goods in the manner in which they were directed to do. . . .

I think they obeyed the directions given to them and, therefore, for that reason I am of the opinion they have been guilty of no wrong because they dealt with these goods in the manner in which they were directed to do. For the purpose of making carriers guilty of a conversion of goods there must be something beyond this—some fault, some wrong, and in my judgment it is a question of fact whether or not their conduct with respect to the delivery of the goods was negligent. If they, by reason of the directions given by the consignor were naturally led to act as they did, I do not think that would be a conversion. . . .

Upon a careful reading of the evidence I can find nothing which entitled the defendants to act as they did, or to do anything other than to make delivery of the oats to Currie Bros.—and the more so is this the case when it is the defendants themselves who make the representation that Currie Bros. are the purchasers, and in the ordinary course of business the receipt is given for the oats, delivery to be made to Currie Bros.

Stephenson v. *Hart and Waterhouse*, 4 Bing. 476, 488, 6 L.J.C.P. 97, 29 R.R. 602, is very close to this case upon the facts, and further establishes the liability of the defendants, and the correctness of the decision of the learned County Court Judge. The head-note of the case reads as follows:—

Plaintiff having been imposed upon by a swindler, consigned a box at Birmingham by the defendants, as common carriers, to J. West, 27 Great Winchester Street, London. The defendants found that no such person resided there; but upon receiving a letter signed J. West, requesting that the box might be forwarded to a public house at St. Albans, they delivered it there to a person calling himself West, who shewed that he had a knowledge of the contents of the box: that person having disappeared, and the box having been originally obtained of the plaintiff by fraud: *Held*, that the defendants were liable to him in an action of trover. Gaselee, J., *dissentiente*.

Held, also, that it was properly left to the jury to say whether the defendants had delivered the box according to the due course of the business as carriers.

Parke, J., at pp. 484, 485, 486, said:—

It is clear that in the present case the person calling himself West never meant to pay for the goods, and the question of fraud was sufficiently

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left to the jury by the Chief Justice saying in the course of the trial that the whole appeared to be a swindling transaction. Then, on summing up, he left it to the jury to say whether the defendants had delivered the box according to the course of their business and duty.

It is manifest that they had not. The property in the box was never out of the plaintiff: and it is plain the defendants thought so, for upon their failing to find any person in Great Winchester Street to whom it belonged, and upon enquiry being made what they had done with it, they affirmed that they had sent it back; when the falsehood of this was discovered, asserted that they had, at all events, delivered it to the right person. A felon could not be the right person. But were carriers, of their own authority, without consulting the consignor, to send to an inn at St. Alban's a box addressed to Great Winchester Street, London? If they had made enquiry at Birmingham, whence the box arrived, there could have been no difficulty in discovering who was the consignor. But without enquiry, and notwithstanding the warning that was given by the circumstance that West had never been heard of at the place to which the box was addressed, they forward it to an unknown person at an inn, upon the faith of a letter of which they did not know the writer. I cannot distinguish this case from *Duff* v. *Budd*, 23 R.R. 609, 3 Brod. & B. 177. There the plaintiffs having received an order from a stranger to furnish goods for J. Parker, of High Street, Oxford, and finding upon enquiry that Mr. Parker of the High Street was a tradesman of respectability, forwarded the goods by a carrier, having directed them to J. Parker, High Street, Oxford. On the arrival of the parcel at Oxford, the carrier's porter there, who knew W. Parker of the High Street (and who was accustomed to deliver parcels at the houses of the consignees) told him of the arrival of the parcel, no other Parker residing in that street. W. P. said he expected no parcel. A person to whom the porter had before delivered parcels under the name of Parker, called at the defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name in Oxford. The plaintiffs having thus lost their goods, desired the defendant, by letter, to apprehend the person who had taken them, if he again presented himself, and afterwards said that they had done with the defendant if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the defendant's office, limiting his responsibility to £5, except where articles were entered according to their value, and the parcel in question had not been so entered, though worth £89.

The plaintiffs having sued the carrier, and the Judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the notice touching the limited responsibility, and a verdict having been found for the plaintiffs, the Court refused to grant a new trial, which was moved for, on the ground that the question touching the notice ought to have been considered; that the Judge ought to have pointed the attention of the jury to the plaintiff's letter, directing the carrier to apprehend the cheat, and the subsequent conversa-

tion: thereon: and that the property of the goods had passed out of the plaintiffs.

That was a much harder case against the carrier than the present, because the person who came to the office had often been there before; but it was never doubted that the property in the parcel remained in the consignor, and I rely particularly on the language of Richardson, J., who says: "There was clearly a property in the plaintiffs entitling them to sue, as they had been imposed upon by a gross fraud."

The argument which has been raised for the defendants, by the assertion that the box has been delivered to the right person, is answered by saying, that a felon cannot be the right person; and as to the defendants' liability to an action at the suit of West, till it was ascertained that the bill he had given would not be honoured, such an action might have been well defended by shewing that the box was tendered at Great Winchester Street, and that no such person was known there. I am, therefore, clearly of opinion that the rule which has been obtained on the part of the defendants must be discharged.

In the present case the property in the oats was never out of the plaintiffs. There can be no doubt that this was a swindling transaction, and it was delivery to a wrong person for which a carrier is without a doubt responsible in law.

It therefore follows that in my opinion the judgment of the learned County Court Judge was right, and should be affirmed, and the appeal dismissed.

Appeal dismissed.

Re NORDHEIMER.

Ontario Supreme Court, Middleton, J. January 12, 1914.

1. COVENANTS AND CONDITIONS (§ III—25)—MARRIAGE SETTLEMENT—CONDITION SUBSEQUENT — AFTER-ACQUIRED PROPERTY — WHAT CONSTITUTES.

A covenant by a woman in her marriage settlement to do all things necessary for transferring and vesting in the trustees thereof all property she may become entitled to under the will, or as one of the heirs or next of kin, of her father will bind her interest in the residue of her father's estate where no contrary direction appears, yet directions contained in the will, as to the application and investment of her interest, may overrule such covenant.

[*Re Baukes*, [1902] 2 Ch. 333, followed; see also *Re Nordheimer*, 14 D.L.R. 658, construing same instruments.]

2. WILLS (§ III G—120)—NATURE OF ESTATE OR INTEREST CREATED—SETTLEMENT NECESSARY TO CARRY OUT DIRECTIONS.

Where a will contains a direction that the "shares of my daughters shall be deemed separate estates free from the control of their husbands respectively and shall not be anticipated and in the event of the marriage of any of my daughters I direct that proper settlements shall

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be made to carry out this intention," the intention is that the property shall be held for the life of the daughter, she receiving the income and holding a separate estate free from the control of her husband and without power of anticipation and requires a settlement to be made to carry out the intention of the testator.

[*Loch* v. *Bagley*, L.R. 4 Eq. 122; *Re Hamilton*, 8 D.L.R. 529, affirmed in 12 D.L.R. 861, referred to; see also *Re Nordheimer*, 14 D.L.R. 658, construing same will and settlements.]

Statement

SEVERAL questions which arose in regard to the estate of Samuel Nordheimer, deceased, were determined by MIDDLETON, J., on the 3rd October, 1913: 14 D.L.R. 658, 29 O.L.R. 350.

Certain other questions which arose after the former decision were argued before MIDDLETON, J., in the Weekly Court at Toronto.

Order accordingly.

D. W. Saunders, K.C., for the trustees.

I. F. Hellmuth, K.C., for Roy Nordheimer.

A. W. Anglin, K.C., for Mrs. Cambie.

Travers Lewis, K.C., for Mrs. Houston.

Christopher C. Robinson, for the remaining daughters of the testator.

H. S. Osler, K.C., for the Official Guardian.

Middleton, J.

January 12. MIDDLETON, J.:—The questions arise on the same clauses of the will, clause 15 and clause 18, and upon the effect to be given to covenants to be found in the marriage settlements of the daughters Mrs. Cambie and Mrs. Houston.

In the first place, the testator has directed that the share of each son or daughter in the residue is to be paid over on the youngest child attaining the age of twenty-one years. The time of distribution is now past.

In Mrs. Cambie's marriage settlement she has covenanted with the trustees of the settlement "that she will at all times and from time to time execute and do all those matters and things which may be necessary for more effectually assigning and transferring to and vesting in the said trustees . . . and also all the property real and personal to which she the said party of the second part may become entitled under the will or as one of the heirs or next of kin of" Samuel Nordheimer, her father. In the settlement it is recited that she has a prospective

interest in the estate of her father, and that she agrees that the amount of this prospective interest shall be settled under the terms of the trust deed.

In Mrs. Houston's marriage settlement there is a similar recital and a similar covenant.

I think that these covenants undoubtedly bind the one-third interest in the residue.

I do not think that the covenants apply to the two-thirds interest or to the $100,000 given by clause 15. I think that they are subject to the terms of the will, and that the last part of clause 15, "the shares of my daughters in my estate shall be deemed separate estate free from the control of their husbands respectively and shall not be anticipated, and in the event of the marriage of any of my daughters I direct that proper settlements shall be made to carry out this intention," requires a settlement to be made to carry out the intention of the testator as found in the clause in question. The intention, as I gather it from the entire clause, is, that the property shall be held for the life of the daughter; for the money is to be invested "during the lifetime of such children for their benefit." The daughter is to receive the income, for the provision is that the trustees "do pay the income arising from such sums so invested to them respectively," and then the shares are to be "deemed separate estate free from the control of their husbands respectively," and "shall not be anticipated."

I do not think that it follows that, in the case of the daughters already married and having settlements, the existing settlement is necessarily such a settlement as is contemplated. I am clear that Mrs. Cambie's settlement is not.

After giving the matter the best consideration I can, I think that a "proper settlement," under the circumstances, is one which will: (a) give the income to the wife for life; (b) give her the power to appoint after her death to her husband and children as a class or to any one or more of them to the exclusion of any other or others and for such interests and in such proportions, if more than one appointee, as she may see fit; and (c) give the estate after her death, in default of appoint-

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ment or in so far as appointment should not extend, to her husband, if he survives, for life, and after his death to issue, and, failing issue, to the wife's next of kin. This, I understand, meets the wishes of all concerned.

I think that there should be power, with the wife's consent and approval, to purchase property for the use of the wife as a home for herself and her family. The issue of any child who may predecease the wife should be declared to be within the power of appointment, and should take the share of the deceased child in default of the exercise of the power.

Another of the daughters, Mrs. Kirk, married during the lifetime of the testator. I think that her share is to be dealt with in the same way. She will take one-third of her share of the residue absolutely, as she is not hampered by any covenant. The $100,000 and two-thirds of the residue must be settled. The words "and in the case of the marriage of any of my daughters" are general, and do not relate merely to the case of marriage after the testator's death.

This, I think, covers everything that has now been argued.

I think the view that I have expressed with reference to the effect of the covenant in the settlement is in accordance with the decision in *In re Bankes*, [1902] 2 Ch. 333. The after-acquired property is, I fear, undoubtedly caught by the covenant contained in the settlement.

Loch v. *Bagley* (1867), L.R. 4 Eq. 122, is of no particular assistance regarding the form of settlement, as there the will directed the property given the daughters to be settled upon themselves strictly. Lord Romilly, endeavouring to follow the testator's direction, directed the property to be settled so that the income would go to the wife for life, if she should die in the lifetime of her husband to go as she should by will appoint, and in default of appointment to her next of kin exclusive of her husband, and if she should survive her husband the property should go to her absolutely. This will was radically different from the will here, and I think I am more nearly following the testator's wishes, as expressed, by directing a settlement in the form outlined.

Loch v. *Bagley* was followed in *Re Hamilton* (1912-3), 8

D.L.R. 529, 27 O.L.R. 445, 12 D.L.R. 861, 28 O.L.R. 534. There the direction was quite different from that here found. The property was to be settled so that in the event of the daughter's marriage "it will be impossible for her or her husband to encroach upon the same." Here the dominant ideas are to keep the property for the daughter during her life and to keep it free from the husband's control.

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Order accordingly. Costs out of the estate.

If desired, a form of settlement may be prepared and approved.

Order accordingly.

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Ontario Supreme Court, Middleton, J. December 30, 1913.

1. DEDICATION (§ I B—12)—SELLING LOTS WITH RESPECT TO PLAT OR MAP—RIGHT OF COMMON—COVENANT FOR ACCESS TO—EFFECT.

A conveyance of a lot by number according to a registered plan of a summer resort park, with a covenant that the grantee, his heirs, administrators and assigns, shall have free access to all streets, terraces and commons of the park, confers on the latter the right to have an open space in the centre of the park as shewn on the registered plan, kept open for use as a common.

Statement

APPEAL by the petitioner in a matter under the Quieting Titles Act and cross-appeal by the claimants from the report of the Referee of Titles at Toronto with respect to certain claims.

The petitioner's appeal was dismissed, and the cross-appeal allowed.

J. Bicknell, K.C., for the petitioner.
M. H. Ludwig, K.C., for the claimants.

Middleton, J.

December 30. MIDDLETON, J.:—By letters patent dated the 16th July, 1886, the Toronto and Lorne Park Summer Resort Company was incorporated by the Province of Ontario, for the purpose of acquiring by purchase, owning, improving, and managing as a summer resort, the property known as "Lorne Park," with power to make improvements and alterations, erect and construct all kinds of buildings, wharves, piers, etc., and to maintain roads, streets, avenues, lanes, etc., with the power to sell, mortgage, or exchange any part of the park, to establish a line of ferries, and to make contracts for the purpose of providing entertainment.

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Thereafter the company duly acquired the park in question, and, after having had a survey made, subdivided a certain portion of it, as shewn by a plan registered on the 7th August, 1886. On this plan were shewn a number of streets, and building lots laid out and fronting thereon. There are two large blocks that were not in any way subdivided. Free access to these blocks appears to have been afforded by Longfellow, Sangster, and Burns avenues, which are shewn as communicating with them, and Tennyson avenue, shewn as passing between them. In 1888, the plan was amended by the company by the laying out of Roper avenue at right angles to Tennyson avenue, so subdividing the larger of these two parcels. Upon the amended plan, these three blocks appear entirely enclosed by the street lines and without any name, mark, or label of any kind to indicate their purpose. For convenience upon the reference they had been marked "X," "Y," and "Z" for the purpose of identification.

These undesignated blocks or places contain, it is said, about 25 acres, approximately one-third of the whole parcel.

Literature was issued by the company indicating its intention in dealing with the park property. It is said in the circular of 1889:—

"The domain of the company has recently been considerably extended toward the north-east, and this delightful resort now embraces about 90 acres, more than half of which has been reserved for terraces, avenues, pleasure-grounds, and woodland rambles, the residue being laid out into cottage lots"—a statement which would only be true if the three blocks in question are regarded as forming part of the reserve.

"The ball ground has been considerably enlarged so as to give ample space for lacrosse and baseball. Lawn bowls, quoits, lawn tennis, croquet, swings, etc., have been provided."

"Pienic Grounds.

"The condition of the pienic grounds (about 25 acres in extent) has been much improved since last season, and every opportunity is afforded societies and schools for enjoying their annual outings. Rustic pavilions and dining-halls, with kitchens attached, are provided. . . . A stable and driving-shed may

be found on entering the park by those visitors who drive from the city or neighbourhood."

In another circular, exhibit 4, a plan is also printed in which the blocks in question and the space taken for Roper avenue are shewn, with a distinctive colouring on the larger parcel, on which a building is indicated marked "pavilion."

In this circular it is said: "In the first place, the design was to unite quietness for private residences with complete sporting grounds for public amusement. This has been done by the admirable adaptation of the grounds for separating the two. A splendid square of about 25 acres has been set apart for picnics and sports."

On the faith of statements contained in this literature and made orally, a number of the lots were sold. The individual lots were described simply by their number according to the registered plan. Each conveyance contained the following clause:—

"And it is hereby agreed that the party of the second part, his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to all the streets, avenues, terraces, and commons of the said park; and shall have free ingress and egress for himself and themselves, his and their family or families, servants and agents, with horses and carriages, or other vehicles, to and from the said lands by any of the streets or avenues in the said park; and, subject as aforesaid, shall have free ingress and egress to and from the said park at any wharf or wharves in front thereof."

And also the following provisions:—

"And it is hereby declared and agreed that the said lands are granted by the parties of the first part to the party of the second part subject to the following provisoes and conditions, which shall be deemed to run with the land:—

"1. No intoxicating or spirituous liquors or beverages shall be sold or bartered upon the said lands, nor shall any be used thereon except for medicinal purposes.

"2. No business is to be carried on upon the said lands, nor is the same to be used for any other purpose than as a private

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dwelling, without the consent, in writing, under seal, of the said company.

"3. The party of the second part, his executors, administrators, or assigns, shall before the 1st day of July, 1888, erect and complete a neat and respectable house or cottage on the said lands for a private dwelling, which will cost not less than $400.

"4. Only one dwelling shall be erected on the said lands, and no building shall be erected or placed on said lands till the plans thereof have been approved by the president and two directors of the said company.

"5. No part of such dwelling or of any verandah or porch in front thereof shall be placed nearer than twenty feet from the front of said lot.

"6. No cess-pools or filth of any kind shall be allowed on the said lands. No fence on the said lands shall be higher than six feet, and all fencing within fifty feet from the front of said lands shall be wire or iron and not more than three feet high.

"7. All water-closets or privy-pits must be approved by the company before being erected, and must be kept clean and free from offensive odours.

"8. No animals or fowl shall be kept on said lands.

"9. No conveyance or lease of said lands or any part thereof shall be made or be valid without the consent, in writing, under seal, of the said company.

"10. And the parties of the first part shall have the right to pass by-laws and make regulations for the construction of sewers, drains, watercourses, waterworks, and for all kinds of street improvements, in streets, avenues, terraces, and commons adjacent to the said lands, and also for lighting all or any of the streets, avenues, terraces, or other public parts of said park adjacent to said lands; and the lands hereby granted and the owners thereof, to the extent of the value of said lands, shall be liable to contribute to the cost of all the above named improvements equally with all other lands that are adjacent to the streets, avenues, terraces, and commons wherein said improvements are made, such contributions to be assessed equally against each lot so situated."

The different claimants now claim title under these convey-

ances. Their contention is, that the effect of the conveyances is to give them some right with respect to the three parcels which I have mentioned, which prevent the present owner from being declared to be the owner in fee simple without some qualification.

The learned Referee held that the claimants had established their rights with reference to the parcels lying north-east of Tennyson avenue, but had failed with reference to the parcel to the south-west of that street. The right of the claimants to the streets, avenues, and unenclosed portions of the park has been conceded, and need not be discussed.

The first question calling for consideration is the meaning of the expression contained in the deed by which it is stipulated that the grantee "shall have free access to the streets, avenues, terraces, and commons of the said park." The claimants contend that this word "commons" should be taken to include the three parcels in question. The owner, on the other hand, contends that this is not the true meaning of the word, and that it is amply satisfied by referring it to the unenclosed spaces upon the plan, more particularly to the wide strip along the lake shore marked "Boustead Terrace." I think this contention is somewhat militated against by the fact that the clause provides for ingress and egress to and from the lots sold "by any of the streets or avenues in the said park." As the lots fronting on the lake shore face Boustead Terrace, this is apparently regarded as a street or avenue rather than the commons.

It is quite true that this word "commons" is not used in its more strict and literal sense, but it is a flexible word; and in *Municipal Council of Sydney* v. *Attorney-General for New South Wales*, [1894] A.C. 444, the Privy Council had no difficulty in giving it a meaning wide enough to cover that which is contended for by the claimants here. There certain lands had been dedicated as a permanent common. The question was, whether this created a common or pasturage only. It was held that it did not. Lord Hobhouse says (pp. 453, 454): "The word 'common,' it is true, has a technical meaning in England and in New South Wales; though what kind of enjoyment it may indicate, and for what persons, cannot be understood without something

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more. Standing alone it is an ambiguous term which requires explanation, and which may be explained by circumstances. But further, it is very often used, though inexactly and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people. And the question is whether it has not been so used in this instance. It appears to their Lordships that there are several considerations, some more and some less cogent, all bearing the same way . . . The omission to name commoners, or in any way to define the nature of the common, is more consistent with the intention of leaving the enjoyment a variable thing and open to all comers, than to give it to a defined class which, even if a large one, must be limited. The contiguity of the land to a populous city suggests that other modes of enjoyment are more suitable than pasturage."

Much was said upon the argument as to the nature of the right claimed, if any. I do not think that it is necessary to define the exact nature of the right. In an early case, *City of Toronto* v. *McGill* (1859), 7 Gr. 462, Spragge, V.-C., said (p. 478): "Whether these acts would amount to a dedication to the public, or an equity in the nature of an easement would have arisen to purchasers, it is not necessary to say."

It may be that the term "dedicate" is only appropriate where the right is conferred upon the public; here no public right was contemplated, nor do I think it was given, because those to be benefited were not the public but the purchasers of the different lands; indeed, I think it would be unprofitable to enter into a discussion to ascertain whether the right claimed can properly be called an easement, or whether it created an implied obligation in the nature of a restrictive covenant, because it seems to me that all this is more a question of terminology than of real substance. The main question remains: was it the intention of the parties that these three parcels should be set apart and held as recreation grounds for the use of those who might buy lots upon the faith and strength of the scheme put forward by the vendors?

In 13 Cyc. 455, it is said: "Where the owner of real property lays out a town upon it, and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with

reference to such plan . . . he thereby dedicates the streets and alleys to the use of the public." This in some countries, as here, depends upon statutory provisions, but it is also true at common law. The writer then proceeds (p. 457): "The owner will be held to have dedicated to the public use such pieces of land as are marked on the plan or map as squares, courts, or parks. The reason is that the grantor by making such a conveyance is estopped, as well in reference to the public as to his grantees, from denying the existence of the easement." The reason underlying this statement is well illustrated by the case of *Clark* v. *City of Elizabeth* (1878), 40 N.J. Law. 172, at p. 175: "Of the propriety of the rule there can be no question. It is based on the most obvious principles of fair dealing: the principles which require the vendor to deliver to his vendee that which the latter has bought and paid for—the principles which hold men to their lawful bargains."

This principle has been applied in our own Courts in the case of *Town of Guelph* v. *Canada Co.* (1853), 4 Gr. 632, where the Canada Company, after having laid out the town of Guelph, shewing upon the registered plan a block marked "market square," sought to sell off the square in town lots. Esten, V.-C., says (p. 645): "The American cases which were cited throw much light on this branch of the law. There can be no doubt that if the owner of land lay out a town or village upon it, containing streets, squares, and other public places, and exhibit maps and plans of such intended town or village so laid out, and people settle in the place upon the understanding that such public thoroughfares and places exist, and no effectual alteration is made, and the place grows under such circumstances into a town or village, there is a complete dedication of such thoroughfares and places to the public use."

See, also, *Attorney-General* v. *Town of Brantford* (1858), 6 Gr. 592.

I quite appreciate that there is room for distinction between cases in which there has been a dedication to the public, and the public right is being asserted, and cases such as this, where there is not in strictness any public right; but the allegation is that a private right has been conferred upon the individuals who

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purchase relying upon the scheme propounded by the vendors. It may well be that these cases may be more aptly likened to the class of cases in which the Court has been called upon to deal with building schemes.

In *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, the principle underlying these cases is discussed in the Court of Appeal. All that is there regarded as essential appears to me to exist here. There is a defined area within which the scheme is operated; there is the reciprocity which is said to be the foundation of the idea of a building scheme; there is the local law imposed and yet to be imposed by the vendors over the whole area; for the extracts from the deed which I have quoted shew the co-operative nature of the whole undertaking. In the defined area of this park, the cottagers are to erect suitable dwellings. The lands are not to be conveyed or leased without the consent of the company, and the company is to have the right to pass by-laws providing for the construction of sewers, waterworks, etc., and all necessary improvements and lighting in streets, avenues, terraces, and commons, and other public parts of the park, to which the owners must contribute the cost.

Numerous cases can, no doubt, be found where the plaintiff has failed to establish a valid building scheme or to prevent the user of the lands in a way inconsistent therewith. In none of these cases where the plaintiffs have failed, have I found the principle laid down opposed to that upon which I am now acting. For example, at first sight, what was said by Kekewich, J., in *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253, affirmed, [1906] 2 Ch. 283, might appear inconsistent where he says (p. 260): "A purchaser from a building owner is not entitled to say 'On that plan you see a vacant space, and therefore I can insist as part of my bargain that the vacant space shall remain vacant.'" This, it will be noticed, is spoken of a case in which there is nothing more shewn than the vacant space, and the case, therefore, resembles *City of Toronto* v. *McGill*, 7 Gr. 462. Here much more is shewn; and, when one reads the evidence shewing the conduct of the parties and the rights which it was assumed by both parties the purchasers had with respect to the lands in question, one cannot fail to be impressed with the idea that this is a case

where the whole scheme was that of a group of summer residences surrounding ample recreation grounds.

Mackenzie v. *Childers* (1889), 43 Ch.D. 265, is an effective answer to the suggestion that it is impossible to conceive that the promoters intended to sterilise for all time the 25 acres in question, and that all these statements are consistent with a mere expression of intention and the absence of obligation on the part of the vendors. Kay, J., there (p. 280) says what is equally applicable here: "I have no doubt that it was the best and most lucrative mode of dealing with the estate, and that they have received much more under it than could have been made by sale of the land in any other way. I have no reason to suppose that the conditions imposed were depreciatory. I should infer just the contrary."

The cases cited mostly arise upon plans, but the principle is of wider application, and includes all cases in which the land is sold upon what may be called a "building scheme," a scheme by which a part of the entire tract is set apart by the vendors for the benefit of the purchasers. When this is shewn, either by indications found upon a plan used in making the sales or otherwise, the vendors cannot depart from the plan or scheme which was the foundation of the sales. This may be regarded as an implied covenant, an implied grant of an easement, an equity in the nature of an easement, or it may rest on the principles of estoppel. In any case, the property so dedicated or quasi-dedicated is rendered subject to the rights held out to the purchaser as an inducement to purchase. These rights may exist in perpetuity.

See, in addition to the cases already cited: *Archer* v. *Salinas City* (1892), 16 L.R.A. 145; *Grogan* v. *Town of Hayward* (1880), 4 Fed. Repr. 161; *Mayor, etc., of Bayonne* v. *Ford* (1881), 43 N.J. Law. 292; *Price* v. *Inhabitants of Plainfield* (1878), 40 N.J. Law. 608; *Elliston* v. *Reacher*, [1908] 2 Ch. 374; *Spicer* v. *Martin* (1888), 14 App. Cas. 12.

If the conduct of the parties and mode of user of the land in question can be looked at, the evidence conclusively shews that the three blocks were intended as the "commons" referred to in the deed.

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The right to use these parcels is not an exclusive right conferred upon the lot-owners, but is subject to the right of the vendors themselves to use and to lease or license for picnic purposes.

Reliance was placed on the Registry Act as avoiding the claimants' rights under the deeds in question. No evidence was given to shew that the present owner is a purchaser for value without notice: *Barber* v. *McKay* (1890), 19 O.R. 46. On the contrary, he took with knowledge of the infirmity of title, and cannot complain.

I cannot see any reason for confining the judgment to the two parcels. All three seem to me to be in the same position.

The result is, that the petitioner's appeal fails, and the claimants succeed, and I cannot see any reason why costs should not follow.

Judgment accordingly.

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IRESON v. HOLT TIMBER CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. PARTIES (§ I A 1—7)—WHO MAY SUE—INJURY TO RIPARIAN RIGHTS.

A riparian owner who is deprived of his reasonable and proper right of navigating a river and of obtaining clear access thereto, by reason of a lumber company unreasonably obstructing the stream in the course of their driving operations, has such a special interest, and sustains such special damages, as entitle him to maintain an action against the company where the river affords the only means of egress and ingress he and his family have between their residence and the outside world.

[*Ireson* v. *Holt Timber Co.*, 11 D.L.R. 44, 4 O.W.N. 1106, affirmed. *Benjamin* v. *Storr* (1874), L.R. 9 C.P. 400; *Crandell* v. *Mooney*, 23 C.P. 212, and *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. 251, referred to.]

2. LOGS AND LOGGING (§ I—5)—EXERCISE OF STATUTORY RIGHTS—UNREASONABLE OBSTRUCTION OF STREAM—CONSTITUTIONAL LAW.

A lumber company that unreasonably obstructs navigation on a river by the driving of its logs, cannot justify its conduct by provincial legislation conferring on it the right to float logs, and to use the waters of the stream for such purpose; since the Parliament of Canada alone has jurisdiction over navigation.

[*Ireson* v. *Holt Timber Co.*, 11 D.L.R. 44, 4 O.W.N. 1106, affirmed. *The Queen* v. *Fisher*, 2 Can. Ex. R. 365, referred to. See B.N.A. Act, sec. 91.]

3. LOGS AND LOGGING (§ I—5)—EXERCISE OF STATUTORY RIGHTS—UNREASONABLE OBSTRUCTION OF RIVER—SAW LOGS DRIVING ACT—EFFECT.

The Ontario Saw Logs Driving Act, R.S.O. 1897, ch. 143, does not authorize the obstruction of navigation by the floating of logs in a

stream, which is expressly forbidden, not from necessity but *ex abundanti cautelâ*, by sec. 3 of the Act.

[See B.N.A. Act, sec. 91.]

4. WATERS (§ I C 2—22)—RIGHTS OF RIPARIAN OWNERS—DRIVING LOGS—RESERVE ALONG BANK OF STREAM.

A lumber company operating a timber berth under a provincial license cannot conduct its drive in bringing the logs down a stream, so as to deprive a riparian owner of his reasonable and proper means of access to and use of the river, notwithstanding the reserve of one chain in width along the shore of the river, in the original grant from the Crown.

[*Ireson* v. *Holt Timber Co.*, 11 D.L.R. 44, 4 O.W.N. 1106, affirmed.]

Statement

APPEAL by the defendant company from the judgment of KELLY, J., 11 D.L.R. 44, 4 O.W.N. 1106.

The appeal was dismissed.

E. B. Ryckman, K.C., and *J. Fraser*, for the appellant company.

W. G. Thurston, K.C., for the plaintiff.

Mulock, C.J.

December 23. MULOCK, C.J.EX.:—This is an appeal from the judgment of Kelly, J.

Briefly, the facts are as follows. In 1911, the plaintiff became the owner of parts of lots 34 and 35 in the 14th concession of the township of Burton, containing together about thirteen acres of land, more particularly described in the grant thereof from the Crown, excepting thereout the right of way of the Canadian Northern Railway, and also "an allowance of one chain in perpendicular width along the shore of the Magnetawan river as contained in the original patent from the Crown."

That portion of lot 34 owned by the plaintiff is situate on a point of land made by a bend in the South Magnetawan river, and is separated from lot 35 by that river, which flows between the two properties in a southerly direction.

A bay of considerable area extends from the river easterly along the plaintiff's point of land, and affords the only means of water communication between the residence of the plaintiff and the post-office and the place where he obtained his household supplies. On this point he had erected a residence with various outbuildings, and on the opposite side of the river a boat-house. Throughout part of the summer of 1912 he and his family occupied the property.

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The defendant company, under a license from the Ontario Government, have the right to cut logs on the upper waters of the Magnetawan river, and previous to the year 1912 had floated their logs to market down the North Magnetawan river; but in 1912 decided to float them down the South Magnetawan river, past the plaintiff's land, and into the bay above referred to, and there, by means of a jack-ladder, to load them on the cars of the Canadian Northern Railway, which is close to the bay.

Some 6 or 7 miles below the plaintiff's property, a dam had been erected in order to improve the navigability of the river. Between that dam and the plaintiff's property, and to the easterly limit of the bay, the waters of the river and bay were navigable for boats, and constituted a public highway.

The defendant company, in order to carry out their plan, put in stop-logs in the dam already referred to, whereby the water was raised about seven feet above its normal level. They also erected three other dams, one across the river just above the plaintiff's property, another across the river some distance below it, and a third across the mouth of the bay.

As the defendants' logs floated down from the upper waters, they were stopped by the dam above the plaintiff's property, and in consequence accumulated there in large quantities.

At intervals they were liberated and floated down past the plaintiff's property, but were prevented by the lower dam from going beyond that point. By means of these different obstructions, large quantities of logs were retained within the enclosure thus created, and, drifting about, were at times blown upon the shore around the plaintiff's property, and in such quantities as to have the effect, as found by the trial Judge, of wholly depriving the plaintiff of access to the water by means of his boats, making him and his family practically prisoners for days at a time on his property, which was so hemmed in by masses of logs along the shore that access to the river, their only available highway, was impossible.

The defendant company also caused large quantities of logs to be stored and kept in the bay by means of the dam across its mouth, and, as found by the trial Judge, the plaintiff was thereby prevented from navigating the waters of the bay for the

purpose of getting from place to place on his own property or to places where he obtained his supplies or to the post-office, whereby he and his family were put to special inconvenience and damage. The learned trial Judge also found that the defendant company had erected and were maintaining at least a portion of a jack-ladder on the plaintiff's property.

The learned trial Judge, having found the defendant company guilty of the acts complained of, ordered the removal of the jack-ladder, and that the defendant company be restrained from continuing such nuisance; and from such order the defendant company appeal.

The findings of fact by the trial Judge are, I think, abundantly warranted by the evidence.

To the plaintiff's claim, however, the defendant company say that the plaintiff is not entitled to maintain this action, on the ground that what is complained of constitutes a public nuisance only, and therefore the remedy is by way of indictment only. The authorities, however, shew that, if a person makes use of a highway to such an unreasonable extent that the user amounts to a public nuisance, and if such nuisance causes a particular injury to another beyond that which is suffered by the rest of the public, and if such injury is substantial and direct, and not merely consequential, the injured party is entitled to maintain an action in his own name: *Benjamin* v. *Storr*, L.R. 9 C.P. 400.

In *Crandell* v. *Mooney*, 23 U.C.C.P. 212, which was an action brought by the owner of a steamboat for damages because of obstruction of a navigable river by the defendant's boom, it was held that, the boom preventing the plaintiff navigating the river with his vessel, he was sustaining peculiar injury which entitled him to maintain the action. In that case the rights of persons using navigable rivers are thus stated by Gwynne, J., at p. 224: "All persons have an equal right to navigate this river with logs or steamboats, which right must be exercised, however, in such a manner as not unreasonably to impede or delay another in the exercise of his right; and that if a person navigating with logs obstruct the whole river for a period of eight days or more, as in this case, whereby every other mode of navigation by all other

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persons is prevented during that period, this is such an unreasonable obstruction of others' rights as to give a cause of action, notwithstanding that the obstruction be caused by adverse winds retaining the logs in the river. A party navigating the river with logs should, as it seems to me, be obliged to use steam power to overcome the *vis major* of an adverse wind in such a case."

In *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. 251, the plaintiff, a fisherman, living on a farm fronting on a navigable river, and situate about three miles from its mouth, occasionally used his boat for carrying goods for his neighbours, but the defendants obstructed the river for a whole summer to such an extent as to cut off the plaintiff's access to the river by his boat, and it was held that he was entitled in his own name to maintain the action.

It is not necessary, however, further to multiply authorities in support of the rule above set forth. The only question is, whether the facts here bring the case within that rule. On that point I entertain no doubt. The river afforded the only means of communication to the plaintiff and his family between their residence and the outside world. To be hemmed in by a fringe of logs for days at a time and thereby prevented from obtaining necessary household supplies or mail matter, or in emergency, what often may occur, medical assistance, was a position in which the defendant company had no legal right to place the plaintiff. That he was not thereby damaged in a special, direct, and substantial manner, is not, I think, arguable; and the plaintiff is entitled to maintain this action.

Another answer of the defendant company is, that they were authorised to do what they did by R. S. O. 1897, chs. 142 and 143; but provincial legislation cannot authorise interference with the right of navigation; that subject, under sec. 91 of the British North America Act, being under the exclusive jurisdiction of the Parliament of Canada: see *The Queen* v. *Fisher* (1891), 2 Can. Ex. C.R. 365.

Nor does ch. 143 of R.S.O. 1897 (the Saw Logs Driving Act) even purport to authorise the defendant company to do the acts complained of. Section 3 of that chapter, not from necessity, but *ex abundanti cautelâ*, declares that persons floating logs on lakes,

rivers, etc., shall so conduct their operations as not to "unnecessarily obstruct the floating or navigation of such water."

I, therefore, think that the defendant company have no statutory right to do what they have been found guilty of doing.

The defendant company further urge that, inasmuch as the plaintiff's property is separated from the water front by an allowance of one chain in width, he is not a riparian owner, and therefore has no right to maintain this action. The plaintiff's right does not depend upon his being a riparian owner. He is shewn to be the owner and occupant, during part of the year, of certain lands, access to and from which by means of the river is necessary to the reasonable enjoyment of his property, and to the exercise of his civil rights when in such occupation, and the cause of action is the infringement of those rights by the defendant company.

The defendant company also object to the portions of the judgment declaring that the jack-ladder encroaches on the plaintiff's land to the extent of at least 720 square feet, and ordering its removal. The learned trial Judge's finding was that the encroachment amounted to "at least 320 feet," but the order reads "720 feet," being the figures given by Mr. Ward, P.L.S.

If the defendant company desire it, they may have the portion of land occupied by the jack-ladder described by metes and bounds in the judgment, such description to be prepared by Mr. Abrey, P.L.S., or some other surveyor to be appointed by the Court, the defendant company to be at the expense of the survey and within one week to deposit $100 towards the cost; otherwise the description as in the order to stand.

As to the defendant company's counterclaim for damages because of the granting of the interim injunction, the evidence at the trial shews that the plaintiff was suffering special and substantial injury because of the unlawful, unreasonable, and high-handed conduct of the defendant company; and that, in consequence, he was entitled to summary relief by way of injunction. Therefore, there is no foundation for the counterclaim for damages.

For these reasons, I think the appeal should be dismissed

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with costs; the order to issue at the expiration of one week if the defendant company fail to make the deposit of $100. If it is made, then the order not to issue until after the surveyor's description is completed.

Any question that may arise out of such description may be spoken to before the order issues.

Riddell, J.

RIDDELL, J.:—The plaintiff is the patentee and owner of parts of lots 34 and 35, concession 14 of the township of Burton, Parry Sound District—his land is near the Magnetawan river, but separated from it by land described as "an allowance of one chain in perpendicular width along the shore of the Magnetawan river." His certificate of title bears date the 10th July, 1911, and he had bought shortly before, during the same year. In 1911, he began building a wharf opposite his place at the edge of the water, and in 1912 he furnished it as a landing-place and built a house upon his property, which he occupied with his family during the summer of that year. After the plaintiff's purchase, the water in the river opposite to his property was raised some seven feet by a dam, etc.

The defendants are a company who own valuable timber limits in the vicinity, to bring the timber from which it is reasonably necessary for them to use the river at this point for floating logs down to a branch of the Canadian Northern Railway, which runs near by, and which takes away the logs to be converted into lumber, etc. The company stretched some booms across the river, floated down a large number of logs, and raised them by a "jack-ladder" from the water to cars on the railway. The jack-ladder was built partly on the chain-reserve; the plaintiff claims that it was and is in part upon his land, but this the defendants deny.

On the 16th August, 1912, the plaintiff, claiming that the method of floating logs, retaining booms, and operating the jack-ladder, etc., was a derogation of his rights, obtained an injunction against the defendants, but this was dissolved four days later.

The action came on for trial before Mr. Justice Kelly in September, 1912, and that learned Judge gave judgment in favour of the plaintiff—the defendants now appeal.

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The judgment (1) declares that the jack-ladder encroaches on the lands of the plaintiff 720 square feet (this is a clerical error for 320 square feet, as will be seen from the reasons for judgment, and we at the hearing of the appeal directed that it should be amended accordingly)—$15 damages are awarded for this trespass and for cutting down certain trees, etc. (2) The defendants are ordered to "remove from the said lands of the plaintiff the said jack-ladder with its engine and apparatus connected therewith, and that the plaintiff do forthwith recover possession of his said lands from the defendants on which there was such wrongful entry by the defendants, and that the defendants do also forthwith . . deliver to the plaintiff, or to whom he may appoint, possession of the said lands." (3) The defendants are "perpetually restrained from continuing the boom or booms across the Magnetawan river . . . so as to unnecessarily interfere with the plaintiff's right to the use and navigation of the said river," and ordered to remove "the said booms . . . or so re-arrange said booms as that they may not unduly interfere with the use of said river . . by the plaintiff and not to unduly interfere with the privilege or right to use and navigate the said river . . ." (4) The company are "restrained from storing logs in said river . . . in such a manner as to prevent access to said river . . . by the plaintiff . . or in such a manner as to unduly interfere with the . . right of the plaintiff . . . to the use of the said river . . . . ." and ordered "to remove or re-arrange said logs so stored . . . so as not to unduly interfere with the right . . of the plaintiff to make any reasonable use of said river . . ." (5) Reference to the Master in Ordinary as to "damages . . . sustained by reason of the undue obstruction of said river . . ." reserving costs of reference. (6) The plaintiff is awarded costs up to and inclusive of judgment, and including the costs of and incidental to the interim injunction. (7) The defendants' counterclaim for damages in consequence of the interim injunction is dismissed with costs.

The judgment is attacked in every clause.

The objection to the award of costs in (6) above is, that County Court costs only should have been directed to be paid;

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we pointed out in the argument that Rule (1913) 649 covers the case, and the quantum or scale of costs must be passed upon under such a judgment as this by the Taxing Officer.

A careful perusal of the evidence convinces me that the learned trial Judge was right in finding that the arrangement of the booms and the method of floating the logs were in violation of the rights of the plaintiff to use this river. It is admitted by the defendants that the river is a navigable river; it is consequently in the same position as a common or public highway. I adopt without hesitation the criterion laid down by counsel for the defendants, and agree that the defendants have a right to use the river in a reasonable way, considering the rights of others to use the river. What is and what is not a reasonable user differs in different circumstances: in the circumstances of this case, the user by booms and floating of logs in the manner in which the defendants used them, was wholly unreasonable.

The objection that the plaintiff has no right of action is untenable—the position of the plaintiff and of his property is such that he suffered a peculiar damage differing from that of the public at large, and consequently he may sue, and is not driven to indictment or information at the instance of the Attorney-General. The principle has been recently discussed at length by this Court in *O'Neil* v. *Harper*, 28 O.L.R. 635, 13 D.L.R. 649, and it is not necessary here to do more than refer to the judgment in that case.

Much complaint is made concerning the form of the injunction ordered, and reliance is placed upon the language of Turner, L.J., in *Warden, etc., of Dover* v. *London Chatham and Dover R.W. Co.*, 3 DeG. F. & J. 559, at p. 564. In that case the defendants had a special Act of incorporation; the plaintiffs' bill set out that the defendants intended to cross a certain street, not on the level, but at a depth of more than two feet below the level, divert the street, raise the road and carry it across the line by a bridge—an injunction was asked restraining them from raising or diverting the street. The special Act enacted that, subject to the provisions in the Railway Clauses Consolidation Act, 1845, contained, in reference to the crossing of roads on a level, it should be lawful for the company in con-

structing the railway to carry the same on a level across the street in question. Stuart, V.-C., granted an interlocutory order restraining them from crossing the street "in any other manner than was authorised by the defendants' special Act of incorporation." It was on appeal from this that Turner, L.J., said: "This appears to me a most inconvenient form of injunction. There is no declaration . . of what, in the opinion of the Court, is the right mode in which this railway should be constructed, and the consequence of the injunction being in that form is, that no possible alteration can be made by the railway company in the mode of constructing the railway, without exposing themselves to the danger of commitment for a breach of the injunction. The defendants are left perfectly at large to judge what, on the part of the defendants, may be the mode of constructing the railway which is required and authorised by the special Act and the public Acts incorporated therewith . . ." It is, of course, quite plain that the objectionable injunction was in substance an order not to do anything in constructing the line which the company had not the right to do—and that is not a form of injunction which the Court should make: *Cother* v. *Midland R.W. Co.* (1848), 2 Ph. 469, 472; *Low* v. *Innes*, 4 DeG. J. & S. 286, 295; *Hackett* v. *Baiss* (1875), L.R. 20 Eq. 494, 499; *Parker* v. *First Avenue Hotel Co.* (1883), 24 Ch. D. 282, 286.

In cases of public or private nuisance, that is, of private nuisance and of a public nuisance become actionable because peculiarly affecting the plaintiff, the injunction is given in general terms as a rule—the Court does not take it upon itself in the ordinary case to give specific directions how the nuisance is to be abated or how the defendant is to act thereafter.

Forms may be seen in Seton, 6th ed., vol. 1, pp. 604 *sqq.*—"restrained from burning bricks . . . so as to occasion a nuisance . . ," "so as to cause a nuisance . . ," "doing or causing any damage or nuisance to the plaintiff, and from doing any other act to endanger the safety or stability of the building," etc., "to interfere with the enjoyment by the plaintiff of the premises for the purpose of his business," etc.

See also the general form in *Parker* v. *First Avenue Hotel*

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Co., 24 Ch. D. at p. 287, substituted for the more special form directed by the trial Judge.

In *North Eastern R.W. Co.* v. *Crossland* (1862), 2 J. & H. 565, the injunction restrained the defendants from working mines in such a manner as to occasion damage to the railway; and such a form was approved by the House of Lords in *Elliot* v. *North Eastern R.W. Co.* (1863), 10 H.L.C. 333; see p. 359.

It is manifestly impossible for the Court to give specific directions to these defendants how they are to float their logs or arrange their booms—and it is equally impossible for the Court to determine in advance whether any particular method or arrangement will interfere with the plaintiff's rights. The defendants need not have any apprehension of anything like oppression. If they make an honest attempt to act in such a way as to give the plaintiff his undoubted rights, there will probably be no attempt to proceed against them for contempt—and, if such an attempt be made, a Court must be satisfied of a violation of the injunction before process will be awarded: *Elliot* v. *North Eastern R.W. Co.*, 10 H.L.C. at p. 359. The recent case of *Alex. Pirie & Sons Limited* v. *Earl of Kintore*, [1906] A.C. 478, at p. 482, points out the difference between the Scottish and the English, and therefore our, practice.

Then it is said that there is no need for an injunction, as the defendants do not intend to continue the nuisance. There are several answers to this contention. We have no evidence upon which to act—there is no undertaking filed which might take the place of an injunction, and the rule supposed to be established by *Dunning* v. *Grosvenor Dairies Limited*, [1900] W.N. 265, that when the nuisance has ceased at the time of the trial "it would be contrary to the practice of the Court to grant an injunction," is not general.

In *Dean and Chapter of Chester* v. *Smelting Corporation Limited* (1901), 85 L.T.R. 67, the defendants had injured the trees and crops of the plaintiffs by smoke and effluvia from their smelting works. This nuisance ceased before trial, owing to the defendants having stopped work after action brought, and it was contended for the defendants that no injunction order would be granted, citing *Dunning* v. *Grosvenor Dairies*

Limited and *Carr & Co.* v. *Bath Gas Light and Coke Co.*, [1900] W.N. 265, note, upon which it was based. The Judge, Farwell, J., after consulting Joyce, J., who had given the decision in the *Dunning* case, said that Mr. Justice Joyce had no intention to lay down any general rule in that case, and added: "I should say the practice of the Court is that it is almost a matter of course for the injunction to be granted when the damage has been proved." In that statement of the law I agree. *Batcheller* v. *Tunbridge Wells Gas Co.* (1901), 84 L.T.R. 765, and *Barber* v. *Penley*, [1893] 2 Ch. 447, 460, are cases which shew that where it is proved at the trial that the nuisance has ceased, there will not always be an injunction; but the rule is as laid down in *Dean and Chapter of Chester* v. *Smelting Corporation Limited*.

The reference as to damages on this head is also proper; though I should be better satisfied if the parties can agree upon the amount. Any unreasonable conduct on the part of either as to the amount can, however, be taken into account in determining the costs, which have been reserved.

The question as to the jack-ladder is not so simple—whether it is in part upon the plaintiff's land depends upon the true position of "the shore of the river" in 1911, at the time of the plaintiff's patent.

Abrey, P.L.S., who saw the locus in 1911 and also in 1912, swears that the edge of the water in 1912 was 25 feet (horizontal distance) farther than in 1911—he takes the shore line of the lake in 1911 at the edge of vegetation; and, with that as a starting-point, he says that the jack-ladder at its east end projects a distance of 12 feet over the boundary-line between the chain-reserve and the plaintiff's land. He does not give an exact computation of the number of square feet covered by the jack-ladder on the plaintiff's land, but there were at least 350 square feet. His shore-line is marked by trees, stumps, vegetation, and he checked this by finding how far out the water was 7 or 7½ feet deep, and found the lines to correspond. Ward, another P.L.S., took much the same methods, and says that "it was almost impossible to fix it to a foot or two." He is a surveyor of experience, and concludes that the water comes

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in 20 to 25 feet from the former shore-line where the jack-ladder is situated. His conclusion is that the jack-ladder is at the west end about 26 feet on the plaintiff's land, at the east 10 to 15 feet, and east and west 45 feet—averaging the north and south encroachment at 16, he makes the superficial encroachment $16 \times 45 = 720$ square feet.

For the defence Holt says that the jack-ladder makes an angle of 45 degrees with the water (which will account for the west encroachment being greater than the east), and claims that the chain should have been measured from the existing edge of the water; Clarke, P.L.S., takes the chain "from the water-line around the shore," "would take it now from the side of the water," "measuring from high water if you are there in the spring:" Drowley, A.C.E., in the employ of the Canadian Northern, shews the shore-line as he found it, measured "from the water's edge;" Frost, C.E., took his measurements from the water-line as he found it. It is perfectly plain that the defendants' witnesses did not attempt to take the line as it was in 1911, but assumed that the chain-reserve retreated with the river, with the rise of the water. This rise was not a gradual movement by inappreciable intervals, but a rise caused by dams, etc., which dams may be taken at any time. It is not, therefore, a case for the application of the rule that where land is given to the water's edge, etc., it is increased or diminished by inappreciable and gradual changes. The law has recently been investigated in *Volcanic Oil and Gas Co.* v. *Chaplin* (1912), 27 O.L.R. 34, 484, 6 D.L.R. 284, 10 D.L.R. 200, and need not here be restated. Nor does any case arise of high water and low water—there is no evidence of any such phenomena as high water and low water upon this river.

I think the plaintiff has shewn that the true line of the shore of the river is some 25 feet inside of the line existing in 1912 near the jack-ladder, and the learned trial Judge was entirely justified in finding an encroachment by the defendants by their jack-ladder upon the plaintiff's land. And it was right to order them to remove the same from the plaintiff's land.

The form of the order should present no difficulty to the

defendants, and probably it does not—but, to avoid any question, the following description may be added to the 3rd paragraph: "The said lands being as follows: beginning at the north-east corner of the jack-ladder, thence in a southerly direction along the east side thereof a distance of 12 feet, then in a direction parallel to the edge of the water to the west side thereof, then in a northerly direction along the west side thereof to the north-west corner thereof, then along the north side to the place of beginning—the jack-ladder being taken as it was when Mr. Abrey made his survey." I take this description, as Abrey, who was believed by the learned trial Judge, is quite certain of the one measurement, and from that all the other boundaries may be derived.

There is no objection to the mandatory form of the judgment in this respect. While it may be that the plaintiff must submit to the inconvenience and annoyance of the working of the jack-ladder, there is no reason why he should submit to its operation on his own property. No such case of estoppel is made out as existed in such cases as *Grasett* v. *Carter* (1884), 10 S.C.R. 105.

The counterclaim is based upon the interim injunction granted on the 16th August by Mr. Justice Britton, and by the same learned Judge dissolved on the 20th August, 1912—a suspension of the defendants' operations for four days being thereby effected and considerable pecuniary loss occasioned.

The injunction was obtained upon affidavits of the plaintiff and of Abrey—the plaintiff swearing to a state of facts in respect of the interference by the defendants with his right to use the river and as to the position of the jack-ladder on his land, and Abrey as to the position of the jack-ladder substantially as found at the trial. It is impossible to say that this order was improperly obtained, or that the facts alleged in the affidavits are either without foundation or imperfectly stated.

The defendants moved to dissolve this injunction: on the motion were read several affidavits. Holt, the president of the defendant company, swears positively that the jack-ladder is wholly upon the chain-reserve, and two affidavits by engineers are filed indicating or suggesting that, in their opinion, this

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was the fact. Holt also swears that the defendant company had not "done anything to annoy or inconvenience the plaintiff or to deprive him of any of his rights." In that state of the case, there being a direct conflict as to the facts, the learned Judge, on a balance of convenience, decided—and, if I may say so without presumption, rightly decided—that the injunction should be dissolved. This was brought about by the defendants procuring affidavits which misrepresented the facts (I do not suggest want of good faith or anything but an honest mistake): had the facts been admitted as they were proved at the trial, the injunction could not have been dissolved with justice to the plaintiff. In my view, the defendants have no reason to complain of the interim injunction, whatever reason the plaintiff may have to complain of its dissolution.

Much argument was addressed to us as to the form of the interim injunction, and the affidavits upon which it was obtained, shewing that the plaintiff had no real complaint except as to the jack-ladder. I can find nothing of the kind: the affidavit of the plaintiff himself, paragraphs 4 and 6, is clear enough, and the injunction restrains the defendants from "interfering with the plaintiff's right of user and enjoyment of the waters surrounding the plaintiff's said lands and the streams, rivers, and bays connecting with said waters."

Except the description in para. 3 of the judgment at the trial, I see nothing of which the defendants can rightly complain—if that paragraph be amended by adding thereto the description given above, the judgment should stand.

The appellants should pay the costs of the appeal.

NOTE. It seems proper again to call the attention of the profession to the necessity of bringing into Court all the papers in the action. In the present instance, the injunction order and the order dissolving the same were to have been filed by the defendants; and much argument took place about the original order—and yet, when we came to examine into the case, these documents were not at hand, and the Court was forced to apply for them to the defendants' solicitors. This is not to be taken as a precedent, and the Court cannot undertake to

look up missing documents. Had the default been that of the successful party, I think we might well have withheld costs, as was done in *Re Stinson and College of Physicians and Surgeons of Ontario* (1912), 27 O.L.R. 565, 10 D.L.R. 699; but the default here was that of the appellants.

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LEITCH, J., agreed with RIDDELL, J.

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SUTHERLAND, J., agreed that the appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. MASTER AND SERVANT (§I E—23)—LIABILITY FOR WRONGFUL DISCHARGE—EFFECT OF RECOVERY FOR PORTION OF TIME UNEMPLOYED—ESTOPPEL—RES JUDICATA.

The recovery by a servant of wages for the month following his wrongful dismissal from a yearly hiring, estops the parties from asserting that he was not entitled to the amount recovered *qua* wages, and also negatives a contention that the wrongful discharge applied to that month; therefore the wrongful dismissal will not take effect until the following month, when the servant may recover damages therefor for the balance of the term of his employment.

Statement

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Dufferin, dismissing an action brought in that Court, to recover damages for the wrongful dismissal of the plaintiff from the service of the defendant.

The appeal was allowed, Sutherland, J., dissenting.

G. H. Watson, K.C., and *A. A. Hughson*, for the defendant, the respondent.

C. R. McKeown, K.C., for the appellant.

Mulock, C.J.

December 23. MULOCK, C.J.Ex.:—This is an appeal from the judgment of the Judge of the County Court of the County of Dufferin, dismissing the action. The facts disclosed by the evidence are as follows:—

On the 1st February, 1912, the defendant engaged the plaintiff as assistant in the Orangeville post-office, of which the defendant was postmaster, for one year, at the rate of $900, pay-

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able monthly, that is, $75 per month. The plaintiff accepted the engagement and entered and continued upon the work until the 11th October, 1912, when he was dismissed without cause. The plaintiff then withdrew from the post-office. In a few days thereafter the defendant offered to re-engage him on different terms. The plaintiff refused the offer, but from time to time proffered his services to the defendant under the contract, but the same were not accepted.

On the 7th November, 1912, the plaintiff sued the defendant for $75, the claim in that action "being wages due to the said George B. Hayes by the said George H. Harshaw for the month of October, 1912, under contract," etc. On the 13th December, 1912, the plaintiff obtained judgment for the $75 thus sued for, namely, wages for the whole month of October.

On the 27th December thereafter, the plaintiff sued the defendant in the Division Court for $75 for his November wages, but that action was discontinued, and the present one begun for $225 damages for breach of contract, being a sum equal to $75 per month for the three remaining months of his year's engagement. To this claim the defendant pleads recovery by the plaintiff of $75 for his wages for October as a bar to this action.

The judgment in the plaintiff's favour for $75, being for wages due to the plaintiff for that month, estops the parties from saying that the plaintiff was not entitled to that sum *quâ* wages for the month of October; and, therefore, whatever be the facts, negatives the contention that the wrongful dismissal applied to the month of October. In the face of that judgment, the wrongful dismissal did not take effect before the 1st November, and the plaintiff is entitled to damages therefor.

I, therefore, with respect, think the judgment of the learned Judge should be reversed, and that judgment should be entered in the plaintiff's favour for the amount of damages assessed, namely, $225 (less $5 earned by the plaintiff during the three months), together with the costs below and of this appeal.

Riddell, J.

RIDDELL, J. (after setting out the facts as above):—It seems to me that certain elementary considerations are sufficient to dispose of the case.

The defendant, by his written contract, agreed that at the end of each month he would pay the plaintiff $75 if the plaintiff had performed his services under the contract during that month. Subject to the principle *de minimis non curat lex*, and speaking generally, the plaintiff had no claim for any wages for work done during any month unless and until he had worked under the contract for the full month. It did not need to be the particular work for which he was hired, but it must be either that work or some work or action, etc., which the defendant accepted as answering the contract. Having done such work or so acted, etc., he was entitled, under the contract, to be paid the sum for that month. And, once the right to be paid accrued, it could not be divested without payment or something equivalent to payment, as accord and satisfaction, etc. If at the end of the month he should be wrongfully dismissed, he would have, in addition to the right to be paid his earned wages, the right to sue for damages for wrongful dismissal. These are two separate and distinct causes of action.

Both causes of action assert the existence of the contract, and both are based upon a breach of it. Instead of suing at once for wrongful dismissal, there is nothing to prevent the plaintiff continuing to offer his services. If these services are accepted by the master as a performance under the contract of his work under the contract, at the end of the month he becomes entitled to be paid for that month. In such a case, as in most others, "actions speak louder than words," and the master could not be heard to say that while he did accept what the plaintiff did as in performance of his duty under the contract, nevertheless the contract is at an end. Anything which the master may accept as such is a performance of the servant's duty under the contract. It was once thought that being willing to serve was equivalent to actual service on a wrongful dismissal—that it was constructive service. This was in substance laid down by Lord Ellenborough in *Gandell* v. *Pontigny* (1816), 4 Camp. 375; but it is no longer recognised as law.

Of course, the servant may submit to the dissolution of the contract, in which case he can recover only the amount to which he had already become entitled.

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If the servant have entered upon the new period (a new month, say), and is then dismissed, he may submit to the cancellation of the contract; he may then sue for remuneration for the work done, not upon the contract—for that has gone by the board—but on an implied contract to pay what the work was worth, an *indebitatus assumpsit*, as the old legal terminology has it. Or he may not consent to a cancellation of the contract, but insist upon its continuing in existence; then he may sue for damages for breach of the contract. In such an action the amount of work done by him in the broken period should be taken into account by the jury in assessing the damages: *Goodman* v. *Pocock*, 15 Q.B. 576.

The servant cannot be allowed to blow hot and cold; he must elect to consider the contract at an end or in force; and, if he sues setting up the contract and recovers judgment, he cannot then turn around and sue setting up its cancellation: *Elderton* v. *Emmens* (1848), 6 C.B. 160; *Emmens* v. *Elderton* (1853), 4 H.L.C. 624; *Snelling* v. *Lord Huntingfield* (1834), 1 C.M. & R. 20, 26, n. (*b*); *Walstab* v. *Spottiswoode* (1846), 15 M. & W. 501.

In *Goodman* v. *Pocock*, 15 Q.B. 576, so much relied upon by the defendant, a servant had been wrongfully dismissed in the middle of a quarter, and brought an action. The hiring had been from the 23rd January, 1847, at a salary of £200 a year, payable quarterly. The action was on two counts: (1) a special count for damages for wrongful dismissal; and (2) the common counts for work and labour, money paid, and an account stated. Particulars were delivered shewing four quarters' salary up to the 23rd January, 1848, certain disbursements and expenses, and payments to the defendant. At the trial Lord Denman, C.J., held that "the plaintiff could not recover for service actually rendered during the broken quarter . . . because what might be due for such service was recoverable under the *indebitatus* count only, and was not included in the particulars" delivered. The jury gave a verdict for the balance of unpaid salary, etc., to the 23rd January, 1848 (*i.e.*, what had already become due and payable), also for disbursements and expenses, also for £50 for wrongful dismissal; but did not take into ac-

count the transactions of the broken quarter at all. The plaintiff thereupon brought an action for remuneration for work actually done and for disbursements and expenses during the broken quarter. Erle, J., at the trial, was of opinion that by suing in the first action the plaintiff had treated the contract as open and in existence, and could not now recover under the common counts for work and labour, which, as we have seen, implies that the contract was at an end. This view was supported by the full Court. Coleridge, J., at p. 583, puts it concisely: "The servant may either treat the contract as rescinded and bring *indebitatus assumpsit*, or he may sue on the contract; but he cannot do both; and, if he has two counts, he must take the verdict on one only. Here the plaintiff elected to sue on the contract; and he cannot now sue in this form." The Court held (p. 580) that "the jury in assessing damages for the wrongful dismissal ought to have taken into the account the plaintiff's salary up to the time of his dismissal;" and (p. 583) "the damages given to him in his special action must be taken to have been awarded to him in respect of the period subsequent to the last complete quarter which he served."

A very great injustice was thus done to the plaintiff owing to Lord Denman's mistake in the law—an injustice which our more elastic practice would now avoid.

While there was an objection to the plaintiff's contending in the same action that the contract was rescinded and that it was not, there was no objection to the plaintiff's contending that the contract was not rescinded, but was in full force, and that he had two causes of action under it, one for money due and payable and the other for wrongful dismissal. In the former case, tried before Lord Denman, C.J., a verdict was given for salary due and payable, and also for certain disbursements, as well as damages for wrongful dismissal; all of which were recoverable upon the basis of an existing contract. In the new action, 15 Q.B. 576, a verdict was given for certain other disbursements, *i.e.*, those after the 23rd January, 1848, which were recoverable only on the basis of the existence of the same contract; but the plaintiff was not allowed to recover damages based upon the contract being rescinded.

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In the present case, in November the plaintiff brought an action explicitly for salary for the month of October, and succeeded in obtaining a verdict. He probably should not have had this verdict—on the evidence before us he clearly should not—but we do not know what evidence was adduced before the Division Court which might shew an acceptance by the defendant of the conduct of the plaintiff during the month of October as a performance of his duty under the contract. There is something even in the evidence before us which shews transactions which might almost justify a jury coming to such a conclusion. When the plaintiff went back shortly after the alleged dismissal, he offered his services under "my old contract if he wished; he said he would let me know in the afternoon . . . Mr. Harshaw on the afternoon of the day I was in . . . told me he had a new agreement drawn and for me to go to Mr. Hughson's office and sign that agreement and he would employ me." The proposed agreement began on the 1st November, saying nothing about the work done in October or any payment for October at all. It is not to be supposed that any one of even common decency and honesty would desire to rob his employee of pay for work honestly performed for him; and very little more would entitle a jury to infer that the defendant accepted the plaintiff's course of conduct as a performance of his work under the contract for October. Perhaps that little was supplied—no evidence was allowed at the trial of this action as to what took place at the trial of the former. Or it may be that the jury found against law and evidence, or the Judge may have misconceived the law. All that we must leave without investigation; the Division Court can no more be interfered with except on appeal than any other Court; *transit in rem judicatam*. The result was that the plaintiff obtained a judgment for his wages for the month of October under the contract. His course in bringing that action and in continuing it was an election to treat the contract not as rescinded but the reverse. So was the conduct of the plaintiff in bringing the second action, even if that (having been withdrawn) can be of any significance.

Then the plaintiff, having insisted that the contract was in existence for one purpose (or two), sues in this action on the

same hypothesis. Nothing in the cases, or on principle, prevents this. Having blown hot, he keeps on blowing hot and does not blow cold. *Allegans contraria non est audiendus*; but the plaintiff *allegat unum et idem, non contraria*. Leaving aside all technical terminology, the plaintiff's position is: "The defendant on the 11th October gave me a written notice of dismissal. I have contended and a Court has conclusively held that what he did was not such as that he need not pay my wages for October under the contract, but I admit that, while he has not permitted me to do my work in November, December, or January, he has done nothing which would entitle me to wages under the contract for these months. I, therefore, sue for breach of contract, and claim damages for the loss during these months."

He might in one action in the first instance, after the 1st November, have sued for (1) wages for the month of October under the contract, and (2) breach of contract—both claims assert the existence of the contract. He did not do so, but waited, as he had a right to do, for the conclusion of one action before bringing another.

Nor is this a splitting of a cause of action. A very fair test is that given by Erle, J., in *Wickham* v. *Lee* (1848), 12 Q.B. 521, 526: "It is not a splitting of actions to bring distinct plaints where, in a superior Court, there would have been two counts." *In Goodman* v. *Pocock*, 15 Q.B. 576, the action was brought, as we have seen, for wages already due and also for damages for wrongful dismissal. These were claimed in separate counts, the latter under a special count, the former under the common count. The facts required to support them are entirely different: *Read* v. *Brown* (1888), 22 Q.B.D. 128; so that, even if in this action such an objection could be raised—and I am far from saying that it could (*Grace* v. *Walsh* (1863), 3 P.R. 196; *Adkin* v. *Friend* (1878), 38 L.T.N.S. 393)—the objection is without weight.

There is no evidence in support of the contention of the defendant that the former judgment is in reality for wrongful dismissal; evidence was offered as to what the Judge said to the

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jury, but that evidence was rejected, and there is no appeal from that rejection. There was no amendment in the Division Court; and, moreover, the defendant expressly pleads that the recovery was "for wages . . . to the said Gordon B. Hayes . . . for the month of October, 1912, under contract . . ." There is, therefore, no passing of this claim into judgment.

No complaint is made and none can rightly be made as to the quantum of damages.

I think the appeal should be allowed, and judgment entered for the plaintiff for $220, with costs here and below.

I have discussed the case at perhaps wearisome length; my reason for so doing is what seems to me a fundamental misapprehension of the principles underlying—and indeed sometimes expressed—in the cases cited to us.

Leitch, J.

LEITCH, J.:—I agree.

Sutherland, J. (dissenting)

SUTHERLAND, J. (dissenting):—The defendant, who is the postmaster in the town of Orangeville, on the 1st February, 1912, employed the plaintiff under written contract to work in the office "for one year, at the rate of $900 per year, wages payable monthly," and agreed to give him "three months' notice" if he wished "to discontinue his employment when the agreement expired."

The plaintiff entered upon his employment, and continued to work therein until the 11th October following, when the defendant notified him in writing that his services as assistant postmaster were no longer required, and that he was dismissed from that position. The reason assigned in the notice was his "improper discharge of duty." On the same day, however, the defendant gave him a written certificate to the effect that he had found him "honest, capable, and efficient in every way."

The trial Judge in this action has found that the dismissal was "improper, unreasonable, and without cause." The plaintiff had been paid for his services monthly, according to the contract, up to the end of September. On receiving notice of discharge as aforesaid, what were his remedies? They were two: (1) To treat the contract as continuing and sue for its breach. This is the usual and generally the more advantageous course.

(2) To sue on a *quantum meruit* for the service actually rendered: *Goodman* v. *Pocock*, 15 Q.B. 576; *Smith* v. *Hayward*, 7 A. & E. 544; *Doherty* v. *Vancouver Gas Co.*, 1 W.L.R. 252; *Foreman* v. *Davidson*, 12 O.W.R. 521, at p. 523; Halsbury's Laws of England, vol. 20, p. 110; Smith's Law of Master and Servant, 6th ed. (1906), p. 146; 26 Cyc. 998, 999; Leake on Contracts, 6th (Can.) ed., p. 37; Smith's Leading Cases, vol. 2, p. 48.

It is clear from the evidence in this case that, while there was a talk between the parties for a few days after the 11th October about another contract of hiring, it never came to anything; and the plaintiff, before his suit in the Division Court, about to be referred to, was well aware that he would not again be employed. As a fact, he never did, after his dismissal, work for the defendant. His remedies being as indicated, what course did he take? He claimed, in an action brought in the Division Court early in November, to recover from the defendant "seventy-five dollars, being wages due to" him, "for the month of October, 1912, under contract made between the parties hereto, dated on the 1st day of February, 1912."

He apparently elected to treat the contract as a subsisting one, and sued on it for wages. He had not worked during the whole of the month. He had not, as a fact, earned wages for the month. The verdict of the jury awarded him the $75 claimed. That judgment stands, and in fact the amount thereof has been paid by the defendant. The plaintiff in December brought action again in the Division Court for $75 wages for the month of November; but, after a defence had been put in, in which the defendant pleaded the judgment in the first action as a bar to recovery, it was abandoned.

On the 26th April, 1913, the plaintiff brought the present action in the County Court, in which he claims $225 for breach of the contract already referred to.

I quote certain paragraphs from his statement of claim:—

Paragraph 5: "Under and in pursuance of said agreement, the plaintiff entered upon his duties as such assistant postmaster in the post-office in the said town of Orangeville, and continued

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to work for the said defendant under said agreement until on or about the 12th day of October, 1912."

Paragraph 6: "On or about the 12th day of October, 1912, aforesaid, the defendant served upon the plaintiff a notice in writing to the effect that his services as assistant postmaster were no longer required, and intimated that the reason of this dismissal was for very improper discharge of the plaintiff's duty as assistant postmaster."

Paragraph 8: "The said defendant paid to the plaintiff his wages to the last day of October, 1912, and the said defendant has not paid the wages which would have been due and payable to the plaintiff for the months of November and December, 1912, and for the month of January, 1913."

Paragraph 9: "The loss sustained by the said plaintiff by reason of said breach of contract on the part of the said defendant amounts to $225, being the wages for the months of November and December, 1912, and January, 1913, as aforesaid."

The defendant, by paragraph 5 of his statement of defence, says: "The defendant pleads the said judgment recovered in the First Division Court in the County of Dufferin by the plaintiff against the defendant in bar to this action."

The trial Judge finds "that such action" that is, the action in the Division Court on which judgment was obtained, "operates as a bar to any further action for the breach of the contract set out in the plaintiff's statement of claim:" but adds: "Should I be wrong in my conclusion, I place the damages the plaintiff has sustained by reason of the improper discharge at the sum of $220." The reason he reduced the claim by $5 was probably because the evidence disclosed that the plaintiff had been employed for some short time between the 11th October, 1912, and the 1st February, 1913.

It is plain from the evidence that the notice of dismissal was, within a few days after it was given, and certainly before the action in the Division Court was commenced, treated by both parties as definite and final.

It seems also clear to me from the evidence in the County Court action that in the Division Court action, as in it, the plaintiff's claim was on account of breach of the contract in con-

sequence of the alleged improper dismissal, notwithstanding that the form of the claim was in the one case for wages, and in the other for damages for breach of contract: *Routledge* v. *Hislop* (1860), 2 E. & E. 549. The two actions arose out of the one contract, and as a result of the one alleged breach, namely, the improper dismissal of the plaintiff by the defendant.

It was suggested in the argument that the suit in the Division Court being for wages for the month of October, and judgment having been given for $75, the amount of one month's wages, the proper inference is, that the jury considered, upon the facts presented to them, that he had worked for the whole of the month of October, and was entitled to pay therefor. This is not, as it seems to me, on the evidence given by the plaintiff himself in this action, a reasonable or proper inference.

While we have not the evidence before us on which judgment was given in the Division Court action, we are, I think, entitled to look at the plaintiff's own evidence with reference to that judgment in the present action. He says:—

"Q. And you did work how long in October? A. I had worked ten days and part of the eleventh day until about ten o'clock.

"Q. Did you ever collect the wages that you earned or those that were coming to you in October? A. Well, no more than by the previous suit.

"Q. Your contract, I think, according to this exhibit, expired about the 1st February, 1913? A. Yes.

"Q. And at that time you had been out of employment how many months? A. Since the 11th day of October.

"Q. This suit was commenced on the 7th November, and was in respect of the same contract that you are suing on now? A. Yes."

I am of opinion that, under these circumstances, the judgment appealed from is right, and that the action in the Division Court does operate as a bar to the present action.

"The object of the rule of *res judicata* is always put upon two grounds. One, public policy that there should be an end of litigation; the other, the hardship on the individual that he

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should be vexed twice for the same cause:" *Lockyer* v. *Ferryman* (1877), 2 App. Cas. 519.

The scope of the rule is indicated in *Henderson* v. *Henderson* (1843), 3 Hare 100, at pp. 114, 115: "In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

I think that the plaintiff in this action attempted "to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest" in the Division Court suit. The County Court action is based on the same breach of the same contract. In it no breach of the contract subsequent to the institution of the Division Court action was shewn.

I would dismiss the appeal with costs.

Appeal allowed; SUTHERLAND, J., *dissenting.*

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Ontario Supreme Court, Latchford, J. September 19, 1914.

1. CONTRACTS (§ III E—285)—RESTRAINT OF TRADE—TO REFRAIN FROM BUSINESS—COVENANT NOT "AS AGENT OR OTHERWISE" CONSTRUED—INJUNCTION.

A covenant not "as agent or otherwise for any person directly or indirectly to enter into competition with or opposition to the business" of the covenantee precludes the covenantor from acting as manager for her daughter in a competing business, and is ground for an injunction.

2. CONTRACTS (§ III E—287)—TO REFRAIN FROM BUSINESS—REASONABLENESS AS TO SPACE—RESTRAINT OF TRADE.

A covenant against competing in trade is reasonable as to space, although it includes the entire Province of Ontario where the covenantee's business embraces Ontario.

Statement

MOTION by the plaintiffs for an interim injunction.

The motion was granted.

W. R. Cavell, for the plaintiffs.

E. B. Ryckman, K.C., for the defendant.

Latchford, J.

LATCHFORD, J.:—The plaintiffs Parkers Dye Works Limited have for many years carried on business as dyers and cleaners in Toronto and the other principal cities of Ontario, and have in all about 400 agencies in the Dominion of Canada. In 1912, they purchased a similar business, theretofore for many years conducted by the defendant under the name of "Smith's Toronto Dye Works." They incorporated the latter business as "Smith's Toronto Dye Works Limited," and retained the defendant in the position of manager.

In June, 1914, an agreement dated the 23rd April, 1914, was made between the plaintiff companies and the defendant whereby Mrs. Smith (the defendant), in consideration of $1,000, assigned to the Parker company her claims against the Smith company, acknowledged that she had no further claim against either company, and covenanted that she would not, "as agent or otherwise, for any person . . . directly or indirectly enter into competition with or opposition to the business" of either company within Ontario for a period of three years from the date of the agreement.

In a Toronto newspaper of the 23rd July, the following advertisement appeared:—

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"Smith
"French Cleaning and Dyeing
"85 Bloor St. West,
"Under the management of
"Mrs. E. T. Smith."

A circular issued about the same time sets forth that "O. E. Smith" has opened a dyeing and cleaning business, at the address mentioned, "under the management of Mrs. E. T. Smith, formerly of Smith's Toronto Dye Works, with many years of experience in high class trade."

The plaintiffs (the two companies) now seek an injunction restraining Mrs. Smith from managing the rival business of O. E. Smith, on the ground that her management of the business at 85 Bloor street west constitutes a breach of her covenant.

The defendant was examined under oath for the purposes of the motion. Her evidence—to say the least—is not remarkable for its candour. With much reluctance, Mrs. Smith admitted that "O. E. Smith" is her daughter Olive. There was even greater difficulty in obtaining from the defendant an admission that she was acting as manager of the O. E. Smith business. She was asked—Q. 147—"Are you managing the business?" and answered "I am working for her." While denying that she knew anything of the advertisement, she acknowledged that the daughter had shewn her the circular. The examination referring to this circular proceeded:—

"148. Q. You told me just now the circular was correct, you know, and that circular says 'under the management of Mrs. E. T. Smith'? A. I said I was doing anything I was told to. She may call me a manager; I don't know what she calls me."

There is little difficulty about the reasonableness of the restriction by which the defendant agreed to be bound. As the business of the Parker company extends throughout the whole of Ontario, the restriction does not, in my judgment, afford the company more than fair protection, and the interests of the public are not interfered with. See *Allen Manufacturing Co.* v. *Murphy*, 22 O.L.R. 539, 23 O.L.R. 467.

The business carried on at 85 Bloor street west is undoubtedly

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in competition with or opposition to the business of the plaintiffs. I assume for the purposes of this motion that that business is not a mere cover for a business which is in fact the defendant's.

Yet the management of that business by the defendant is, in my opinion, in breach of her covenant that she would not for the term mentioned, as agent or otherwise for any other person, directly or indirectly enter into competition with or opposition to the business of the plaintiffs.

The covenant in *Gophir Diamond Co.* v. *Wood*, [1902] 1 Ch. 950, so much relied on by the defendant, turns on the use of the word "interested" in any connection which meant that the defendant was to have a proprietary or pecuniary interest in the success or failure of the business. No such connection exists in the present case. "Manager" seems to me to fall within the general words "or otherwise" following the word "agent," if, indeed, it is not within the word "agent" itself.

The defendant will, therefore, be enjoined as asked until the trial. Costs in the cause to the plaintiffs, unless the trial Judge shall otherwise order.

Motion granted.

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Alberta Supreme Court, Harvey, C.J., Stuart, Simmons and Walsh, JJ. June 30, 1914.

1. EMINENT DOMAIN (§ II A—80)—PROCEDURE—WARRANT OF POSSESSION—NOTICE OF APPLICATION FOR—SERVICE OF ON REGISTERED OWNER ONLY, AFTER SALE—RAILWAY ACT.

The service of a notice to treat on the expropriation of lands for railway purposes need only be made upon the registered owner, and, in the absence of fraud, the railway company may disregard an unregistered interest of which they have notice; on the subsequent registration of an interest in a part only of the land the holder thereof may be added as a party to the expropriation proceedings, but he is not entitled to a separate offer of compensation or a separate award against the company for his portion.

[*Re Edmonton, Dunvegan and B.C.R. Co.*, 15 D.L.R. 938, varied; see also, on sufficiency of notice, *Sanders* v. *Edmonton, Dunvegan and B.C.R. Co.*, 14 D.L.R. 88.]

Statement

APPEAL from an order, *Re Edmonton, Dunvegan and B.C.R. Co.*, 15 D.L.R. 938, adding an applicant (not the registered owner) as a party to expropriation proceedings under the Railway Act based on a notice to treat served on the registered owner alone, the order appealed from practically directing the railway company

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to commence *de novo*. The sufficiency of such a notice had been formerly considered by this Court (then equally divided) in *Sanders* v. *Edmonton, Dunvegan and B.C.R. Co.*, 14 D.L.R. 88.

The appeal was allowed in part, holding that notice to the registered owner alone (in the absence of fraud) constituted a valid and sufficient foundation for the proceedings.

Edwards, Dubuc and Pelton, for plaintiffs.

Short, Cross and Biggar, for the defendants.

Harvey, C.J.

HARVEY, C.J., concurred with WALSH, J.

Stuart, J.

STUART, J.:—It is now clear that four Judges out of the six members of the Court agree that the service of a notice to treat need only be made upon the registered owner even though the company is at the time aware of other unregistered interests. This opinion ought, of course, to prevail although I entertained a contrary view. Such being the case, I think the result arrived at by my brother Walsh is inevitable. I am unable to see how it is possible to say at one moment that the company has done all that the statute required it to do by serving the notice to treat upon, and making an offer to, the registered owner, and then at the same moment say that it must be ordered to do something more. Aside from the difficulties which would arise in trying to work such a scheme out, particularly in reaching a decision as to liability for costs in the case of those interested in the remainder of the property after the share of Sanders is dealt with, it seems to me that there is an inconsistency here which is fatal to the direction made by the learned Judge below as to the service of a separate notice upon and making a separate offer to Sanders.

I agree, therefore, with the disposition of the appeal proposed by my brother Walsh.

Simmons, J.

SIMMONS, J.:—I concur.

Walsh, J.

WALSH, J.:—I can see no objection to that part of the order appealed from which adds the applicant as a party to the arbitration proceedings. The company practically admits that he should be a party, and all that it urges in support of the appeal on this branch is that he is already a party under my order of August 5,

1912, which was made on the company's application. It says that the "Mr. Sanders" named in that order is the applicant, while the applicant says that he is not and there is no proof one way or the other with respect to it. The better way would be to put the matter beyond further doubt by allowing at least that part of the order to stand.

The rest of the order which directs the company to make the applicant a separate offer for his land and directs the arbitrator to find the amount to which he is entitled for it may be equitable, but with great respect, I am of the opinion it is in the circumstances unworkable and that there is no authority for it. The learned Judge says that the company was entitled "in the absence of fraud which is not proved, to disregard the plaintiff's unregistered interest when serving the notice to treat," and in this I quite agree with him. It follows, therefore, that the notice to treat given to the registered owner with respect to the whole of the land of which that in question is a part was a perfectly good notice which exhausted the liability of the company in that respect and created a valid foundation for the subsequent applications for the warrant of possession and the appointment of an arbitrator. The order appealed from practically directs the company to commence *de novo* with respect to that portion of the land included in this perfectly regular notice to treat of which the applicant is now the registered owner, and for this I have been unable to find any authority. It seems to me that when the company has given a proper notice to treat an order directing it to give a new and entirely different notice imposes upon it a liability which the Railway Act does not authorize and from which it is, therefore, entitled to be relieved.

In addition to this, the effect of this new notice, if given, upon the regular notice to treat upon which the company's subsequent expropriation proceedings are grounded must not be lost sight of. That notice makes an offer for the whole of the land mentioned in it. An arbitrator has been appointed to determine the compensation to be paid in respect of all of this land, and the sum of $2,500 has been paid into Court pursuant to a Judge's order to answer this compensation. The company is entitled to treat this as one entire proceeding in which all of its liability will be disposed of, leaving the distribution of the compensation amongst

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the various parties interested to be determined without reference to or further liability upon it. If a new notice is given to the applicant and a separate award of an amount to be paid to him is to be made, the arbitration proceedings with respect to the rest of the land must be carried on without reference to the notice to treat already given. It may perhaps be that in practice everything would work out all right, for the difference between the amount of the company's offer for the entire parcel and the amount of its offer to the applicant under the order appealed from might fairly represent the value of the land after the applicant's portion was taken out. On the other hand, this might not be the case. The applicant's land may have one value as a separate and distinct parcel and may have another and totally different value as part of the larger parcel expropriated by the company. I do not think that the company should be asked to assume the increased risk of two arbitrations instead of one with the added danger not only of heavier compensation being awarded as a result of this division, but also of its liability for costs to either or both sets of claimants being affected by the change when the notice upon which it rests its right to expropriate this land was, as is the case here, a perfectly valid and regular notice.

I would allow the appeal except in respect to making the applicant a party to the arbitration, and would otherwise dismiss the application and direct the applicant to pay the costs of it and of this appeal.

Appeal allowed in part.

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Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 30, 1914.

1. SALE (§ III A—31)—RIGHT OF ACTION—DELIVERY F.O.B. CARS—REFUSAL BEFORE DELIVERY TO ACCEPT—RESULT AS TO FORM OF ACTION.

In an action for goods sold and delivered, the plaintiff must establish appropriation of goods in pursuance of the contract so as to vest the property in the goods in the buyer; if the latter repudiates the contract before delivery has been made to the carrier at the place where the contract provides for delivery f.o.b., and refuses to accept the goods from the carrier, the action should be a claim in damages for non-acceptance and not for goods sold and delivered.

[*Atkinson* v. *Bell*, 8 B. & C. 277, and *Ginner* v. *King*, 7 Times L.R. 140, referred to.]

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2. CORPORATIONS AND COMPANIES (§ VII C—376)—FOREIGN COMPANY'S RIGHT TO SUE—SALE DISTINCT FROM AGENCY.

Where a company's contract purporting to appoint a special agent for sale in Alberta of a line of goods is really only a contract for sale of the goods to him with a restriction that he should not carry an opposition line of goods, and delivery is stipulated to be made f.o.b. in another province, in which the company's head office is situate, the vendor company is not debarred by the Foreign Companies Ordinance (Alta.) from suing for the price, although not licensed in Alberta as an extra-provincial or foreign corporation, merely by reason of such buyer being called the company's agent.

[*Standard Fashion* v. *McLeod*, 17 D.L.R. 403, followed.]

APPEAL from the trial judgment in the defendant's favour, involving the question as to the proper form of action on an alleged sale of goods where the buyer repudiates before delivery. Statement

The appeal was dismissed.

I. W. McArdle, for the plaintiffs, appellants.

D. S. Moffatt, for the defendants, respondents.

The judgment of the Court was delivered by

SIMMONS, J.:—The plaintiffs are an incorporated company with head office at Toronto, in the Province of Ontario, and the defendants are merchants carrying on business at Calgary, in the Province of Alberta. The claim of the plaintiffs is for $362.51 for goods sold and delivered to the defendants pursuant to an agreement in writing executed by the parties. Simmons, J.

The agreement in writing provided that the plaintiffs appointed the defendants

to act as special agent for the sale of its patterns in the city of Calgary: To sell and deliver f.o.b. Toronto, patterns at 50% of retail prices and advertising matter at the prices specified on the reverse side hereof. To allow defendants to return twice during each year . . . at nine-tenths of the sum paid for them, patterns purchased hereunder, in exchange for new patterns to be shipped thereafter.

To permit the sum of $100 part of purchase price of patterns to stand unpaid on its books as standing credit. The defendants agreed to purchaser from the party of the first part, and to keep on hand for sale at all times during the period this agreement continues in force, except in the months of January, February, July and August, patterns to the amount of $300 at 50% of retail price. To allow the plaintiffs or any party delegated by it to examine and take account of the pattern stock at any time it may desire. To purchase for free distribution advertising matter from the plaintiffs to a number not less than 12,000 sheets of Butterick fashions and 400 small quarterly catalogues per annum. To pay the plaintiffs for patterns to be furnished by its original stock, the sum of 200 as follows: $30

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upon signing contract, balance 30 days after shipment of stock less credits as per attached clause, and *to pay for other goods purchased* . . . on or before the fifteenth day of the month succeeding the month of purchase.

The agreement was to continue in force for 5 years and from year to year thereafter until terminated by notice. The defendants then signed an order for goods to be delivered f.o.b. Toronto for original pattern stock including September issue of $300 and new patterns each month commencing with October issue and certain other supplies at prices specified. The contract contained a clause requiring the defendants to handle no other pattern goods but the plaintiffs.

In June, 1912, the plaintiff's agent, L. C. Ross, canvassed the defendants with the view of making a contract and was advised by the defendants that they had a contract with the Pictorial Review Pattern Co. which required them to deal exclusively with the Pictorial Co. Ross suggested that they cancel this contract, admitting, however, that they had no legal right to do so, but expressing the opinion that the Pictorial Pattern Co. would not cause the defendants any trouble. Ross also drafted two letters which the defendant were to forward the Pictorial Co., the first one notifying them of termination of their sales agreement with the defendants and the second in reply to a probable reply to the first letter protesting against the action of the defendants. The defendants admit, however, that they assented to the suggestion of Ross to dishonour the Pictorial Review contract because they were of the opinion that the plaintiffs' contract was a better one for them.

The goods were ordered on June 11, and on June 15 the defendants decided that they would not carry out the suggestion of Ross to refuse performance of their agreement with the Pictorial Review and they wrote the plaintiffs advising the plaintiffs of their decision and asking the plaintiff to cancel the agreement made by plaintiffs with the defendants and to return the $30 deposit.

The letter was addressed to plaintiffs' agent Ross, who admits that he received it at Winnipeg on June 27, 1912, but he inadvertently omitted to forward it to his principal until July 19, 1912. The plaintiffs replied insisting upon the defendants carry-

ing out their contract. The defendants replied on July 23 advising the plaintiffs that any goods shipped would be returned at the plaintiff's expense.

The plaintiffs admit that they received the notice of the defendants purporting to cancel the order for goods before they were shipped, and that the first shipment of goods was made on July 27, 1912.

At the trial the defendants alleged that the contract with the plaintiffs was not to take effect until the defendants had been released by the Pictorial Review Co., but the correspondence does not in any way indicate such an arrangement. The defendants also set up as a defence that the plaintiffs were carrying on business in the Province of Alberta under an agency contract with the defendants and are debarred from maintaining an action by the Foreign Companies Ordinance. The trial Judge upheld this view and dismissed the plaintiffs' action with costs.

Standard Fashion v. *McLeod* was a case quite similar to this one and the judgment of the trial Judge was set aside upon appeal (17 D.L.R. 403). The Court of Appeal held that the contract was not one of agency, but one of sale, and the ground of the judgment of the trial Judge cannot, therefore, be sustained in the present case. Notwithstanding this, however, the plaintiffs fail upon another ground. They sue for goods sold and delivered. They admit repudiation before shipment—that is to say before delivery f.o.b. Toronto. In order to succeed in their action they must establish appropriation of goods in pursuance of the contract so as to vest the property in the goods in the defendants. If the property in the goods has not passed to the defendants at the date of repudiation, the action should be a claim in damages for non-acceptance.

Leake on Contracts, 6th ed., p. 771, enunciates the reason for this rule:—

> A party to a contract is bound to take all reasonable means of mitigating the damages consequent upon a breach by the other party. . . . Upon this principle in an action for not accepting goods sold, the seller cannot recover the full price as damages, but only the difference between that and the price for which he could sell them to another person.
>
> If the right of property has not been divested out of the vendor, he can-

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not bring an action for the price of the goods. Addison on Contracts, 11th ed., p. 635.

The Sales of Goods Ordinance enacts that—

Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may maintain an action against him for damages for non-acceptance. (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.

Sec. 48, Ord. N.W.T., ch. 39, sub-sec. 3 of sec. 48, provides that—

Where there is an available market for the goods in question, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or if no time was fixed for acceptance then at the time of the refusal to accept.

Atkinson v. *Bell*, 8 B. & C. 277, 2 M. & Ry. 292; *Ginner* v. *King*, 7 T.L.R. 140, are leading cases on this view; and *Brown* v. *Muller*, 41 L.J. Ex. 214, for the converse case of the vendor refusing delivery. The plaintiff clearly had the right to sell the goods to a third party when they received notice of the defendants' repudiation and the defendants could not have maintained an action against the third party for possession of the goods.

The right of property in the goods not having passed to the defendants, the plaintiff cannot, therefore, maintain an action for the price, his right of action, if any, would be for damages for non-acceptance. I would, therefore, on this ground dismiss the plaintiff's appeal with costs.

Appeal dismissed.

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Alberta Supreme Court, Scott, J. November 10, 1914.

1. MALICIOUS PROSECUTION (§ II A—10)—WANT OF PROBABLE CAUSE—IN CRIMINAL PROSECUTION—USE OF ALLEGED FORGED DOCUMENT.

Since the actual use by a person of a document really forged does not raise the presumption that he forged it, or that he knew it was forged, in a case where the defendant wrongly believed a document to be forged the onus is on him to shew reasonable grounds for his wrong belief, such grounds as would lead a reasonably cautious man so to believe, and in an action for malicious prosecution the defendant is held to such onus.

2. MALICIOUS PROSECUTION (§ III—20)—TERMINATION OF PROSECUTION—MINUTE OF DISMISSAL—REQUIREMENT AS CONDITION PRECEDENT, HOW LIMITED.

As a basis for an action against the defendant for malicious prosecution, it suffices if the plaintiff proves his dismissal in the prosecution complained of, nor is proof of a minute in writing of such dismissal a condition precedent to recovery in the action for malicious prosecution.

Statement

ACTION for damages for malicious prosecution.

Judgment was given for the plaintiff.

A. F. Ewing, K.C., for plaintiff.

Frank Ford, K.C., *H. H. Parlee*, K.C., and *W. J. A. Mustard*, for defendant.

Scott, J.

SCOTT, J.:—This is an action for damages for malicious prosecution. The plaintiff and defendant were candidates at an election for the provincial electoral district of Whitford held on April 17, 1913. On March 25, 1913, Hon. Atty.-Gen. Cross wrote plaintiff the following letter:—

Personal.

Dear Sir,—If you are desirous of having any appointments made of justices of the peace, notaries or commissioners in connection with my department during the election, kindly wire to me at government offices, Edmonton, and the appointment will be attended to at once by Mr. Thom.

Wishing you every success in the coming election and with best regards.

I am,

Paul Rudyk, Esq., Whitford, Alberta. C. W. CROSS. Yours very truly.

This letter was read and interpreted by the plaintiff to those present at a Ruthenian meeting held on April 13 at which the

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defendant was also present. He then asked to see the letter, which was handed to him. It was carefully read by him and he understood its contents. On Tuesday, April 15, defendant had a telephone conversation with Mr. Cross respecting the letter which I will refer to later. On Wednesday, April 16, defendant telephoned Mr. Stewart, a justice of the peace, asking him to come down to his (defendant's) house at Shandro post office. There the defendant on that day laid an information before him upon the following charge:—

That Paul Rudyk, of Edmonton, Alberta, on or about the 13th day of April, A.D. 1913, at Edward, in said province, did unlawfully forge a letter signed C. W. Cross, Attorney-General of Alberta, and did have a letter in his possession alleged to have been signed by C. W. Cross which is a forgery, said C. W. Cross stating so. Said C. W. Cross states said letter never signed by him.

On the same day a warrant for the arrest of the plaintiff was issued by Mr. Stewart upon that information, which warrant was delivered to constable Schreyer, of the North West Mounted Police, who on the evening of the same day arrested the defendant and took him before Dr. Lawford, a justice of the peace, who remanded him into custody until the following morning, when, upon his own recognizance in $200, he was admitted to bail conditioned for his appearance on April 18. On that day the defendant appeared before Dr. Lawford, who, by reason of not having received the papers from Mr. Stewart, was unable to proceed with the hearing of the charge and he, therefore, again adjourned it until April 25. As the papers had not then reached him he notified plaintiff by telephone that he had again adjourned the hearing until April 28. On that day plaintiff, when on his way to the hearing, met the defendant and asked him to attend in order that the case might be disposed of, to which request he replied, "I don't think I am going to go, I am going to my dinner and, if I decide to go, I will be there not later than four." Plaintiff attended before Dr. Lawford on that day and was informed by him that defendant had not appeared and that he did not expect him. He then said, "I dismiss the case," and handed the plaintiff the information and warrant and the letter from Mr. Cross which had been taken from the plaintiff at the time of his arrest. It appears, however, that Dr. Lawford did not make a

minute of the dismissal or of the remand to April 28, and it does not appear that he made any minute of either of the other remands.

The defendant says that during his telephone conversation with Mr. Cross he explained to him what the letter was about and that he replied that the plaintiff had no such letter in his possession and that he did not write or sign or authorize any one to write plaintiff any letter within the last seven years. Mr. Cross states that defendant, in referring to the letter, described it as a letter endorsing plaintiff's candidature and that he (Mr. Cross) replied that he had not written such a letter. He also states that, at that time he was certain that he had not written any letter to the plaintiff, but he was unable to state whether he told defendant so.

I am led to the conclusion that, in this conversation, the defendant did not describe the letter with reasonable certainty or with such certainty that the memory of Mr. Cross would have been refreshed or as would lead him to make inquiries whether the letter had been sent from his office. The defendant admits that he read the letter carefully and he was, therefore, in a position to describe it even minutely. It presents the appearance upon its face of being authentic, being typewritten upon the official letter paper of the Attorney-General, having embossed upon it the provincial arms with the words "Attorney-General, Alberta." Even if it may be construed as a letter endorsing the plaintiff's candidature, and I hold that it was described by the defendant merely as such, I think that, had he called the attention of Mr. Cross to its date, to the fact that it was written on his official paper and that it was an offer to appoint certain officials at plaintiff's request, he would probably have received a different answer to his inquiry.

Mr. Stewart, the justice who issued the warrant, states that he advised the defendant not to issue it and that he at first thought he would take his advice, but that he did not do so, that Sergeant Fyffe, of the North West Mounted Police, was present and he (Stewart) thought that he would execute it, but he was unwilling to do so and that it was then handed to one Ostrowski, an agent of defendant, with instructions to deliver it to con-

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stable Schreyer. Constable Schreyer states that on the day before the election the defendant telephoned him to await him at Pakan as he would have a warrant for plaintiff's arrest and that later during the same day he again telephoned him asking him to go to Smoky Lake, where plaintiff was having a meeting, and arrest him, take him to Mr. Stewart's and keep him there until after the election. The defendant states that he instructed Ostrowski not to go ahead with the matter and also denies that he had any telephone conversation with constable Schreyer, but, notwithstanding his denial, I hold that the warrant was issued and executed at his request and that he directed constable Schreyer to arrest the plaintiff and hold him until after the election. I see no reason for disbelieving the statement of either Mr. Stewart or constable Schreyer. The former was a supporter of the defendant and acted as his agent at a polling place during the election. The latter appeared to me to be a disinterested witness and I was favourably impressed by his demeanour while giving evidence. His statement is to some extent corroborated by the evidence of two witnesses who state, and it is not denied by the defendant, that at a meeting held by him at Bozan schoolhouse on the evening before the election he told the meeting that plaintiff had been arrested and that they could not vote for him. I gather from the evidence that at the time defendant made this statement the plaintiff had not then been arrested, but that defendant knew that he would be arrested that evening.

The defendant's conduct throughout shews that he was actuated by express malice towards the plaintiff. He states that if there had been any easier way of stopping the using of the letter he would not have had the plaintiff arrested, but his instructions to constable Schreyer to keep the plaintiff in custody until after the election shews that that was not his only object in instituting criminal proceedings against him.

The defendant states that, before laying the information, he endeavoured to procure from Mr. Cross a telegram confirming what he had said to him on the telephone, but that, not having obtained it, he decided to lay the information and let it stand over until the telegram reached him. He did receive on the

polling day and after plaintiff's arrest a telegram dated April 16 which purported to have been sent by Mr. Cross, but the latter cannot say that he sent it, and he states that the fact of the signature being followed by the words "Attorney-General" leads him to think he did not send it. Even if he had sent it the defendant cannot rely upon it as a justification for plaintiff's arrest as it was not received until after the arrest.

In his statement of defence the defendant alleges that it was brought to his knowledge that plaintiff was exhibiting on a public platform a letter purporting to have been written by Mr. Cross in which it was stated that the plaintiff was the Liberal nominee of the electoral division, that he communicated with him and was notified by him *in writing* that the plaintiff did not possess such a letter and that any such letter which plaintiff might have was unauthorized by him and that he (the defendant) laid the information against the plaintiff, relying upon such notification *in writing*. The letter in question did not state that the plaintiff was the Liberal nominee for the electoral division, nor did the defendant, before he caused the arrest of the plaintiff, receive any notification in writing from Mr. Cross respecting the letter which plaintiff had read to the electors. In my opinion the defendant had not reasonable and probable grounds for instituting criminal proceedings against the defendant. I have already expressed the view that in his telephone conversation with Mr. Cross, he did not describe the letter with such reasonable certainty as would refresh his memory or cause him to make inquiries whether such a letter had been written from his office. But, even if it were held that his description was sufficient the information he received from Mr. Cross would not, in my opinion, justify him in assuming that the plaintiff had forged it or even that he was making use of it, knowing it to be forged. The use by a person of a forged document does not raise the presumption that he forged it or that he knew it was forged. In this case the defendant, in order to assume that the plaintiff had forged the letter, must first have assumed that he had purloined or otherwise improperly obtained the paper on which it was written.

I am also inclined to the view that the defendant, in consider-

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ing the question of the guilt of the plaintiff, should have attached some importance to the position and standing of the plaintiff. He was known to the defendant for thirteen years and he is shewn to be possessed of considerable wealth and occupying positions of trust, being a large property owner in Edmonton and elsewhere, the manager of a loan company and a director of a co-operative company operating a chain of stores. Surely some consideration should be given to the question whether it is reasonably probable that a man in his position would commit an act which, if discovered, as it necessarily would be, would ruin his character and reputation and whether a man seeking election to an office of honour would, for the purpose of securing his election, commit an act which would render him unfit to hold the office.

It may be that the defendant believed that the plaintiff had forged the letter, but that is not material. The important question is whether he had reasonable grounds for so believing, that is, whether the information he had at the time he instituted the proceedings was such as would lead a reasonably cautious man to entertain that belief. I am inclined to the view that if the defendant entertained that belief it was due to the fact that his judgment was warped by his desire to put the plaintiff out of the way during the election.

I am of opinion that, even if the defendant believed that the plaintiff was guilty of the charge, his arrest was unnecessary, in so far as the administration of the criminal law was concerned and was an unreasonably harsh proceeding in view of his position and standing in the community. There was no reason to suspect that he would not have attended at the hearing of the charge if he had received a summons to attend. That his arrest was unnecessary, or, at least, ill advised is evidenced by the fact that Sergeant Fyffe was unwilling to execute the warrant, and that Dr. Lawford discharged the plaintiff from custody upon his entering into his own recognizance in $200. It was contended on behalf of the defendant that the plaintiff was not entitled to recover as he had not shewn that the proceedings against him had terminated.

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I hold that the dismissal of the charge by Dr. Lawford when the plaintiff was brought before him on April 28 was a termination of the proceedings against him. A minute in writing of such dismissal does not appear to be necessary. (See *Sinclair* v. *Haynes*, 16 U.C.Q.B. 247, and *Fancourt* v. *Heaven*, 18 O.L.R. 492.)

I give judgment for plaintiff for $1,200 (being $1,000 for general damages and $200 for the special damages claimed) with costs of the action.

Judgment for plaintiff.

Re CUST.

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S. C.

Alberta Supreme Court, Beck, J. November 5, 1914.

1. CONSTITUTIONAL LAW (§ II A—211)—SUCCESSION TAX—"TAXES, DIRECT AND INDIRECT"—LIMITATION OF PROVINCIAL POWERS—SUCCESSION DUTY ORDINANCE, 1903, SESS. 2, CH. 5 (ALTA.).

The Succession Duty Ordinance, 1903, session 2, ch. 5 (Alta.), is *ultra vires* of the Provincial Legislature even as to property within Alberta of persons domiciled there at time of death, as it purports to make the executor or administrator primarily liable for the succession duty and not the property devolving or the beneficiaries who take the same, and in consequence the Ordinance imposes "indirect taxation," which is beyond the powers of the province.

[*Cotton* v. *Rex*, 15 D.L.R. 283, applied.]

2. EXECUTORS AND ADMINISTRATORS (§ IV A—91)—DEBTS AND OBLIGATIONS —"TESTAMENTARY EXPENSES" — SCOPE OF — SUCCESSION DUTY AGAINST DEVISEE, WHEN.

A direction in a will for payment of "testamentary expenses" out of the estate is not sufficient to entitle a specific devisee to be relieved at the expense of the estate of payment of any succession duty to which the devise to him is subject. (Dictum *per* Beck, J.)

Statement

APPLICATION by executors for directions as to whether certain succession duty should be paid by the applicants or by a devisee or otherwise, involving the constitutionality of the Succession Duty Ordinance, 1903, 2nd session, ch. 5 (Alta.).

Judgment was given declaring the Ordinance *ultra vires*.

E. B. Edwards, K.C., for the executors and residuary beneficiaries.

C. B. F. Mount, for the specific devisee.

G. P. O. Fenwick, for the Attorney-General.

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BECK, J.:—This is an application by executors for the direction of the Court as to whether the succession duty payable to the Province of Alberta in respect of land devised to Richard Cust is payable by the devisee or by the executors out of the residuary estate or otherwise. The application having come before me some weeks ago and on the argument a question of the *ultra vires* of some provisions of the Succession Duty Ordinance (ch. 5 of 1903, 2nd sess.) having been raised I directed the Attorney-General of the province to be notified and the matter has now been argued before me by counsel for the Attorney-General, the executors and the devisee. The deceased was domiciled in the province and the land devised is in the province. It was admitted—it could not but be admitted—that certain portions of the ordinance are *ultra vires* of the Provincial Legislature. I think that these are not so interwoven with those which it is now argued are *intra vires*, so as to make the latter unworkable by treating the former as eliminated and, therefore, that I am compelled to decide the direct question raised before me. A careful consideration of the ordinance in the light especially of *Cotton* v. *Rex*, 15 D.L.R. 283, [1914] A.C. 176, 110 L.T. 276, leads me to the conclusion that the ordinance is *ultra vires* of the Provincial Legislature even when confined to the case of the estate of a person domiciled at the time of his death within the province where the whole of the property comprising the estate is then also within the province.

I come to this conclusion for the reason that it seems to me that the theory upon which the Act is framed is that the executor or administrator is made primarily liable for the duties imposed and is to look for indemnity to the several and respective devisees, legatees or other beneficiaries, that in intent and in effect the duty is to be raised not as—and the case does not correspond to the case of—a tax primarily and directly against property with a secondary or subsidiary legal obligation to pay upon the legal or beneficial owner, occupier or possessor, for it could not have been intended to make a direct tax against property outside the province and the intent of the ordinance in respect of property whether within or without the province is the same; and if this is the proper interpretation of the ordinance the ordinance is an

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attempt to impose—not a direct but an *indirect* tax, which is beyond the power of the province. In my opinion, therefore, no succession duty is collectable by the Crown. In the event of this opinion not being sustained I hold that as between the specific devisee and the residuary beneficiary the specific devisee and the property devised to him are liable for the succession duty.

I think this is quite plain upon the face of the ordinance, especially sec. 19. No doubt a testator can make provisions which will place the liability elsewhere; but there is no provision in the will which in my opinion effects this. The only one suggested is that for payment of "*testamentary* expenses" which I think does not include such charges as are made by way of succession duty.

Judgment accordingly.

CITY OF HALIFAX v. NOVA SCOTIA CAR WORKS.

IMP.
P.C.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Moulton and Lord Sumner. August 4, 1914.

1. TAXES (§ I F—80)—EXEMPTIONS—CORPORATIONS AND THEIR PROPERTY—"TAXATION" DEFINED—SPECIAL SEWER RATES—SANCTION BY LEGISLATURE.

"A total exemption from taxation," granted by a city under statutory authority for a certain time upon the lands, buildings, plant and stock of a company operates to exempt the company from liability to contribute a share of the cost of sewers constructed by the city in streets upon which its land fronts; the essence of taxation is that it is in a limited sense imposed by superior authority without the taxpayer's consent and the presumption that the sewer construction charges so imposed constitute "taxation" is not rebutted by the circumstance that the rate is a capital and not a recurring charge and is fixed by reference to the linear frontage independently of the tax assessors, nor by a statutory direction that they may be enforced in like manner to a rate or tax.

[*Nova Scotia Car Works* v. *City of Halifax*, 11 D.L.R. 55, 47 Can. S.C.R. 406 affirmed; *Les Ecclesiastiques de St. Sulpice* v. *City of Montreal*, 16 Can. S.C.R. 399, 14 App. Cas. 660, applied.]

Statement

APPEAL by the plaintiff municipality from the judgment on a stated case in appeal of Supreme Court of Canada, *sub nom N. S. Car Works* v. *Halifax*, 11 D.L.R. 55, reversing Nova Scotia Supreme Court, 4 D.L.R. 241, involving the right to exemption from municipal taxation set up by the defendant company.

The appeal was dismissed.

Sir R. Finlay, K.C., *F. H. Bell*, K.C., and *Geoffrey Lawrence*, for the appellants.

P. O. Lawrence, K.C., *E. P. Allison*, K.C., for the respondents.

IMP.

P. C.

CITY OF HALIFAX v. NOVA SCOTIA CAR WORKS.

Lord Sumner.

The judgment of the Board was delivered by

LORD SUMNER:—The respondents own a manufactory in Halifax, N.S., situated on four streets. In 1908, 1910 and 1911 the City of Halifax made public sewers in these streets under the city charter, and under section 600 required the respondents, as owners of land and buildings fronting the sewers, to pay $2387.34 towards the cost of their construction. If the respondents are in the position of an ordinary ratepayer, that sum is due and constitutes a lien on their lands under sec. 603 of the charter. The question is, in the words of par. 15 of the case stated for the opinion of the Supreme Court of Nova Scotia, 4 D.L.R. 241, "does the exemption claimed by the defendant apply in respect to the sewers," or, put in another form, is this charge "taxation on the company's buildings . . and on the land on which its buildings used for manufacturing purposes are situated?"

The Silliker Car Co. was incorporated in 1907. The Nova Scotia Car Works, Ltd., now respondents, are assignees of its manufactory and entitled to its rights and exemptions. For present purposes no distinction need be drawn between them. Both alike may be referred to as "the company." The City of Halifax has power, under sec. 344 (1) of its charter,

> when any company proposes to purchase any land or erect any building in the City of Halifax for the purpose of establishing any manufacturing industry, wholly or in part to exempt the land and buildings . . of such company from taxation for the general purposes of the city other than water rates for a period not to exceed ten years from the establishment of such industry.

The company did propose to purchase land and erect buildings, but the City of Halifax was minded to do more than merely to apply this section, and an agreement was negotiated between the city and the company, which, in the form of a schedule to a special Act, received legislative sanction on April 25, 1907. Under this agreement and the Act the city was to lend the company $125,000, to grant it an exemption from taxation for ten years, and to limit the yearly assessable value of its property during the second ten years to an agreed sum. As the consideration for this assistance the company agreed to establish a manufactory in Halifax, and this has been done.

The actual terms of the exemption thus specially enacted are as follows:—

> The city will grant the company a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings

used for manufacturing purposes are situated . . . . . At the expiry of the ten years the city agrees that the total yearly value for assessment on such lands, buildings, plant and stock shall, for a further period of ten years, not exceed fifty thousand dollars, the foregoing exemption not to apply to the ordinary water rate for fire protection, nor to the rate for water used by the company which shall be charged at the minimum rate charged other manufacturing concerns.

So far as a simple question of interpretation is affected by presumptions at all, their Lordships are of opinion that this clause should be construed favourably to the respondents. They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted. The matter is one of bargain and of mutual advantage; it is not a case of one citizen seeking to escape from his share of common burthens and so increasing *pro tanto* the burthen on the others.

In the case of *La Cité de Montréal* v. *Les Ecclésiastiques du Seminaire de S. Sulpice de Montréal* (14 App. Cas. 660 at 663) Lord Watson, speaking of an exemption from "municipal and school taxes," or "cotisations municipales et scolaires," says of a district rate for drainage improvements, "*primâ facie* their Lordships see no reason to suppose that rates levied for improvements of that kind are not municipal taxes." It will be observed that this was a case of exempting a certain class of ratepaying bodies, namely educational institutions, on public grounds. Hence what Lord Watson says applies *a fortiori* in the the present case of a particular bargain. It is true that all that was decided by that judgment was that leave to appeal should not be given, but their Lordships had taken time to consider it, and this dictum, given in the course of it, is of great weight in the present case.

But apart from this their Lordships think that *primâ facie* the exemption covers the charge in question. Put shortly, the appellants' argument must be, this liability "to pay to the city towards the cost of construction of such sewer, the sum of $1.25 for each lineal foot of property so fronting," is not "taxation on buildings or on the land" on which the buildings are situated. If it is not taxation, what else is it? No doubt other words may be found to describe it aptly, but the word "taxation" covers it too. Even in England, where the expression "rates and taxes" sometimes is used as if it connoted the distinction between national and

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local imposts, "tax" and "taxation" are words familiarly used in this connection. The Sewers Act, 1841, for example, authorises Commissioners of Sewers to levy a "general sewer tax" for construction and upkeep of sewers, and this tax is included with other taxes and with rates in the returns required by the Local Taxation Returns Acts, 1860 and 1870.

It is, therefore, incumbent upon the appellants to rebut this presumption, and to limit this exemption so that the liability in question will fall outside it. Three things are relied on—the nature of the charge, the terms of the charter, and the context of the clause. In a sense it is true that the charge resembles the price of benefits conferred if not of work and labour done. The contribution is kept down to $1.25 per foot of frontage apparently to discriminate between the local benefit to property owners in the street and the general benefit to the city at large. This does not carry the matter far. All rates and taxes are supposed to be expended for the benefit of those who pay them and some really are so, but the essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except in so far as representative government operates by the consent of the governed. Compulsion is an essential feature of the charge in question. The respondents might have drained their factory for themselves; they might think that it needed no drainage; they might object to the municipal scheme as defective; but the city sewers would be laid and the respondents would have to pay just the same. There is not enough here to differentiate this charge from "taxation."

What is relied on in the terms of the charter is that, alike in the headings of parts of the Acts, in the arrangement of the sections themselves, and in the language employed, the charter seems to distinguish between "taxation," and the "execution of city works"; that "taxation" is a matter of valuation, assessment and rate books, and is subject to exemptions in favour of the Crown and of those who enjoy the benefit of grants of exemption from the city or exemption by special Act, while the execution of works of sewerage is treated as a specific city service, and is followed by an apportionment by the city engineer not by the assessors which is in proportion to linear frontage and not based on annual value. Its cost is a capital and not a recurring charge, and the

remedies given are to be pursued in the like manner as remedies for rates and taxes, as though the charge was not either a rate or a tax, but only like them. Many sections were invoked as showing this contrast; they do show it and need not be enumerated here.

Their Lordships are by no means satisfied that criticism of this sort would suffice to rebut the *primâ facie* meaning of "taxation." The arrangement of the sections and the headings of the different parts of the Act are matters of orderly arrangement and convenience not directed to the present point but adopted *alio intuitu*. The charge is a capital instead of being a recurring charge, not because it is not a tax but because it is not a recurring tax; for a sewer, if once well laid, should last some considerable time. To say, that the charge may be enforced as taxes are enforced, is a condensed reference to procedure without necessarily meaning that the charge is not a tax but only something like it. There is, however, another short answer to this kind of reasoning. The agreement scheduled to the special Act does not expressly refer to the charter, nor is any such reference implied or involved. It provides for help to the company much beyond what the charter provided for. It is really independent of the charter. The company is not to pay any taxes at all; what does it matter, for the purpose of the exempting agreement, what powers the city has or when, or how, or in what terms they can be exercised? The company has nothing to do with them; why should its privilege, for which it has given the agreed consideration, be limited by reference to powers and provisions, which cannot be used to its prejudice? Reference to the charter would only be necessary if the agreement had bound the company to pay such taxes as the city might lawfully impose.

The third point turns on the latter words of the clause of exemption. Firstly, limiting the annual valuation to $50,000 during the second ten years is supposed to shew that the exemption during the first ten was merely such as might have been effected by saying that the annual valuation on which the company should be taxed should be *nil*. Their Lordships can only say that this argument seems too shadowy to be of any service. In fact, the provision for the second ten years may not amount to an effective exemption at all. Secondly, the exemption is not to apply to

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ordinary water rates for fire protection or to the rates for water used by the company. These words are quite consistent with a wide sense of "taxation." These two rates can only be taken out of the exemption by naming them. How does naming them shew that the exempted taxation is *ejusdem generis* with water rates alone? If the exemption enjoyed by the company had been only one which the charter empowered the city to grant by s. 344, or only that which is referred to in s. 335, it would by s. 362 (3) have stopped short of exempting if from charges for sewers or other betterments, but it is an exemption under a special Act, and the charter anticipates that such exemptions may occur, and provides *ex abundanti cautelâ* that among things wholly free from taxation shall be (s. 335 (1) (*i*)) " the property of any corporation exempted from civic taxation under any special Act as therein provided." Accordingly it is the provision in the special Act, that is in this case the clause in the agreement scheduled to the special Act, that must govern. That clause simply provides that the company is to be exempt from taxation and is to pay water rates, not that it is to pay water rates but no other taxation.

Their Lordships are of opinion that these considerations do not, either singly or in the aggregate, meet the *primâ facie* meaning of the words of exemption, and that taken as they stand they cover the liability in dispute. They therefore think that the Supreme Court of Nova Scotia was wrong in answering the question, put in the case stated, in the negative, and that the order appealed from, namely, that of the Supreme Court of Canada which reversed that decision and answered the question in the affirmative, was right and should be affirmed. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 8, 1914.

1. BROKERS (§ II A—8)—REAL ESTATE—EMPLOYMENT OF SUB-AGENTS—ONUS OF PROOF.

Where the real estate agent suing for commission on a sale of lands completed by him entered into the negotiations as the sub-agent of another broker with whom the owner had listed the property, and who also laid claim to the commission, the onus of proof is strictly on the former to shew an agreement with the owner whereby he became the latter's agent in substitution for the agent through whom he had been introduced into the transaction.

[*Greatorex* v. *Shackle*, [1895] 2 Q.B. 249, 64 L.J.Q.B. 634, referred to.]

Statement

APPEAL from the judgment of a County Court Judge in plaintiff's favour in an action by a real estate broker for commission for effecting an exchange of properties between the defendant and a third party, the right to the commission being also claimed by another real estate agent.

The appeal was allowed.

J. Auld, for defendant, appellant.

H. Phillipps, for plaintiff, respondent.

Howell, C.J.M.
Richards, J.A.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with HAGGART, J.A.

Perdue, J.A.

PERDUE, J.A.:—This action was brought in the County Court of Winnipeg to recover $500 claimed by the plaintiff to be due to him as commission for effecting an exchange of properties between the defendant and one Fanset. The defendant was the owner of a house in Winnipeg, which he valued at $20,000, and which he was anxious to sell or exchange for other property. He instructed one Findlay, a real estate broker, to procure a purchaser, and, on Findlay's advice, he advertised the property for sale in one of the daily newspapers, but neither the description of the land nor the name of the owner was given in the advertisement.

Fanset had a farm which he valued at $12,800 and which he was willing to exchange for a house in Winnipeg. This farm he had listed, for sale or exchange, with one Gilchrist, a real estate agent, and Gilchrist re-listed the farm with the plaintiff, another real estate agent. Findlay had mentioned the defendant's house to one McDonald, also a real estate agent. According to McDonald's evidence, the plaintiff told him that he, the plaintiff,

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had a farm to exchange for a house, and McDonald immediately went and saw Findlay, had a conversation with him and obtained from him the defendant's name. He says that while he was present Findlay telephoned some one, but he was not permitted to say whom. He made arrangements with Findlay to go and see the house that afternoon about 5 o'clock. On returning from his interview with Findlay, McDonald discussed the matter with the plaintiff, and tried, at plaintiff's request, to make arrangements with Findlay to go and see the house at one o'clock, but failed to make telephone connection with him. McDonald says he then gave the plaintiff the defendant's name and told him to call him up on the telephone. The plaintiff then spoke to the defendant over McDonald's telephone, and in presence of the latter. The result was that on the same afternoon Fanset was taken to see the house, the defendant was brought to Gilchrist's office and an exchange of the properties was arranged, the defendant receiving the difference in price partly in cash and partly by mortgage.

Upon completion of the transaction, the plaintiff and Findlay both claimed commission from the defendant. Both of them brought action against the defendant in the County Court. Each of these actions was for $500, the full commission foreffecting the sale. The defendant endeavoured to interplead and paid the sum of $500 into Court in the two actions. The plaintiff Morris took objection to the defendant's right to interplead, and the County Court Judge, considering himself bound by *Greatorex* v. *Shackle*, [1895] 2 Q.B. 249, 64 L.J.Q.B. 634, refused the application. The affidavit upon which this application was based was put in by the plaintiff at the trial of this action, and the trial Judge was fully informed of the fact that the commission was claimed by Findlay and that a suit had been entered by him to recover the amount from the defendant.

The plaintiff claims that he obtained his information as to the defendant's house from the advertisement in the newspaper and from the defendant himself, after ascertaining the name and address of the latter through the telephone number mentioned in the advertisement. He is completely contradicted by McDonald, who gives a very clear and reasonable account of how the parties were brought together. In my view, the plaintiff's

evidence is contradictory and far from convincing. He utterly fails to prove any contract on the part of the defendant to pay him commission. The evidence shews that down to the day of the transaction, he and the defendant were complete strangers. The defendant, as far as the evidence shews, did not make the plaintiff his agent. The plaintiff clearly came into the transaction as a sub-agent of Fanset through Gilchrist, Fanset's authorized agent. The plaintiff's claim rests altogether upon the fact that he brought the defendant to Gilchrist's office and introduced him to Fanset. But before the plaintiff had communicated with the defendant in any way, Findlay had laid the proposal for the exchange of the farm for the house before the defendant and he had accepted it. Evidence to prove that Findlay had made this proposal to the defendant immediately upon receiving it from McDonald was objected to by plaintiff's counsel and rejected by the Judge, but defendant's counsel finally succeeded in establishing the fact. It seems to me that in the circumstances of this case it was relevant, for the purpose of corroboration of the defendant, to shew that another person in fact performed the services for which the plaintiff was suing, and that evidence of that fact was admissible.

After Findlay had made the proposal to the defendant, the plaintiff spoke to the defendant over McDonald's telephone, stating that McDonald's office was speaking, and asking permission to shew the house to the party intending to make the exchange. The defendant gave this permission, and about two hours afterwards the plaintiff called on the defendant, introduced himself as the party who had been telephoning, and requested the defendant to accompany him to Gilchrist's office. This the defendant did, and he there met Fanset and closed the contract. While they were on their way to Gilchrist's office, the plaintiff asked the defendant if he was paying a commission and the defendant said he was. This is urged by the plaintiff as evidence of a contract to pay him the commission. But when that answer was made the defendant believed that the plaintiff came from McDonald's office and was in some way connected with him. The question and answer are altogether of too vague a character to form the foundation of a contract to pay commission.

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The learned County Court Judge in giving judgment said:—

I am not impressed with the strength of the evidence herein, but such as it is it supports the claim of the plaintiff. In fact, it would not require very strong evidence to support that claim in the face of the fact that defendant admits owing some one the commission and there is no other one but plaintiff laying claim thereto, so that there will be judgment for plaintiff for the amount of his claim, $500 with costs.

When giving the above judgment the learned Judge overlooked the fact, which had been clearly laid before him, that Findlay, the defendant's agent, was claiming the commission, and that a suit by him to enforce payment of it was at the time of the trial pending against the defendant. It seems obvious to me from the language he used that the learned Judge was greatly influenced by the impression he had formed that, although the defendant admitted that he owed a commission to some one, no one, except the plaintiff, was claiming it. I think it is probable also that the Judge overlooked the statement of Findlay that he first communicated the proposal for the exchange to the defendant and that the latter accepted it. This statement is to a certain extent corroborated by McDonald, who was present when Findlay sent a telephone message, and the statement by Findlay corroborates the defendant's evidence that he first received the proposal for the exchange of lands from Findlay. Besides, the preponderance of evidence is that both McDonald and the plaintiff learned of the defendant through Findlay and through him alone.

The appeal should be allowed with costs, the judgment entered in the County Court set aside, and judgment entered for the defendant with costs, including counsel fee.

Cameron, J.A.

CAMERON, J.A.:—I am not disposed to dissent from the opinion of the majority of the Court in reversing the judgment appealed from. The point that raises some doubt in my mind is that it was open to the learned trial Judge to accept fully the evidence of the defence, but this he did not do. I am, also, inclined to doubt that the evidence introduced as to conversations between Findlay and the defendant, intended to shew that Findlay was the only authorized agent of the defendant, was properly admitted. However, I am not inclined to go so far as to dissent from the opinion of the majority. There are, no doubt, reasons for coming to the conclusion that the version of the transaction alleged by

the defence is in accordance with undisputed facts, while that of the plaintiff is by no means clear. The expression made use of by the defendant with reference to the payment of commission is ambiguous and readily susceptible of a meaning different from that sought to be put upon it by the plaintiff. With some hesitation I concur in the judgment of the majority of the Court.

Cameron, J.A.

HAGGART, J.A.:—More than two months elapsed between the trial and the giving of judgment. The Judge's notes of evidence taken by himself at the trial may not have been very full, or he may have forgotten some of the principal features of the evidence.

Haggart, J.A.

After a careful reading of the reported testimony, with all due respect as to the Judge's conclusions, I would not find as a fact that there was no one other than the plaintiff laying claim to the commission. One Findlay, a real estate broker, who was expressly appointed an agent for the defendant, certainly makes a demand for the commission, and one McDonald, who was an intermediary, thinks he did something towards earning a commission, as he claims he was the first one to come in touch with Findlay and tell him of Fanset's farm.

The Judge does not expressly find that he believes certain witnesses in preference to others, and, under the circumstances, I think, as between Morris and Walton, I would believe Walton, for the reason that he is corroborated by Findlay and McDonald and that there are some material discrepancies between Morris' evidence given at the trial and his depositions given on his examination for discovery. There is no question that the plaintiff Morris entered into the negotiations which led up to the exchange of properties as the sub-agent of Gilchrist, Fanset's agent, and that the onus is strictly on Morris to shew how the change took place by means of which he became the agent of the defendant. I cannot accept the brief conversation between Morris and the defendant on the stairs when he came to Walton's office to bring him to meet Fanset. Of course the defendant and plaintiff give different versions as to what was said.

I think the onerous position in which the plaintiff believes he is placed might have been avoided. When the defendant was refused the interpleader order by the County Court Judge, who thought he was acting on the authority of *Greatorex* v. *Shackle*,

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[1895] 2 Q.B. 249, he might have made another application under sec. 347, ch. 44, R.S.M. 1913, the County Courts Act, which is as follows:—

> A Judge shall have power at any time to make or order any amendments in substance or form in any action, cause or proceeding, and to add or to strike out or substitute so that thereby the real subject matter intended to be litigated may be tried or heard between the real parties, and that any defect not involving the actual merits of the case may be cured, although it may not be a matter of form only, but one of substance.

And I think it could have easily been shewn that the real issue was as to whom belonged the $500, the commission in question, and that the proper parties to that suit were the plaintiff, Morris, and Findlay.

I think the verdict for the plaintiff should be set aside and a nonsuit entered.

I would allow the appeal.

Appeal allowed.

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HOUGHTON LAND CORPORATION v. INGHAM.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. June 29, 1914.

1. CORPORATIONS AND COMPANIES (§ IV D—85)—CONTRACTS—FORMAL REQUISITES—STATUTORY REQUIREMENTS—CONTRACT FOR SALE BY LAND COMPANY.

As to lands held for re-sale by a land company incorporated under the Manitoba Joint Stock Companies Act, a wholly executory agreement of sale entered into by the company's officers must have been authorized at a shareholder's meeting or have been specially authorized by a by-law passed by the board of directors to conform with sec. 68 of the Act (sec. 65*a* added in 1911), otherwise a defence of want of mutuality must prevail as to a document purporting to be a contract under the hand and seal of the purchaser and under the seal of the land company attested by its executive officer, where no consideration had passed and the purchaser had given notice of repudiation.

[*Houghton Land Corpn. v. Ingham*, 14 D.L.R. 773, reversed.]

2. STATUTES (§ II D—125)—RETROACTIVE IN TERMS—EFFECT—CONTRACT FOR SALE BY LAND COMPANY.

Sec. 68 of the Manitoba Joint Stock Companies Act, being in terms retroactive and applicable to past transactions, has the effect of declaring invalid executory contracts of sale by a land company made prior to its passing as to which there was neither the authorization of a shareholder's meeting or of a director's by-law specially authorizing such agreement.

[*Houghton Land Corpn. v. Ingham*, 14 D.L.R. 773, reversed.]

APPEAL from the judgment of Metcalfe, J., in plaintiff's favour, *Houghton Land Corporation* v. *Ingham*, 14 D.L.R. 773, an action by the alleged vendor of land to recover money due on a contract of sale.

The appeal was allowed, HOWELL, C.J.M., and CAMERON, J.A., dissenting.

C. S. Tupper, for defendant, appellant.

A. E. Hoskin, K.C., and *W. F. Guild*, for plaintiff, respondent.

Statement

HOWELL, C.J.M.:—I assume that the plaintiffs were duly incorporated and that by their letters patent they were authorized to buy and sell lands as their chief business. The matter was so treated at the trial and on the argument of this appeal. Under sec. 4 of the Joint Stock Companies Act, R.S.M. 1913, ch. 30, there was power to incorporate a company whose chief business was to buy and sell lands. Secs. 31 and 64 give powers to the directors of the company to carry on the business of the company, and I would expect thereunder that the directors having the control of the corporate seal could enter into contracts and execute conveyances of the land in which the company was dealing, just as a company incorporated to buy and sell chattels could acquire and dispose of them.

Howell, C.J.M. (dissenting)

Sec. 65 deals with and gives power to dispose of real estate which any company may need to carry on its business and then follow provisions respecting the real estate which a land company may deal in, that I am quite unable to understand. I cannot read the provisions as a restriction upon the powers of the directors. When this section was consolidated in 1913, its provisions were made clear and it seems to me but repeat, and give powers to acquire and convey real estate which the sections preceding it, and above referred to, have clearly conferred.

In 1910 the contract of sale was entered into and it was then a valid and binding contract, and must I hold that this contract was made null by the provisions of 1 Geo. V. ch. 8. It was no doubt expedient to give a land company wide and easy power to mortgage any of their real estate; indeed it is practically necessary to give such power or otherwise the company

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might be unable to execute a mortgage upon land being purchased to secure the balance of purchase money, and the section above referred to gave such power and thereby settled doubts which then perhaps existed.

I cannot read the provisions of this section respecting its retroactive effect as a declaration that this contract lawfully in force was made null because deeds executed pursuant to a by-law expressly passed to authorize the same are to be deemed sufficient. Perhaps, as to deeds and contracts executed after the passage of the statute it might be held to be a procedure directed by the Act, but I do not think that the Legislature intended to make invalid that which was before the enactment valid. It looks to me as if the legislative intention was rather to make the invalid or doubtful deeds and contracts valid. I do not think the evidence would justify me in reversing the learned trial Judge on the question of fraud.

I would dismiss the appeal.

Richards, J.A.

RICHARDS, J.A.:—The plaintiffs are a company incorporated under the Manitoba Joint Stock Companies Act for the purpose of buying and selling land. On or about June 25, 1910, the defendant and the plaintiff's manager agreed on a sale to the defendant by the plaintiffs of a farm in Manitoba on certain terms. The defendant then executed and delivered to the plaintiff's manager a document, purporting to be an agreement under seal, whereby the plaintiff agreed to sell to the defendant, and the defendant agreed to buy from the plaintiff, the above lands on those terms.

When the defendant signed the document the plaintiff had not executed it, or agreed to the sale. Several days after it was so signed the defendant refused to carry out the purchase, and, in effect, repudiated it. This action is to compel the defendant to pay the price named in the agreement, and for specific performance. Amongst other defences set up, the defendant alleged that the agreement never was executed by the plaintiffs. The learned trial Judge decided in the plaintiff's favour and the defendant appealed to this Court.

The agreement, when produced at the trial, purported to be

executed under the plaintiff's corporate seal and the signature of their presiding officer. The evidence shewed that no by-law of either the shareholders, or the directors, of the plaintiffs had ever been passed to authorize the sale to the defendant. At the trial it was stated that there was a general by-law authorizing certain of the plaintiff's officers to contract for the plaintiff in making sales. It was then agreed that a copy of such by-law should be filed as ex. 20. But, though asked since the trial to file such a copy, the plaintiffs have not done so, and I think we must treat the case as if no such by-law existed.

I do not by the above mean to imply that a by-law in such general terms would, if existent, be sufficient.

Sec. 67 of the Manitoba Joint Stock Companies Act provides that every company incorporated under it

> may acquire, hold, alienate and convey real estate requisite for the carrying on of the business of such company, and in case of a company incorporated for the purpose of the buying and selling of land (hereinafter called a land company) *may acquire, hold, alienate and convey real estate* in addition to any real estate requisite for the business of the company.

When the agreement now in question was signed by the defendant the word "undertaking" was used where "business" first appears in the above quotation. But the meaning was the same with either word. The words italicized above were not in the section, which was then sec. 65. They have since been inserted, not to change, but to make easier, the reading of the section. A careful scrutiny of the wording as it stood before they were inserted satisfies me that the words "may acquire, hold, alienate and convey real estate," as originally, and still, used in the first part of the quotation above, applied before the amendment not only to that real estate "requisite for the carrying on," etc., but also to that which, in the case of a land company, would be acquired, etc., in addition to that requisite for the carrying on of the business of the company, and which additional real estate may, for distinction, be called the company's stock in trade lands.

From the foregoing, it is evident that a land company is given power in the same language to acquire, hold, alienate and

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convey, both such land as may be requisite for the carrying on of its business (that is for office purposes or similar uses), and also such land as may be its stock in trade.

Then, in 1911, a sub-section (*a*) (which is now sec. 68) was added to sec. 65 as follows:—

(*a*) Every such land company may mortgage or convey or make an agreement of sale of land without the assent of the shareholders, and it shall be sufficient if each such conveyance, mortgage, or agreement be specially authorized by a by-law passed by the board of directors. This provision shall be retroactive and shall apply to all such transactions heretofore entered into by any such land company.

I take it, from the wording of the last clause, that the above section, passed in 1911, must, in this action, be read as if it, in fact, had been in force when the agreement was signed. Then, there being no by-law to authorize the alleged sale to the defendant, was one necessary to constitute the act of plaintiffs assenting to the alleged sale?

It is said that, as to the lands bought for the purpose of being sold at a profit, a land company is a trading company, and that the assent of their manager is their assent, as it would be in the case of a trading company dealing in goods. I have found no authority to support that proposition. The cases are not similar. In that of a company trading in goods, the business could not be carried on if some one person had not authority to make sales. Goods have settled prices in the different trades that deal in them. Land, however, is not a commodity in that sense. It has no settled prices at which it can be readily bought and sold. Land sales are generally made for large sums, as compared with those changing hands on individual sales of goods, and they do not ordinarily occur with such frequency that it would impede the business of dealing in them to have a by-law of the company's directors for each sale. In considering the sections above quoted, we find that, in the case of a land company, land acquired for purposes of carrying on business (such as office sites, etc.), and that acquired as stock in trade are dealt with in the same language.

Before the passing of the Act of 1911, it was necessary for a limited company, whether incorporated for trading or other

purposes, to pass a by-law of its shareholders in order to enable it to contract to sell its land held for business purposes, and it is argued that it is only to such lands that the amendment applies. It will be noticed that the 1911 amendment applies only to land companies. If it had been intended to be restricted to sales of property held for business purposes one would have expected the amendment to extend to all joint stock companies. But it leaves unaltered the law as to dealings with business properties of companies other than land companies.

I think, there is some doubt whether, even as to a land company, its business property can be dealt with under the amendment and whether in fact the amendment is not intended to be confined to the company's stock in trade lands. It seems to me that, prior to the amendment of 1911, a land company could only bind itself as to a sale of stock in trade lands in the same way as to a sale of its business lands, and that the amendment was enacted to make easier such dealings with the former. I am of opinion, therefore, that, to enable the plaintiffs to agree, or contract, to sell the land here in question, a shareholders' by-law or a by-law such as contemplated by sec. 68 was necessary, and there never has been either.

If I am right in the above, the plaintiffs have never had a right of action on the document they sue on. Though signed by the defendant, it was never a valid document to bind him as there was no mutuality in the dealing.

It is not like the case where a document, though signed by only one party, is evidence against him under the Statute of Frauds. In such a case there was always, without the writing, a bargain between parties capable of contracting, and who, in fact, did contract, so that the writing became merely a matter of proving that bargain or contract, which already existed. Here there has never been a contract, because the company, without the by-law, has never been able to agree to sell.

With deference, I would allow the appeal, set aside the judgment in the Court of King's Bench, and enter judgment there, dismissing the action with costs.

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I have expressed no opinion as to the defence of misrepresentations by plaintiff's manager to the defendant, as in view of the above it seems unnecessary.

I agree that the defendant may amend and file evidence of the plaintiffs' incorporation as suggested by my brother Perdue.

PERDUE, J.A.:—This is an action on an agreement for sale of land alleged to have been made between the plaintiffs, a land company, as vendors and the defendant as purchaser. The agreement is dated June 25, 1910, and the action was commenced May 2, 1912. The plaintiffs seek to recover payment of the total purchase money and interest, claiming that, by reason of the acceleration clause in the agreement, the whole amount became due on the defendant making default in payment of the earlier instalments. The plaintiffs also ask for specific performance of the agreement. The defendant admits that he executed the agreement, but claims that he was induced to execute it by various misrepresentations made by Andrew C. Houghton, the manager of the plaintiff company, which alleged misrepresentations are set out in the statement of defence, and are claimed to be material. He also sets up that the agreement was never executed by the plaintiffs. The evidence shews that the defendant signed the agreement on the day it bears date, but that he did not make, and never has made, the cash payment called for by the terms of the written document. It is also shewn that defendant wrote to the plaintiffs' manager on July 8, 1910, declining to carry out the agreement. The plaintiff company's corporate seal was affixed to the document shortly after its execution by the defendant.

In his statement of defence the defendant made the simple allegation that "the said agreement was never executed by the plaintiffs," without basing upon this allegation any legal consequence as flowing therefrom. At the trial the defendant applied to amend by alleging, amongst other things, that there was no mutuality of contract betwen the parties and that he withdrew from the contract before it was executed by the plaintiffs and so notified them. He urged before the trial Judge that there was no mutuality because the plaintiffs had not followed

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the provisions of the statute, 1 Geo. V. ch. 8, sec. 1, requiring each sale of land made by a land company to be specially authorized by a by-law of the directors. It was admitted that no special by-law had been passed in reference to this sale.

The enactment in question was passed as an amendment of sec. 65 of the Manitoba Joint Stock Companies Act, R.S.M. 1902, and it now forms a distinct section of the Act in the late revision, being sec. 68 of ch. 35, R.S.M. 1913. The amendment is as follows:—

> Every such land company may mortgage or convey or make an agreement of sale of land without the assent of the shareholders, and it shall be sufficient if each such conveyance, mortgage, or agreement be specially authorized by a by-law passed by the board of directors. This provision shall be retroactive and shall apply to all such transactions heretofore entered into by any such land company.

It is not contended that the statute does not apply to this company. If it does apply, it governs the transaction in question in this case, the provision being made retroactive and applicable in express terms to transactions entered into before its enactment. The purpose of the amendment was, no doubt, to facilitate the dealings of land companies in their business of buying and selling land. Sec. 69 of the Act (R.S.M. 1902, ch. 30), made it necessary to obtain the sanction of the shareholders before a land company could mortgage its land to secure moneys borrowed. A question appears to have arisen as to whether the assent of the shareholders should be obtained in the case of a sale of land. Sec. 65 of the above Act enabled a company incorporated thereunder, subject to any limitations in the letters patent, to acquire, hold, alienate and convey real estate requisite for the carrying on of the undertaking of the company, and this, in the case of a land company, in addition to any real estate requisite for the business of the company. By sec. 31 of the same Act the directors are given

> full power in all things to administer the affairs of the company; and may make or cause to be made for the company any description of contract which the company may, by law, enter into.

The same section empowers the directors to pass by-laws to regulate, amongst a number of other essential things,

> the conduct in all other particulars of the affairs of the company.

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There was, prior to the amendment, no express provision in the Act as to how a sale or conveyance of real estate should be authorized by a company formed under the provisions of the Act. Such a company is a statutory corporation having merely the powers conferred upon it by the Joint Stock Companies Act and the letters patent issued thereunder. It has not the powers *primâ facie* inherent at common law in a corporation created by Royal charter; one must look to the statute and the letters patent only to ascertain its powers: *Wenlock* v. *River Dee Co.*, 36 Ch.D. 674.

The language of the amendment shews that a doubt had arisen as to the manner in which a conveyance, a mortgage or agreement of sale might be legally made by a land company incorporated under the Act. The language of the amendment raises a presumption that the amendment was passed to correct a defect or to remove a doubt. See *Shaw* v. *G.W. Ry. Co.*, [1894] 1 Q.B. 373, 382. The question apparently had been raised that the assent of the shareholders was required to effect a conveyance, mortgage or sale and the amendment was passed to remove these doubts and to provide the necessary procedure.

Then the amendment declares that

> it shall be sufficient if each such conveyance, mortgage or agreement be specially authorized by a by-law passed by the board of directors.

The words "it shall be sufficient" are precisely similar in meaning to "it shall suffice." This latter expression received judicial interpretation in *Ridsdale* v. *Clifton*, 2 P.D. 276, at 346. That was an appeal from the Arches Court of Canterbury and involved, amongst other questions, the construction of a rubric of the Church of England (having the effect of a statute) which commenced with the words:—

> To take away all occasion of dissension and superstition, which any person hath or might have concerning the bread, it shall suffice, etc.

Lord Cairns, in giving the judgment of the Privy Council, said:—

> These words seem to their Lordships to make it necessary that that which is to take away the occasion of dissension and superstition should be something definite, exact, and different from what had caused the dissension and superstition. If not, the occasion of dissension remains, and the superstition may recur. *"To suffice" it must be as here described. What is substantially different will not "suffice."*

I think the meaning and intention of the amendment was to clear up the existing doubt and declare what action on the part of the directors would be sufficient to accomplish the purposes mentioned in the amendment. It is declared that it shall be sufficient if each conveyance, mortgage or agreement is specially authorized by a by-law passed by the directors. This means that nothing less will suffice, although the company might go further, if it pleased, and submit the matter also to the shareholders and obtain their assent. I think it is needless to discuss what would have been sufficient before the amendment was passed. The necessary procedure has been provided by the amendment, that procedure is declared to apply to past transactions, and, therefore, applies to the one in question in this appeal.

It was shewn that at the time of the trial no special by-law had been passed by the plaintiff company's directors authorizing the sale to the defendant. Therefore, when Houghton entered into negotiations with the defendant for the sale of the land, and when the agreement was executed by the defendant, the company had no legal authority to sell, and matters were in the same position when the plaintiff company pretended to execute the agreement. Then followed the defendant's repudiation of the contract. The question therefore arises, was the defendant bound by the agreement when the plaintiff was not? In other words was there such want of mutuality between the parties that the defendant was not bound by the contract he had signed?

In *Kidderminster Corporation* v. *Hardwick*, L.R. 9 Ex. 13, a municipal corporation caused certain tolls to be put up for letting by auction under certain conditions. The defendant was the highest bidder and was declared the purchaser. He paid a month's rent in advance and signed an agreement to become lessee under the conditions, but he did not furnish sureties as required and the plaintiffs ultimately determined the contract and re-sold the tolls at a loss. The contract was not executed by the plaintiffs under their common seal and was not signed by any person duly authorized to sign it. After the sale the plaintiff, by resolution under seal, adopted the report that the

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tolls had been purchased by the defendant, but before this the defendant had notified the plaintiffs in writing that he could not carry out his contract. In an action against the defendant to recover damages for the breach of his agreement, it was held that the plaintiffs could not maintain the action against him, upon the ground that, there being no contract under the seal of the corporation, there was no mutuality. It was also held that the payment by the defendant of a month's rent was not such part performance as would have bound the plaintiffs in equity to specifically perform the agreement.

In *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535, *Kidderminster* v. *Hardwick*, L.R. 9 Ex. 13, was followed, and it was held that a contract made by the municipal corporation, not having been under the seal of the corporation, or signed by any person authorized under seal to do so, or ratified under seal, or partly performed or acted on, and repudiated by defendant before suit, could not be enforced by the corporation.

No doubt, there are many cases which hold that a plaintiff may enforce a written agreement which he has not himself signed because the bringing of the suit bound him to the contract and, therefore, the objection of want of mutuality was removed: See *Butler* v. *Powys*, 2 Coll. 156 at 161; *Martin* v. *Mitchell*, 2 J. & W. 428; *Dowell* v. *Dew*, 1 Y. & C.C.C. 344. But these cases do not apply where the plaintiff had no capacity to contract at the time the pretended agreement was made and the defendant had withdrawn before action brought.

In the present case the objection of want of mutuality seems to me to be fatal to the plaintiff's case. The requirements of the amendment to the statute passed in 1911 and above quoted, are, to my mind, quite as stringent as the common law necessity for the affixing of its corporate seal by a municipal corporation when entering into a contract. A special by-law to authorize this transaction was required by the statute and none was passed. Without such authority the company was not in a position to contract. The defendant was not called upon to perform his part of the proposed contract until the company was legally authorized to enter into and carry out the contract upon its part. There was no part performance. Before anything

was done under the contract the defendant withdrew and notified the plaintiffs of his withdrawal. I would regard the agreement when executed by the defendant as merely an offer to be accepted by the company in the way the statute provides, and one capable of being withdrawn before acceptance. Until both parties had agreed there was no concluded agreement made; until both parties are bound, neither party is bound: *Dickinson* v. *Dodds*, 2 Ch.D. 463.

I cannot find in the evidence a clear admission that the plaintiff company was incorporated under the Manitoba Joint Stock Companies Act, although the effect of the statute, 1 Geo. V. ch. 8, sec. 1, was discussed at the trial and on this appeal, as if the plaintiffs were a land company formed under the Act. I think the defendant should be allowed to amend his defence by setting up the statute and its effect, and to file as evidence, if necessary, a certified copy of the letters patent incorporating the plaintiff company.

One of the misrepresentations alleged by the defendant and acted upon by him seems to me to have been of vital importance. At the time of the negotiations Houghton knew that the defendant desired, if he bought a farm, to work it along with another which he already owned at Gilbert Plains, making it necessary to move heavy implements and machinery from one place to the other. The road by which Houghton took the defendant to see the farm was, for part of the way, a trail crossing the adjoining land, and was very bad in the vicinity of the farm, but Houghton assured the defendant that there was a good road to the farm "on the square to the south." This meant that there was a good road along the road allowance according to the government survey. The defendant relied upon this representation. He did, indeed, while at the farm, ask to be driven along the south road in order to see it, but Houghton urged that he was pressed for time and again repeated the assurance that it existed. That this representation was made is abundantly clear. In Houghton's letter of August 11, 1910, written more than six weeks after the signing of the agreement, he says:—

> My previous trip to this farm I was driven by Mr. Wilson on a road to the south, which was a good road on the road allowance.

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As a matter of fact there was no road to the farm along the road allowance. I am satisfied from the evidence that there was no road to the farm over which it would have been feasible to move a traction engine and other heavy implements in the spring of the year, although Houghton represented to the defendant that the road was good enough for that purpose. The defendant was given no opportunity of examining the "good road" alleged to exist on the south, and he relied on the representation as to its existence. A farm practically isolated by impassable roads during the spring time would have been useless for defendant's purposes. The terms of the agreement itself shew that it was intended as a grain growing farm and was to be paid for largely by a share of the grain crop to be raised upon it. I do not think it is necessary to deal with the other misrepresentations. I am convinced that the defendant, an Englishman new to the country, was deceived and misled as to the quality and suitability of the farm for the purposes for which he was buying it, and as to its accessibility in the matter of a suitable road.

I think the appeal should be allowed with costs and the plaintiff's action dismissed with costs.

Cameron, J.A. (dissenting)

CAMERON, J.A.:—On the argument of this appeal the provisions of sec. 67 and 68 of the Companies Act were referred to and discussed. It was contended that, inasmuch as there was no by-law proved specially authorizing the agreement in question in accordance with sec. 68, the execution of the agreement by the plaintiff company was not established, and that, therefore, the plaintiff must fail. The statement of claim sets out the agreement in question, and its terms. In his statement of defence the defendant admits that he executed and delivered that agreement. He does not distinctly set up in his statement of defence that the plaintiffs purported to execute the agreement, but did so without the authority of a by-law as required by sec. 68. It is alleged therein, however, that the agreement was never executed by the plaintiffs, an allegation which, it does seem to me, was intended to raise the point that the cash payment by the defendant of $500 not having been made, the agreement never became operative. Evidence on this subject was given at the

trial on the cross-examination of Houghton, the manager and secretary of the plaintiff company, who effected the sale in question. The witness was examined subject to the objection of counsel for the plaintiff company that the matter was not pleaded and not in issue. It was contended on the other side that the evidence was admissible under the above allegation in the defence that "the said agreement was never executed by the plaintiffs." Notice was also given for leave to add certain amendments to the statement of defence, which, it was argued, are sufficiently wide to cover this evidence, though this is far from clear. The evidence was given, however, subject to the objection and the amendments were not permitted to be made by the trial Judge. On his examination, the witness said there was a by-law passed for all sales made, but in the absence of the minutes he could not say whether there was a by-law passed for this particular sale, p. 242. On re-examination, reference is made by this witness, subject to the objection, to the minute book of the company shewing a record of the sale to the defendant, and also to a general by-law authorizing sales by the manager (p. 266). These were apparently not actually produced.

The learned trial Judge dealt with the matter at p. 289 of his judgment, holding that sec. 68 did not interfere with the prior law.

With respect to the capacity of corporations to alienate their lands, the rule is, as we have seen, that every corporation existing as such *at the common law* has as full capacity to dispose of its lands as a natural person free from disability. Williams, Vendor and Purchaser, 946.

A distinction must be drawn between corporations at common law and those created by or under a statute for particular purposes.

Looking at this statutory creature one has to find out what are its powers, what its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute.

Per Bowen, L.J., in *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D. 674 at 685.

The capacity of a corporation to contract, whether with respect to its property or otherwise, is determined by the same principles exactly as regulate its capacity to dispose of its land. Williams, Vendors and Purchasers, 949.

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If created by statute for any particular purpose, the corporation can enter into any contract consistent with those purposes. Its capacity to contract is qualified by the general rule that it can only bind itself under its corporate seal. But, amongst the exceptions to this rule, is that of trading corporations and of corporations created for particular purposes, when making contracts necessary to effect those purposes. *Ib.* 951, 952.

The agreement in this case is signed by the president and secretary of the company, and has the seal of the company affixed. The business of the corporation is admitted to be that of a land and investment corporation.

Every corporation has, by necessary implication, the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or by its charter. The express power to accomplish certain objects carries with it, by implication, a grant of the right to use all such powers as a natural person might properly and naturally use to accomplish the same results under similar circumstances. The power to enter into contracts is one of the ordinary incidents of a corporation. Cyc., vol. 10, 1098.

With respect to all those contracts which are made in the ordinary administration of the business of the corporation by its managing officers . . . no antecedent authorization by the board of directors applicable to each particular case is required, but a general authorization or employment to make contracts of a class which embraces the particular contract will be sufficient. Cyc., vol. 10, 1060.

The law is thus stated by the highest authority in *The Winnipeg Electric Railway Company* v. *The City of Winnipeg*, 4 D.L.R. 116, [1912] A.C. 355, where permits were issued to the company by officers of the city for the erection of certain poles under the provisions of by-laws of the city. These permits were challenged by the city as having been granted without a by-law. It was held that

the granting of permits did not require a by-law in each case, but was an executive act to carry out a general by-law such as is admitted to have been quite properly passed. Page 371, 4 D.L.R. at 129.

The presumption in the case of a contract purporting to be executed by a corporation is in favour of its due execution. In this case we have the direct evidence of Houghton as to execution of the agreement by the president and secretary and as to the affixing of the seal, p. 218. This uncontradicted evidence answers the allegation of the defence that the agreement was never executed.

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I think it can be taken here that the execution of the agreement was pursuant to authority. The evidence points to the existence of a general by-law. But I cannot see how the existence of such a by-law is called into dispute by any pleading before us.

When a contract on behalf of a corporation has been executed by certain officers, duly designated, it will be presumed that they were authorized to execute the contract. Thompson on Corporations, p. 1873.

The presumption is that the contract is binding on the corporation until it is shewn that the same was not authorized or ratified. *Ib.*

Where the seal appears on an instrument or deed purporting to be executed by a corporation, the presumption is that it was rightfully affixed, and the burden of proof is on him who would attack the instrument for want of authority to affix the seal. *Ib.* 1934.

Surely in this case where the want of antecedent authority is not pleaded or directly placed in issue, the burden of establishing it must be on the defendant.

What is the effect of sec. 68? It says every land company may mortgage or convey or agree to convey without the assent of the shareholders. That does not alter the previous law so far as alienations of real estate by a land company, in the course of its business as such, are concerned. It does, however, alter it as to mortgages of real estate which, under sec. 69 of ch. 30, R.S. M. 1902, required the assent of two-thirds in value of the shareholders at a special general meeting. Sec. 68 further says that it shall be sufficient if each such conveyance, mortgage or agreement be specially authorized by a by-law.

I see nothing here abrogating the old law by which the officers of this land company, are empowered to dispose of its real estate under the general authority of a by-law, the existence of which is to be assumed until the contrary is proved.

I consider that sec. 68 merely provides that a by-law authorizing each special transaction shall be a sufficient authority, and that no further evidence that proof of the existence of such a by-law shall be necessary. That is to say, the legislature indicates one method of procedure which, if adopted, shall be deemed sufficient. But the existing provisions of the law are not annulled or intended to be annulled. If such had been the intention of the legislature, that intention would surely have been

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made manifest beyond question. All other methods would, in that case, have been expressly prohibited or all transactions, in contravention of sec. 68, would have been declared invalid. But it is not so enacted.

I cannot imagine that the legislature intended that there must be a separate by-law for each sale, setting forth the particulars of each. If the particulars of a score of sales were comprised in one by-law, that could hardly be held to invalidate the by-law. And a by-law, general in its terms, but clearly referring to certain properties and transactions would, it seems to me, satisfy the statute. It can, I think, be fairly contended that all that is required by sec. 68 is, that there should be clear authority given for every transaction. I would so consider, because I think the sec. 68 is directory only and not mandatory, within the rules laid down in well-known cases, and failure to comply with it has not the effect of invalidating transactions perfectly valid under the law as it existed prior to the enactment of this section.

In *Ridsdale* v. *Clifton*, 2 P.D. 276 at 278, it was held by the House of Lords that the words "it shall suffice" in the rubric quoted at p. 346, mean what is therein described, and that what is substantially different will not "suffice." But the opinion of the Lord Chancellor is founded on the introductory words, "to take away all occasion of dissension and superstition," and he prefaces it by observing that,

> there is no doubt that in many cases these words ("it shall suffice") standing alone and unexplained by a context, would be quite consistent with something different from, larger or smaller, more or less numerous, more or less costly, than what is mentioned, being supplied.

So, I take it, judging from the context of sec. 68 and from the state of the law prior to its enactment, the words "it shall be sufficient" are consistent with a method different from the method mentioned, provided such different method be valid and operative under the law existing prior to the enactment of sec. 68. If, in the case of a sale of lands by a land company, the assent of the shareholders, declared by by-law, had been obtained, without a directors' by-law, it would be difficult to argue that such a transaction was inoperative. The assent of the share-

holders so manifested would be of a higher character and more explicit authority than any shareholders' by-law and I submit would be effective and absolutely binding. In my humble judgment, therefore, the view taken of the legal effect of sec. 68 by the learned trial Judge is perfectly sound.

Nor am I inclined to differ from the trial Judge as to his finding on the question of fraud, which was fully and exhaustively argued before us. According to the terms of the agreement, providing for the maturing of the future payments on the occurrence of the defaults mentioned, there seems no escaping the conclusion that the plaintiff is entitled to the whole amount of the purchase money and interest. I think, however, the judgment ought to give the defendant an opportunity to make the payment and receive a conveyance. Otherwise I would affirm the judgment appealed from.

Haggart, J.A.

HAGGART, J.A.:—The plaintiff's statement of claim alleges an agreement bearing date June 25, 1910, made between the plaintiff as vendor and the defendant as purchaser, by which the defendant agreed to purchase three quarter sections of land for the sum of $11,000 to be paid as follows: $500 on the execution of the agreement; $500 on July 1, 1911, and the balance of the purchase money and interest by turning over to the plaintiff the proceeds of one half the crop from the lands in each year until the principal and interest was fully paid. The interest was 7 per cent. per annum. There are set forth certain other provisions as to payment of taxes, and breaking and cropping the land which need not be given in detail. It is alleged that no moneys have been paid and that by reason of such default the whole of the principal and interest had become due and now amounts to $12,480.60. The plaintiff asks payment of that sum and specific performance of the agreement.

The defendant admits that he executed the agreement, but says he was induced to execute it by the misrepresentation of one Andrew C. Houghton, manager for the plaintiff company, and that the agreement was never executed by the plaintiff. The defendant also defends upon the ground that Houghton represented to him that the lands were good arable lands and that the

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cultivated lands and 75 acres in addition were good for grain growing, and further that there was a good road leading from Ochre River to the farm, which representations were untrue both as to the character of the land and the existence of the road. At the trial the defendant asked to be allowed to amend his statement of defence by setting up (1) that it was implied that the contract should not become operative until the cash payment of $500 should be made; (2) that there was no mutuality in the contract; (3) that he withdrew before the contract was executed by the plaintiff, and the plaintiff was notified. The trial Judge refused the amendments, but with all due respect, I think they should have been allowed because the evidence is wide enough to cover the issues. In any event the averment in the original statement of defence that the agreement was never executed by the plaintiffs would raise the defence of *non est factum*.

When the defendant and Houghton returned from viewing the farm, Houghton drew up the document referred to in the statement of claim and had the defendant attach his signature and affix his seal, and came to Winnipeg, which was the head office of the plaintiff company. The defendant on July 8 went again to the farm and made a further examination as to the quality of the farm and as to the existence of the road to the south and upon that day wrote to Houghton stating that he refused to take the farm, and several letters then passed between the defendant and Houghton, the substance of which were that Houghton endeavoured to persuade the defendant to go on with the deal. This correspondence had no result and the plaintiffs on May 12, 1912, commenced this action.

I agree with the trial Judge that as to the charges of misrepresentation regarding the quality of the land and the existence of a good road to the south the defendant fails, and that there is no sufficient evidence as to misrepresentation in respect to these matters to render void a contract otherwise validly entered into between the parties. The defendant was on the land and he had opportunity to examine it if he so desired, and it was open to him to make ample enquiries as to the existence of the road to the south for the transporting of stock and farm mach-

inery. The word road, so far as it applies to a comparatively newly settled farming country, is not a very definite term. A good road might be an ordinary grade on the prairie, a trail across the country or a trail through the bush with the trees and stumps cleared for a space sufficiently wide to admit horses, cattle and vehicles, and I do not find in the evidence that there is a direct statement from any one having an accurate knowledge of the district that no good road exists towards the south of the farm in question. The other question as to whether there was a binding contract between the parties before the withdrawal of the defendant must be seriously considered. No money had been paid and no possession had been given or taken. There is simply the writing signed and sealed by the defendant in the possession of Houghton. No consideration had passed. The document could not be more than an executory contract. For the promise or undertaking of the defendant the only consideration would be the promise or undertaking of the plaintiffs. Would not then the promise of the defendant be only an offer until it was formally accepted by giving the binding promise of the plaintiffs?

Leake on Contracts at page 5, in discussing mutual promises, says:—

> An executory consideration is a promise to do or give something in return for the promise then made. . . . The contract with an executory consideration thus comprises two promises, commonly described as mutual promises, the one promise forming the consideration for the other, and conversely. Consequently contracts of this kind must be binding on both parties otherwise the consideration for one of the promises fails and the contract is then described as being void for want of mutuality. . . . The necessity for mutuality in contracts must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise.

Accordingly, where one party has received the benefit of the stipulations for which he contracted or the other party has performed all the obligations on his part which ever way it may be put, a defence based on want of mutuality will not in general be a defence. Upon this principle a contract signed by one party only may amount to a mere offer until accepted by the other. See *Lees* v. *Whitcomb*, 5 Bing. 34; *Arnold* v. *Poole Corporation*, 4 Man. & G. 860, *Dickinson* v. *Dodds*, 2 Ch.D. 463.

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The onus is upon the plaintiffs to prove a binding contract, and they have not discharged that onus by producing a writing to which is subscribed the signature "W. J. Christie, President," and "The Houghton Land Corporation, Limited, per A. C. Houghton, Secretary," and to which is affixed what purports to be a corporate seal. I think I am warranted in assuming that the plaintiffs are incorporated under the Manitoba Companies Act. No letters patent were produced at the trial, and it was never contended that the provisions of that Act did not apply for the reason that they became incorporated elsewhere. Now, the powers of directors are defined by the statute, but the powers of the officers are determined by the board of directors, and as such must be conferred by a by-law of the directors: ch. 32, sec. 35, R.S.M. 1913, enacts that "the directors . . . may make by-laws" as to "the appointment, functions, duties and removal of all agents, officers and servants of the company," and no such by-law has been proved either by the production of any original or by a "copy . . . under the seal and purporting to be signed by any officer of the company" as provided by sec. 87 of the Act. Was it not the duty of the plaintiffs to produce a binding promise on the part of the company made and executed by a duly authorized agent or officer? There is no evidence that any such authority was duly given to either Christie or to Houghton. Was not the writing signed by the defendant only an offer until it was validly accepted by a valid and binding promise of the plaintiffs?

In regard to the passing of any by-law I find that there is in the evidence on page 357, the following:—

Q. There was no by-law passed? A. Yes.

Mr. Pitblado: Do you mean about this particular sale?

Mr. Tupper: Yes, I would like to see it.

Mr. Pitblado: There is a general by-law which we have not been able to get up here.

[By-law to be produced and filed as ex. No. 20.]

Mr. Pitblado: I object to this going in. I mean as to its being immaterial. . . . The question of the by-law relating to this sale.

I believe no by-law was produced either as to sales generally or this particular transaction. I cannot find that any obligation binding on the defendant has been shewn.

Another question was raised as to the effect of the amending enactment, 1 Geo. V. ch. 8, sec. 1, which is now incorporated in the revision of 1913, ch. 43, sec. 68, R.S.M. and which is as follows:—

> Every such land company may make an agreement of sale of land without the assent of the shareholders and it shall be sufficient if each such . . . agreement be specially authorized by a by-law passed by the board of directors. This provision shall be retroactive and shall apply to all such transactions heretofore entered into by any such land company.

I have perused the judgment of my brother Perdue, and I agree with the conclusion at which he has arrived as to the effect of this amendment, and respectfully submit the following as additional reasons for giving it the wider meaning which I think the legislature intended. Here, we have an amending statute and what is the effect of it? This amendment must be considered as an important provision read into the letters patent of every land company incorporated under the Companies Act. It declares the steps by which a valid sale may be effected. The legislature must have observed some defect in the original Act or else it had some special object in view. Maxwell on Statutes, 3rd ed., p. 36, says:—

> There is some presumption that statutes passed to amend the law are directed against defects which have come into notice about the time when these statutes passed.

It is true that the enactment does not say in express terms that a sale or an alienation in any other manner shall be void. It is not necessary that there should be express words of prohibition to make the statute mandatory. If the plaintiff's contention is right then the officers of any land company who happened to have in their possession the stamp used for a corporate seal could without any special authorization divest a land company of all its assets. Such a procedure as this amendment introduces would exercise a wholesome check and safeguard the interests of the shareholders. Maxwell on Statutes, p. 554, discusses the question:—

> Where a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequences of non-compliance, the question often arises what intention is to be attributed to the legislature. Where, indeed, the whole aim and

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object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other no doubt can be entertained as to the intention.

Unless we give the statute the force and effect above indicated I cannot see what the legislature had in view or what good object would be served by the amendment.

The maxim *omnia prasumuntur rite esse acta* is invoked. In the cases of the *Royal British Bank* v. *Turquand*, 5 E. & B. 248; *Clarke* v. *Imperial Gas Co.*, 4 B. & Ad. 315, and *Hill* v. *Manchester*, 5 B. & Ad. 866, formalities were deemed to have been complied with and documents were presumed to have been executed after due compliance with all conditions, but I do not think that maxim applies here so as to absolve the plaintiffs from giving affirmative evidence of the due appointment of an agent or officer, or of the passing of the necessary by-law for the appointment of such officer or agent, or of the by-law authorizing this sale, in the case of an action for specific performance of an executory contract where no consideration has passed, and where there has been no acquiescence on the part of the defendant.

I would allow the appeal.

Appeal allowed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 7, 1914.

1. JUDGMENT (§ I E—35)—FORM AND SUBSTANCE—CONFORMITY TO PLEADINGS AND PROOF—DECLARATION OF NON-LIABILITY.

On the dismissal of an action by vendors for the purchase price and specific performance of an agreement for sale of lands, the judgment should not include a declaration that the defendant is in no way liable upon the agreement unless there has been a counterclaim for such declaration of rights, and this although the ground of dismissal was the want of mutuality in the contract.

[*Houghton Land Corpn.* v. *Ingham*, 18 D.L.R. 660, referred to.]

2. APPEAL (§ IV F—135)—ADDING FRESH EVIDENCE—AS PART OF RECORD ON APPEAL—BY-LAW OF PLAINTIFF COMPANY TOO LATE, WHEN.

Where a by-law of plaintiff company was referred to at the trial whereupon defendant's counsel called for its production, but plaintiff company objected to produce it and withheld it from the Court notwithstanding a direction for its production, leave is properly refused the company to produce it after the dismissal of the action and the argument of their appeal therefrom.

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APPLICATION for directions to settle form of judgment, *Houghton Land Corpn. v. Ingham*, 18 D.L.R. 660.

Order accordingly.

A. E. Hoskin, K.C., for plaintiffs.

RICHARDS, J.A.:—On June 29, 1914, this Court gave judgment on the appeal to it from the decision of the learned trial Judge. The reasons for judgment are reported in 18 D.L.R. 660. The parties, being unable to agree on the form of the judgment to be entered, have applied to this Court to settle it. The first paragraph of the proposed minutes of judgment allows the appeal and sets aside the judgment entered in the Court of King's Bench, and orders that the plaintiff's action be dismissed with costs. The second paragraph declares that the defendant is in no way liable upon the agreement sued upon. The third permits the defendant to amend his defence by pleading the statute, 1 Geo. V. ch. 8, sec. 1, and allows him to file, as an exhibit, a certified copy of the letters patent incorporating the plaintiffs. The fourth allows the defence to be further amended by adding: "The defendant further alleges that there was not at any time any mutuality in the contract between the plaintiffs and the defendant referred to in the statement of claim." The fifth orders the plaintiff to pay the defendant's costs of the appeal.

The plaintiffs object to the second and fourth paragraphs. As the defendant did not counterclaim, or ask for cross relief, or a declaration, I think the second paragraph should be struck out, though its effect is, perhaps, implied in the reasons for judgment delivered by the majority of the Court. The fourth paragraph should be allowed. It only forms a defence to the action, and is a statement of the principal ground upon which the action is dismissed.

The plaintiffs asked that this Court order that their by-law, number 5, be filed as an exhibit in the action. That by-law was mentioned at the trial. Its production was then opposed by plaintiffs' counsel, as is shewn in an extract from the evidence quoted in the judgment delivered on the appeal by my brother Haggart. The learned trial Judge ordered it to be filed as ex. 20.

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It was, however, not filed and was not before the trial Judge. After the hearing of the appeal it was several times asked for by members of this Court. But it was not produced, and judgment was given without it, as appears from the reasons for judgment delivered by my brothers Perdue and Haggart and myself. In my opinion the plaintiffs should not now be allowed to have it filed as an exhibit.

Perdue, J.A.

PERDUE, J.A.:—This is an application to settle the minutes of the judgment pronounced by this Court. It is objected by the plaintiffs, in the first place, that it is sought to insert in the judgment a declaration that the defendants are in no way liable upon the agreement sued upon. The defendant did not in his pleading call for such a declaration and it appears to me, upon reflection, that a dismissal of the action with costs sufficiently disposes of the issues actually before the Court.

Plaintiffs' counsel applies to put in as part of the evidence in the case a by-law of the plaintiff company, called by-law No. 5. At the trial the defendant's counsel called for the production of a general by-law of the company, the existence of which was mentioned. The passage in the evidence relating to this is cited in the judgment of Mr. Justice Haggart, as reported in the official report, 24 Man. L.R. 529. The production of this by-law was objected to by plaintiffs' counsel as being immaterial. The trial Judge directed the by-law to be produced and filed as ex. 20. This, however, was not done and the by-law was not produced or used either before the trial Judge or on the argument before this Court. The Judges of this Court on reading the evidence saw the reference to the exhibit that was to be filed and repeatedly called for its production. Nevertheless, it was not produced until after all the Judges had made up their reasons for judgment and the judgment of the Court had been decided upon. The clerk of the Court states that a copy of the by-law was produced to him on the same day that judgment was given on the appeal, but this, the so-called ex. 20, was not seen by any of the Judges and does not now appear upon the files. The plaintiffs, in whose custody it was, objected to produce it at the trial, and when directed to file it, neglected to comply with this direction.

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Now, after judgment has been pronounced by the Court, the plaintiffs desire to put in evidence the document they previously objected to produce and had in fact withheld from the Court. For these reasons I would refuse to allow them now to put it in.

The second paragraph of the minutes, that declaring the non-liability of the defendant on the agreement, should be struck out, the remainder of the minutes should stand.

Perdue, J.A.

HAGGART, J.A., concurred.

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HOWELL, C.J.M., and CAMERON, J.A., sat on the argument but did not deliver any judgment on the points involved.

Howell, C.J.M. Cameron, J.A.

Direction accordingly.

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Ontario Supreme Court, Middleton, J. October 19, 1914.

1. RAILWAYS (§ II D—30)—OPERATION—DERAILMENT OF CAR—EFFECT OF, IN NEGLIGENCE CASES—HOW WAIVED.

Although proof of derailment of a railway car and its resultant injury generally establishes a *primâ facie* case of negligence against the defendant company in a personal injury action, yet the plaintiff who goes further and undertakes without success to shew specifically the cause of such derailment thereby waives the *primâ facie* case upon which he might otherwise have relied.

Statement

ACTION to recover damages for injury resulting to the plaintiff from a collision of his automobile with an electric street car of the defendant company.

The action was dismissed.

The action was tried with a jury at Sandwich.

J. H. Rodd, for the plaintiff.

M. K. Cowan, K.C., and *G. A. Urquhart*, for the defendant company.

Middleton, J.

MIDDLETON, J.:—This action arose out of a collision between an automobile and a street car. The occurrence took place upon Sandwich street, shortly after midnight upon the 28th October, 1913, when the street was comparatively free from traffic. The automobile was going east. It passed the elevation of the Canadian Pacific Railway bridge upon the street railway track. The street car was then going in the opposite direction, and was dis-

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tant a little over 800 feet. The automobile turned off the street car track and travelled on the south side of the road until it again turned into the track to avoid another automobile standing near the kerb. So far, the accounts substantially agree. The automobile was struck by the front of the street car behind its front wheel, and was very seriously damaged.

The plaintiff's theory is, that the automobile had turned out of the car track again, and that the street car left the rails, running into the automobile. The defendant company's theory is, that, when the automobile attempted to get off the street car track, it skidded, and hit the front of the car, and that the car was derailed as the result of this blow.

So far as developed at the trial, there did not appear to be any physical impossibility in either of these theories being correct. The automobile was a heavy car, weighing, with passengers, 2½ tons, and was said to be travelling at a very high speed. The street car was a light car, weighing about 6 tons, mounted upon a single truck, the overhang at the front being 10 feet.

The plaintiff did not choose to rest his case upon the mere proof of the derailing of the car and the injury to the automobile, but at the trial undertook to assign a definite cause for the derailing of the car. An hour or so after the accident, and after those injured in the collision had been taken away to be cared for, an investigation was made upon the ground. The street car had then been restored to the track. Grooves were found, cut apparently by the car wheels, in the ice upon the road; and at the point where these grooves joined the car tracks a coupling-pin and chain were found in the groove in the rails. It was alleged that this was the cause of the derailing.

The defendant in answer shewed that these grooves were cut when the car was restored to the track, and that the coupling-pin had been used to aid in getting the car back upon the rail, and that it had been accidentally left there.

The jury were asked by the plaintiff to disbelieve this evidence and to find that the car was derailed by the pin, and that the pin had been negligently left upon the rail.

In my charge to the jury, I asked them, when dealing with

any negligence they might find, to state clearly what had been done that ought not to have been done or what had been omitted that ought to have been done. After finding the defendant company to blame, the jury answered the question, "In what did the negligence consist?" thus: "It is our opinion that the street car must have left the track before the collision." I then pointed out to the jury that they had not put their hand on any act of negligence; they had not stated why the car left the track. To this the foreman replied: "The decision, your Lordship, was according to the evidence given by the man, the motorman, he being, according to his own evidence, 810 feet of a distance that he had it in his power to stop the car and to prevent the accident, even if he did see that the automobile was in the track, which would be his bounden duty." I then asked the jury if this was the negligence they found, and they all assented.

This means that, in the view of the jury, the motorman ought to have stopped his car when he first saw the automobile over 800 feet away from him, as it crossed the railway bridge. I cannot give the plaintiff judgment upon this finding, for it is not negligence, and, if negligence, it did not cause the accident, as the automobile after this reached a place of perfect safety.

Upon the argument Mr. Rodd quite properly drew attention to the finding of the jury that the car left the track before the collision. He then argued from this that a case was made out for the application of the maxim *res ipsa loquitur*, and that, the defendant not having shewn that the car left the track without negligence on its part, the plaintiff is entitled to judgment.

I cannot agree with this contention. Had the plaintiff chosen to rest his case upon shewing the derailing of the car and consequent injury to the automobile, I think the case would have been brought within the rule; but the plaintiff went further and chose to assign a specific cause for the derailing. This, I think, relieves the defendant from the general obligation; and the defendant satisfied the onus resting upon it when it shewed that the accident did not happen by reason of the cause alleged; for the refusal of the jury to find the negligence set up by the plaintiff is equivalent to a finding that it did not exist.

Neither counsel has referred me to any case throwing light

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on this precise problem; but I find in White on Personal Injuries on Railroads the statement that proof of a derailment of a train, together with the resulting injury from such cause, is generally held to establish a prima facie case of negligence; but this statement is qualified at para. 615, by the statement: "If the evidence of the plaintiff goes further and shews the cause of the derailment, and this develops to be due to a condition which would not render the railroad company liable, then the prima facie case of the plaintiff is overcome, and the same result follows as to a right of recovery based on a specific ground of negligence which the evidence fails to establish." *A fortiori* must this be so where it is shewn that the cause of derailment alleged did not in fact exist.

I think the action fails, and should be dismissed.

A cross-action was brought by the street railway company to recover for the damage done to the street car. This action likewise fails, and I see no reason why costs should not follow the event in each case.

Action dismissed.

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REX v. NERO.

Ontario Supreme Court (High Court Division), Middleton, J., in Chambers. June 4, 1914.

1. INTOXICATING LIQUORS (§ III G—89)—KEEPING FOR SALE—STATUTORY PRESUMPTIONS.

The mere finding of liquor does not create a statutory presumption that liquor is kept for sale on the premises unless the special circumstances stated in sec. 102 of the revised Act, R.S.O. 1914, ch. 215, are shewn to exist, for example, the maintenance of a bar.

Statement

MOTION by the defendant for an order quashing a conviction of the defendant by a magistrate for having intoxicating liquors on his premises for sale, without having a license to sell, contrary to the Liquor License Act.

The conviction was quashed.

F. W. Griffith, for the defendant.

J. R. Cartwright, K.C., for the Crown.

Middleton, J.

MIDDLETON, J.:—The motion was made before me, on the return of the notice on the 24th April, for an order quashing

the conviction. On that day, owing to some misunderstanding, the Crown was not represented, nor were any papers returned. The papers have now been handed to me by Mr. Cartwright, who tells me that he agrees that the conviction cannot be supported.

The charge was having liquors for sale without a license. The only evidence was the finding of certain bottles containing beer, and certain bottles that had contained beer, in the barn of the accused. It was objected that there was no evidence that the liquor found was intoxicating, and that there was no evidence to shew that the liquor, such as it was, was kept for sale. The magistrate held that the seals on the bottles were sufficient evidence of the intoxicating nature of the liquor contained in them, and also held that the onus was upon the accused under sec. 111 of the statute. The magistrate was quite wrong in holding that this section applies here. The section relates only to the finding of liquor in a bar or upon premises where there is a sign or a display indicating that liquor is for sale.

Section 109, also relied upon, has no application. That dispenses with proof of payment of money if the magistrate is satisfied that there was a transaction in the nature of a sale. Nowhere in the statute is there found anything to justify the presumption that liquor is kept for sale merely from the finding of the liquor, unless found in a bar.

I find nothing to indicate that the magistrate did not act in good faith; and so, while I quash the conviction and direct repayment of the fine and costs, I make an order for the protection of the magistrate, and give no costs of this motion.

Conviction quashed.

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REX v. RAPP.

Ontario Supreme Court (Appellate Division), Sir William Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. March 8, 1914.

1. CRIMINAL LAW (§ IV D—122)—SENTENCE AND IMPRISONMENT—RUNNING OF SENTENCE—CONVICT ALLOWED AT LIBERTY ON BAIL PENDING APPEAL—QUASHING OF APPEAL.

Where a person under sentence for an indictable offence was improperly given his liberty by taking bail for an appeal where no appeal lay, the time during which the convict was at liberty between the giving of bail and the quashing of the appeal does not run in his favour, although he had served a part of the sentence before bail was accepted; the period of the bail in such case is within sec. 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, enacting that the time during which a convict is "out on bail" shall not be reckoned as part of his sentence; and his continuance at liberty after the quashing of the appeal constitutes an "escape" under Cr. Code sec. 196, and on being re-taken he must serve the remainder of the time for which his sentence was to run.

[*Robinson* v. *Morris*, 23 Can. Cr. Cas. 209, 19 O.L.R. 633, applied.]

Statement

APPEAL by the defendant from an order of MIDDLETON, J., in Chambers, refusing the defendant a writ of *habeas corpus*.

The defendant was, on the 17th October, 1913, convicted by a Police Magistrate of an assault, occasioning bodily harm (Cr. Code, 1906, sec. 295), and sentenced to thirty days' imprisonment, and on the same day entered upon his sentence. On the following day, he was admitted to bail and released from gaol, pending an appeal to the Sessions. On the 2nd December, his case came before the Sessions, where it was held that no appeal lay. The defendant was present in court, but was not returned to the gaol; and, no one interfering, he left the court-room, and remained at large until the 3rd March, 1914, when, by order of the Sessions, he was re-arrested and returned to gaol to complete his sentence; and, in these circumstances, applied for the writ with a view of moving for his discharge.

Argument

G. R. Roach, for the defendant, argued that the prisoner's sentence had expired prior to his re-arrest on the 3rd March, as the time began to run on the 17th October, 1913, and nothing that occurred afterwards interrupted it: The Prisons and Reformatories Act, R.S.C. 1906, ch. 148, sec. 3. The writ of *habeas corpus* should, consequently, have been granted: *Rex* v. *Robinson* (1907), 14 O.L.R. 519; *Robinson* v. *Morris* (1909), 19 O.L.R. 633.

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Argument

J. R. Cartwright, K.C., for the Crown, contended that the time of imprisonment did not run from the day the prisoner was admitted to bail until he surrendered himself on the 2nd December, and that from then till his re-arrest on the 3rd March, he was at large, but not on bail: sec. 185 of the Criminal Code. It was the prisoner's duty to have remained in custody on the 2nd December, and his failing to do so constituted an escape within the meaning of sec. 196 of the Code.

Roach, in reply.

The appeal was dismissed.

Mulock, C.J.Ex.

March 8. MULOCK, C.J.EX.:—This is an appeal from Middleton, J., refusing the prisoner a writ of *habeas corpus*. The facts are as follows. On the 17th October, 1913, the prisoner was convicted by the Police Magistrate of an assault causing bodily harm, and was sentenced to thirty days' imprisonment in the common gaol, and on the same day entered upon his sentence. On the 18th October, he applied for and was admitted to bail, pending an appeal to the Court of Quarter Sessions. On the 2nd December, he attended before the Court of Quarter Sessions, when his case was dealt with by the presiding Judge, who held that no appeal lay to the Sessions. The prisoner was not, however, returned to the gaol; and, no one interfering, he left the court-room, and remained at large until the 3rd March, when, in consequence of notice from the Court of Quarter Sessions, he appeared before that Court, and, on the order of the presiding Judge, was returned to the gaol to complete his sentence.

On the appeal before us, the prisoner's counsel contended that, the prisoner having entered upon his sentence on the 17th October, the subsequent occurrence had not the effect of interrupting the running of his sentence, and that, accordingly, it had expired prior to his re-arrest on the 3rd March. The case is really concluded against the prisoner by *Robinson v. Morris*, 19 O.L.R. 633.

From the 18th October until the 2nd December, the prisoner was out on bail. The order liberating him on bail was made on his own motion, and he complied with its terms by entering into

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a recognizance to appear at the Sessions. Having obtained his liberty by reason of these bail proceedings, even though they were unauthorised, he cannot now be heard to say that he was not out on bail. They constituted a lawful excuse for his being at large.

Section 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, provides that the time during which a convict is out on bail shall not be reckoned as part of his sentence. That section is as follows: "The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on or from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

I, therefore, think that his term of imprisonment did not run from the day he was admitted to bail until he surrendered himself on the 2nd December. From that day until his re-arrest on the 3rd March he was at large, but not on bail.

When he surrendered himself to the Court on the 2nd December, he then became a prisoner in respect of his unexpired term of imprisonment, which then again began to run, and his legal obligation was to return to the gaol to serve there the remainder of his sentence.

"As all persons are bound to submit themselves to the judgment of the law . . . whoever, in any case, refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, is guilty of a high contempt, punishable with fine and imprisonment:" 2 Hawk. P.C. ch. 17, sec. 5. "And if by the consent or negligence of the gaoler, the prison doors are opened and the prisoner escapes without making use of any force or violence, he is guilty of a misdemeanour:" 1 Hale P.C. 611.

And now, by sec. 185 of the Criminal Code, R.S.C. 1906, ch. 146: "Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him."

No lawful excuse appearing for the prisoner being at large on or after the 2nd December, this section makes it abundantly clear that it was his duty to have remained in custody. Did his failing to do so constitute an escape within the meaning of sec. 196 of the Criminal Code? That section is as follows: "Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, a term equivalent to the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape."

The following is the generally accepted definition of what constitutes an escape: "An escape is where one who is arrested gains his liberty before he is delivered by the Courts of the Law (Termes de la Ley):" Russell on Crimes and Misdemeanours, 6th ed., vol. 1, p. 889.

The prisoner was under arrest when he surrendered on the 2nd December, and on that day unlawfully gained his liberty, that is, he had not been "delivered by the course of the law." Thus he was guilty of an escape, and sec. 196 applies, and he must serve a term equivalent to the remainder of his unexpired term.

I therefore think that Mr. Justice Middleton was right in refusing the writ, and this appeal must be dismissed.

CLUTE, SUTHERLAND, and LEITCH, JJ., agreed.

Clute, J.
Sutherland, J.
Leitch, J.

RIDDELL, J.:—William Rapp was convicted by the Police Magistrate for the City of Toronto, on the 17th October, 1913, of an assault occasioning bodily harm, and was sentenced to thirty days' imprisonment. Being taken to the gaol, he consulted a solicitor, who advised an appeal to the Sessions. On the 18th October, the prisoner was released on bail by a magistrate, to appear at the Sessions. On the 2nd December, he went to the Sessions to prosecute his appeal, and of course found that no such proceeding could be taken in that Court. He left the court-room without any attempt on the part of police or others to restrain him. On the 3rd March, he was arrested to

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serve his sentence; on the 5th March, he applied to Mr. Justice Middleton for a writ of habeas corpus, and was refused. He now appeals to this Court.

The statute R.S.C. 1906, ch. 148, sec. 3, provides: "The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

The appellant contends that his term began when he was sentenced; and he is undoubtedly right. Then he admits that from the 18th October till the 2nd December he was under bail, and that period cannot count by reason of sec. 3 just quoted; but he says that after the 2nd December, his bail being cancelled, the section does not apply, and his term was running on at least for twenty-eight days. In this he may be partly right, and is certainly at least partly wrong. Section 3 expressly mentioning bail, it may well be *expressio unius, exclusio alterius*, and no other time is excluded by this section. But he has a much more formidable difficulty to encounter. The Criminal Code, R.S.C. 1906, ch. 146, sec. 196, provides: "Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, a term equivalent to the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape."

The magistrate had no authority to admit to bail; in such a case the prisoner taking advantage of such permission is guilty of an escape. This was considered in *Rex* v. *Robinson*, 14 O.L.R. 519. At p. 522 it is said that "if . . . the applicant had taken any part, however small—*e.g.*, by requesting or urging it—in procuring his release, he might well be considered guilty" of an escape. In the particular case I thought the prisoner was not so guilty, because he had simply done as he was told by the authorities; but my error was authoritatively corrected by the Court of Appeal in *Robinson* v. *Morris*, 19 O.L.R. 633.

"An escape is where one who is arrested gains his liberty before he is delivered by due course of law (Termes de la Ley):" Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 555. "It is . . . criminal in a prisoner to escape from lawful confinement on a criminal charge though no force or artifice be used on his part to effect such purpose. Thus, a prisoner is guilty of a misdemeanour if he goes out of his prison by license of the keeper (*Attorney-General* v. *Hobert* (1631), Cro. Car. 210), without any obstruction . . . or if he escapes in any other manner, without using any kind of force or violence:" Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 555. "A person who has power to bail is guilty . . . of negligent escape by bailing one who is not bailable:" Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 557.

The prisoner gained his liberty before he was delivered by due course of law, and this is an escape; he, therefore, comes under the provisions of sec. 196, and must serve his term. But whether he should be prosecuted under sec. 185 of the Code is for the authorities.

It cannot be made too clear that when any one is arrested, he does not cease to be a member of the community, bound to obey and assist in enforcing its laws; he does not become a quarry with the right to use every wile to effect an escape, the rest of the community being the hunter bound to give him a sporting chance. If he leaves the prison, he commits a crime equally with the gaoler who allows him to do so; if he leaves the custody of a policeman, he is equally guilty with the policeman who permits it. By committing a crime no man can become in law an Ishmael with his hand against every man, even if he thinks every man's hand is against him.

The appeal should be dismissed.

Appeal dismissed.

SASK.

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REX v. PROKOPATE.

Saskatchewan Supreme Court, Elwood, J. March 5, 1914.

1. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—ASSAULT OCCASIONING BODILY HARM—TRIAL WITHOUT CONSENT IN SASKATCHEWAN.

A charge under Code sec. 295, of assault causing actual bodily harm may be summarily tried in Saskatchewan by two justices under sec. 776 without the consent of the accused under sec. 778.

[*R.* v. *Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363, *R.* v. *Zyla*, 17 W.L.R. 258, applied.]

2. APPEAL (§ III F—97)—FROM SUMMARY CONVICTION—TEN DAYS' LIMITATION—SHEWING CORRECT DATE OF CONVICTION.

Where there is any question as to the correct date of a summary conviction it is open for the appellant to shew that date by extrinsic evidence and support his appeal taken within 10 days therefrom as in time, although the conviction itself bears a prior date which would make it appear that the notice of appeal was late. (Dictum *per* Elwood, J.).

Statement

APPLICATION for a writ of *habeas corpus* and for an order that a writ of certiorari do issue in aid of such writ. A number of grounds were urged for issuing the writ, among them:—

(*a*) That the accused was convicted under sec. 295 of the Criminal Code of having assaulted Kost Martinuik (the respondent on this appeal) by striking him on the head with an iron bolt, causing actual bodily harm, and that the accused did not consent to be tried summarily by the justices on the charge, and that the justices had no jurisdiction without such consent to hear the charge.

(*b*) That the accused was not tried nor convicted at the time set out in the conviction, and that the said conviction by reason of its being ante-dated by the said justices deprived the applicant of his right to appeal therefrom.

(*c*) That the said justices did not state to the accused as required by sec. 778 of the Criminal Code that he had the option to be tried forthwith by the magistrate without the intervention of a jury or to remain in custody or under bail to be tried in the ordinary way by a Court having criminal jurisdiction.

And in the alternative, the said justices did not reduce the charge to writing and read the same over to the accused.

(*d*) That if the charge dealt with by the said justices was one of common assault, then the accused having been tried summarily, the punishment was excessive.

The motion was dismissed.

H. Ward, for the accused.

H. E. Sampson, for the Crown.

SASK.

S. C.

REX v. PROKOPATE.

Elwood, J.

ELWOOD, J.:—Following the judgments of Wetmore, C.J., in *R.* v. *Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363; *R.* v. *Zyla*, 17 W.L.R. 258; the judgment of Haultain, C.J., in *Rex* v. *Morton*, 18 D.L.R. 553, 23 Can. Cr. Cas. 172, and the judgment (unreported) of Newlands, J., in *R.* v. *Zachman*, I am of the opinion that the magistrates had jurisdiction to try the accused without his consent.

This, therefore, disposes of objections (*a*), (*c*), and (*d*).

So far as objection (*b*) is concerned, the conviction was apparently dated on the 12th of the month, whereas it actually took place on the 28th of the month. Apparently an appeal was taken, and the district Court Judge before whom the appeal was taken refused to hear the appeal on the ground that the notice of appeal was not served within ten days of the date of the conviction, he apparently being of the opinion that the conviction was on the 12th of the month instead of the 28th. I take it from remarks that were let fall before me that there was oral testimony given as to the date of the conviction, and apparently the oral testimony shewed that the conviction took place on the 12th of the month. However, it was quite open to the parties to shew the district Court Judge the date of the conviction. He was not bound by the date mentioned in the conviction, but if proper testimony had been brought before him to shew the date that the conviction did take place he, in my opinion, should have entertained the appeal, if the notice of appeal was served within ten days from the date upon which the conviction actually took place.

The result will be that the application will be dismissed.

The only person who appeared on this application outside of the applicant was the representative of the Attorney-General, and there will be no order for costs against the applicant.

Motion dismissed.

ALTA.

S. C.

REX v. BOARDMAN.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. June 30, 1914.

1. CRIMINAL LAW (§ IV A—104)—RECORD—PUNISHMENT BY WHIPPING—STATUTORY DIRECTIONS FOR MEDICAL SUPERVISION.

Failure to set out, in the record of a conviction on summary trial under which the punishment of whipping was ordered, that the whipping should take place under the supervision of a medical officer in the terms of Code sec. 1060 will not invalidate the sentence; the directions of Code sec. 1060 cannot be varied by the magistrate and, even if they should be formally stated in the record (as to which, *quære*) the omission is an informality only and does not affect the validity of the conviction.

2. CRIMINAL LAW (§ IV A—99)—SENTENCE—IMPRISONMENT AND WHIPPING—ILLEGALITY OF DIRECTION AS TO TIME OF WHIPPING.

The fixing of the time or times for punishment by whipping ordered to take place during the convict's term of imprisonment is left by Cr. Code sec. 1060 in the discretion of the prison surgeon under whose supervision the whipping is to be done; and it is an excess of jurisdiction on the part of a magistrate holding a summary trial to order in the sentence that ten lashes be imposed six weeks after imprisonment and ten lashes six weeks before expiration of the term of six months imprisonment imposed; but the Court hearing a *habeas corpus* application may amend the conviction under Cr. Code sec. 1124 by imposing the proper sentence where satisfied of the offence.

3. APPEAL (§ VIII B—670)—CRIMINAL CASE—RENDERING MODIFIED JUDGMENT—SENTENCE OF WHIPPING.

Where a sentence of whipping imposed on a summary trial was successfully attacked as having improperly included a direction as to the times when the whipping should take place, which by statute was under the control of the prison surgeon and not of the magistrate, and pending such determination in a *habeas corpus* application the Court had stayed proceedings in respect thereof, the Court has a discretion to strike out the sentence of whipping and confirm the sentence of imprisonment if the latter is so near expiry that it would be impossible to carry out the evident intention of the convicting magistrate that the first half of the whipping should be given at a considerable interval from the second half.

Statement

MOTION for *habeas corpus* and a certiorari in aid.

The conviction was amended.

James Short, K.C., for the Crown.

F. E. Eaton, for the accused.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The accused was convicted by Gilbert E. Saunders, Esquire, Police Magistrate for the City of Calgary, of robbery with violence and sentenced to six months' imprisonment with hard labour and to receive 20 lashes, 10 lashes six weeks after imprisonment, and 10 lashes six weeks before expiration of term.

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REX v. BOARDMAN.

HARVEY, C.J.

This is an application for *habeas corpus* and certiorari in aid made to my brother Walsh and by him referred to the Appellate Division. Several objections were taken, but the only one which calls for consideration is the one that relates to the provision respecting whipping.

Section 1060 which states the provisions regarding whipping is as follows:—

1060.—Whenever whipping may be awarded for any offence, the Court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the Attorney-General of the province in which such prison is situated.

(2) The number of strokes shall be specified in the sentence; and the instrument to be used for whipping shall be a cat-o'-nine tails unless some other instrument is specified in the sentence.

(3) Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

(4) Whipping shall not be inflicted on any female.

It is contended that the sentence and the record of conviction must contain all the directions of the first sub-section of the section, and that this conviction is bad in not doing so. Then it is contended that the sentence and conviction are bad in fixing the time, as no authority is given to do more than fix the number of strokes and the number of times.

Under section 1124 authority is given in an application such as this to disregard any irregularity or informality if the depositions shew that the offence has been committed. A perusal of the depositions satisfies us that the offence was committed.

We are also of opinion that even if the section did require all but the first two lines to be set out in the conviction, as to which there is room for argument, the failure to so set it out would be only an informality because it contains nothing as to which the magistrate has any discretion. It simply sets out the law and cannot be varied. It is, therefore, unnecessary to determine whether it is intended that it should be part of the sentence, and record of conviction or not, since no effect should be given to its omission even if required.

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On the second point we are, however, of opinion that the objection is well founded. No authority is given to fix the time or times of the whipping. It is to be done under the supervision of the surgeon, and a certain restriction is imposed by sub-section three. The fixing of the time or times is, in our opinion, an interference with the discretion which is given to the gaol surgeon, which is unauthorized, and which perhaps could not with safety to the health of the convict be carried out. In this respect we think the sentence is in excess of the magistrate's jurisdiction.

Section 1124 also provides that this shall not affect the conviction, but only the punishment, and places on this Court the duty of imposing a sentence which is authorized, as was done in *Rex* v. *Crawford* (1912), 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 6 D.L.R. 380.

We would not think of venturing to criticize the sentence of the Police Magistrate in this case. The Police Magistrate of any important city has so much more experience in dealing with this sort of case than any Judge can have that if he is a man of sound sense and discretion his judgment of what is a proper sentence ought not to be lightly interfered with. Then when that Magistrate has had the experience with crime as a police officer and jailer that Mr. Saunders has, his opinion is entitled to even greater weight.

His intention in the present case was that the whipping should be divided into two portions with a considerable interval between. The term of imprisonment has now been two-thirds passed, and has only about two more months to run, if it is not shortened by executive clemency.

It is apparent, therefore, that there is no possibility of carrying out his intention in this respect, the execution of the sentence as to whipping having been stayed by my brother Walsh pending the determination of this application.

In view of that fact and of the short time yet to be served, we are of opinion that the portion of the sentence which prescribes whipping may well be struck out and the sentence confirmed in other respects, and the necessary amendments will be deemed to be made to the conviction and warrant of commitment.

Conviction amended.

O'SULLIVAN v. MICHUS.

SASK.

D. C.

Saskatchewan, District Court of Prince Albert, Doak, J. July 29, 1914.

1. INTOXICATING LIQUORS (§ III A—59)—UNLAWFUL SALES—LIABILITY OF PROPRIETOR OR OCCUPANT—EMPLOYEE ACTING AS CUSTOMER'S AGENT TO BUY.

Illegal sale of intoxicating liquors on unlicensed premises is not made out against a restaurant proprietor where his employee merely acts as the agent of the customer in going out at the latter's request to buy liquors to be consumed in the restaurant and receives for that purpose the exact amount disbursed or to be disbursed, where the consumption of liquor in restaurants not having liquor licenses was not in itself illegal nor did the circumstances disclose any attempt at evasion of the liquor laws.

[*R.* v. *Regeotas*, 22 Can. Cr. Cas. 113, 8 D.L.R. 1032, approved; *R.* v. *Davis*, 22 Can. Cr. Cas. 187, 8 D.L.R. 1046, 4 O.W.N. 358, and *Jeffries* v. *Alexander*, 31 L.J. Ch. 14, referred to.]

Statement

APPEAL from an order made by the Police Magistrate of North Battleford dismissing a complaint against the respondent for selling liquor contrary to sec. 86 of the Liquor License Act, Sask.

The appeal was dismissed.

W. W. Livingstone, for appellant.

A. M. Panton, K.C., for respondent.

Judge Doak.

JUDGE DOAK:—The facts of the matter appear from the evidence to be as follows: On the evening of February 20th, 1914, two provincial police constables named Rash and Brown went to the Savoy Cafe, a restaurant in the City of North Battleford kept by the respondent ostensibly for the purposes of procuring a meal. They sat down at one of the tables and gave the waiter who attended them an order. After turning in the order the waiter returned to the dining room and before the meal had been served to Rash and his companion they called the waiter to their table, and asked him if they could get something to drink. Upon his replying in the affirmative they asked him to get a dollar's worth of beer.

The waiter thereupon left the restaurant, went to the Metropole Hotel, which is a licensed premises nearby, procured three bottles of beer, for which he paid the bartender a dollar, returned with the three bottles and delivered them to Rash and his com-

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panions. There is some conflict in the evidence at this juncture as to whether the waiter received the money for the beer before or after he went to the Metropole Hotel, but I do not think the conflict on this point very material.

The appellant asks me to find the respondent guilty of selling liquor without a license, and advances in support thereof the following reasons:—

1st. That what took place between the respondent's servant and the two constables actually constituted a sale in fact.

2nd. That if there was no actual sale there was an intention to evade the Act, and the respondent through the act of his employee is, therefore, as guilty as if there had actually been a sale.

With reference to the appellant's first contention it seems to me that the reasoning in the case of *R.* v. *Begeotas*, 8 D.L.R. 1032, 22 Can. Cr. Cas. 113, is conclusive and I fully agree with it.

That was a case decided in British Columbia upon almost identical facts, and upon practically an identical statute.

The same conclusion was reached in Ontario in *R.* v. *Davis*, 8 D.L.R. 1046, 4 O.W.N. 358, 22 Can. Cr. Cas. 187.

The waiter in procuring the liquor in the present case was acting solely as the agent of the persons who ordered it, and in my opinion it makes no difference upon the question of agency whether the waiter received the money for it before or after he had procured it.

Coming now to the appellant's second contention; it is quite clear that if what took place actually constituted a sale then there would be a violation of the Act irrespective of what the parties' respective intentions had been. But if what took place was not actually a sale then the question of intention would become important. If the respondent through his employee did what he did with the intention of evading the statute, then his act, although innocent in itself, would, if coupled with such intention aforesaid, achieve indirectly that which had been prohibited and would constitute a violation of the statute.

The law upon this point is stated by Blackburn, J., in *Jeffries* v. *Alexander*, 31 L.J. Ch. 14, as follows:—

> The principle as I understand it is that whenever it can be shewn that the acts of the parties are adopted for the purpose of effecting a thing

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which is prohibited and the thing prohibited is in consequence effected, the parties have done that which they purposely caused, though they may have done it indirectly and endeavoured to conceal that they have done so.

In applying these principles to the present case, then, I should, in order to find the respondent guilty, have to be satisfied that the acts of the respondent's employee were adopted with intention of evading the Act.

I may say at once that here I can find no evidence of any such intention, nor any evidence from which such an intention could be inferred.

In coming to this decision I am fully awake to the danger which exists in allowing liquor to be consumed upon unlicensed premises, of enabling the proprietors of restaurants and other similar places to evade the statute. The consumption upon the unlicensed premises is, however, not prohibited by law, and it must depend in each case upon the attendant circumstances whether there has been any attempt at evasion.

The appeal in the present case will be dismissed with costs.

Appeal dismissed.

CORRIVEAU v. SIMARD.

QUE.

C. C.

Quebec Circuit Court, McCorkill, J.S.C. February 13, 1914.

1. INTOXICATING LIQUORS (§ III A—56)—UNLAWFUL SALES—TEMPERANCE DRINKS—INTOXICATING PRINCIPLE—QUEBEC LICENSE LAW.

The selling of so-called temperance drinks is within the prohibition of the Quebec License law if they contain any intoxicating principle; evidence that the liquor in question contained from three to five per cent. of proof alcohol and that this would intoxicate is sufficient upon which to base a conviction without proof that intoxication had resulted from the sales made.

Statement

PROSECUTION under article 1112 R.S.Q. 1909 for having sold intoxicating liquor without a license.

The prosecution was sustained.

McCorkill, J.

McCORKILL, J.:—Plaintiff proved by certain witnesses that they bought some bottles of what was called "temperance beer" and "porter," part of which they consumed, and two of which they entrusted to a chemist, Abbé Filion, of Laval University, for analysis. Abbé Filion testified that one of the bottles contained 4.80 per cent. of proof alcohol and the other 3 per cent.,

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and that both were intoxicating, although it would take a large quantity possibly of the 3 per cent. beer to intoxicate a person.

One of the witnesses for plaintiff testified that he felt the effects of drinking it. Several witnesses were examined by defendant to prove they had been in the habit of buying and consuming this temperance beer and porter and that it never intoxicated them. One of the witnesses testified that he would have become sick from drinking a large quantity rather than intoxicated. I may say that most of the defendant's witnesses were, if one might judge from their personal appearance, veterans of the bar (saloon bar, I mean) of various ages.

The enactments of the license law have not been specially placed upon our statutes for the protection of veteran drinkers alone; it is for the protection of children and others who have no desire to consume intoxicating liquors.

A liquid placed in a bottle, labelled as a temperance drink, leads the unwary to believe that it is really what it pretends to be. If it contains an intoxicating principle as an ingredient, it is a legal fraud.

The license law defines what temperance liquors are:—

"All kinds of syrups and other similar liquids or beverages, simple or mixed, in which there is no intoxicating principle." (R.S.Q. 904, sec. 2.)

It also defines intoxicating liquors as: "All liquors, containing an intoxicating principle (R.S.Q. 904, sec. 1.)"

The standard of strength of intoxicating liquors, which allows a certain percentage of proof spirits, in the criminal law, also falls below the standard of the temperance beer in question, 6-7 Edw. VII. ch. 9, amending the Criminal Code, ch. 146, R.C. C. 1906, sec. 2, declaring that all liquors containing more than 2½ per cent. of proof spirits shall be presumed to be intoxicating.

It might be contended under this definition, that proof might be made as to whether 2½ per cent. of proof spirits is really an intoxicating liquor under the Dominion law. It is not so under the Quebec license law.

In my opinion, all that had to be established by the prose-

cutor in this case was that the so-called temperance beer contained an intoxicating principle, in order to bring the act of selling it within R.S.Q. 1009.

I do not need to decide as between the plaintiff's witnesses and defendant's, whether this temperance beer, so-called, would intoxicate or not. It is a well-known fact that some people become intoxicated after drinking a very small quantity of intoxicating liquor, whereas other people can consume a very large quantity without apparent effect.

This action is taken under the license law. The definitions which I have just given of an intoxicating drink and of a temperance drink, shew clearly that the temperance beers which were sold by the defendant, to the plaintiff's witnesses, on the date in question, were not temperance beverages because they contained a principle of intoxication; they were therefore intoxicating liquors within the license law.

Judge Cimon, in the case of *Langis* v. *Huart*, 13 R. de J. 458, discussing the difference between intoxicating liquors and temperance liquors, says, at page 462:—

"La distinction entre les liqueurs enivrantes et les liqueurs de tempérance se réduit à celle-ci: les premières sont celles qui contiennent un principe enivrant, tandis que toutes les liqueurs qui ne contiennent pas un principe enivrant sont de tempérance."

These so-called temperance beers contained 3 per cent. and 4.80 per cent. of alcohol, respectively. Abbé Filion swore that all degrees of alcohol contributed to drunkenness.

In my opinion, therefore, plaintiff's action is well founded.

Under the circumstances, the defendant is condemned to the minimum fine of $50 and costs, and, in default of payment, to imprisonment for three months.

Fine imposed.

N. S.

S. C.

REX v. COOK.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Russell and Longley, JJ. April 24, 1914.

1. TRIAL (§ I D—17)—CRIMINAL CASE—COUNSEL FOR DEFENCE—STATING OR READING THE LAW TO THE JURY.

The right of the prisoner's counsel at the close of the testimony on a criminal trial is to "sum up the evidence" (Cr. Code, sec. 944), and it is in the judge's discretion whether counsel will be permitted in his address to the jury to read to them extracts from legal text-books or law reports, even though the extract sought to be used may be of an English judicial opinion of accepted authority.

2. COURTS (§ II B—180)—TERMS AND SESSIONS—POWER TO CHANGE DATES AS TO CRIMINAL COURTS—CONSTITUTION AND ORGANIZATION OF COURT.

Section 27 of the Nova Scotia Judicature Act, R.S.N.S. 1900, ch. 155, is not *ultra vires* of the Nova Scotia legislature in respect of the change it purports to make in the times at which fixed sessions of certain provincial courts of criminal jurisdiction are to take place.

Statement

THE prisoner was indicted for the murder of Charles Asaff by the grand jury, at the March sittings of the Supreme Court at Halifax, and was tried before Ritchie, J., and a petit jury at said sittings. The jury returned a verdict of guilty.

While counsel for the prisoner was addressing the jury, he attempted to refer to reported cases on circumstantial evidence, and particularly to the charge of Baron Alderson to the jury in *Rex* v. *Hodges*, 2 Lewin's C.C. 228. This the learned Judge declined to allow him to do.

After the jury retired to consider the evidence, counsel for the prisoner requested the learned Judge to recall them and further charge them that they must not only find the evidence consistent with the prisoner's guilt, but they must also be satisfied that the evidence was inconsistent with any other explanation, theory or hypothesis. This he also declined to do.

Counsel for the prisoner further requested the learned Judge to recall the jury and charge them that the possession of the identified stolen property by the accused was not sufficient for the purposes of conviction uncorroborated by other evidence. This he also declined to do.

There was an application to the learned Judge to reserve for the opinion of the Supreme Court en banc, sitting as a Court for Crown Cases Reserved, the following questions:

1. In addition to the matters on which I did charge, should I have directed the jury that, besides being satisfied that the facts proved were

consistent with the prisoner's guilt, they must also be satisfied that said facts were inconsistent with any other explanation, theory or hypothesis?

2. Should I have directed the jury that the possession of identified property of deceased by the prisoner was not sufficient for the purposes of conviction without other evidence?

3. Was I right in stopping counsel for the prisoner and preventing him from referring to reported cases on circumstantial evidence and the charge of Baron Alderson in his address to the jury?

4. Did I misdirect the jury by failing to leave to them the issue whether the deceased Asaff was killed deliberately or accidentally?

5. In further charging the jury on a question asked by a juror as to what evidence existed as to the deceased Asaff being at the prisoner's house, should I, in addition to what I stated, have gone further and told them that if they regarded the prisoner's statement as to the possession of the money order correct, then he had met part of the Crown's case?

6. Is sec. 27, ch. 155, R.S.N.S. 1900, *ultra vires* the legislature of Nova Scotia?

7. Should the conviction be quashed or a new trial ordered?

Statement

The learned Judge dismissed the application, and, in doing so, gave judgment as follows:—

RITCHIE, J.:—As to question 1, the direction asked for is a proper one, except that I think the word "reasonable" or "rational" should have been added before the word "explanation." With the addition of the word "rational," the direction asked for would have been substantially the direction of Baron Alderson in *R.* v. *Hodges*, 2 Lewin C.C. 228. That learned Judge told the jury that, before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

Ritchie, J.

It is, of course, not contended that I was bound to use any particular form of words in charging the jury on this point. I told the jury, as will appear from the charge, that each of the facts relied upon as evidence must be proved beyond a reasonable doubt, and that if the facts were so proved, then, if the inference from such facts was an irresistible one, they should find him guilty; otherwise, not guilty.

At the conclusion of the charge, I again reminded the jury that the prisoner must be acquitted if they were not convinced beyond a reasonable doubt. On this point I am strongly of

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opinion that there was no error so far as the prisoner is concerned. I am not sure that I did not put the matter too strongly against the Crown.

As to the second question, I am quite clear that I was not called upon to make the direction asked for. I left the whole case to the jury in the most unqualified manner. It was for the jury to draw such inference as they thought proper from the possession by Cook of the dead man's property, and it was also for the jury to draw such inference as they thought proper from the false and contradictory accounts which he gave in order to account for the possession of the property.

As to the third question, the law of a case is for the Court and for the Court alone. It is, therefore, clearly within the province of the Judge to stop counsel when he is reading law to the jury.

As to the fourth question, in my opinion there was no misdirection. I stated to the jury my view that the case was that of murder by someone, but I very distinctly told them that they were to act upon their own view of the facts and not mine. I quite agree that the learned Judge should put the case for the prisoner to the jury as carefully as the case for the prosecution, but, if the prisoner calls no evidence and the case for the Crown discloses no satisfactory evidence for the prisoner on a particular point, the Judge cannot put what is not there. I do not think there was any evidence upon which a jury could reasonably have come to the conclusion that death in this case was accidental. Holding this view, it was more in the interest of the defence that I should not refer specifically to it, because, if I had done so, I would have told them what I thought about it.

However, it was really put to the jury, because Mr. O'Hearn put it to them, and I said to the jury:—

> You heard the arguments which Mr. O'Hearn put before you. You will give to them just as much careful consideration as you give to the argument of the counsel for the Crown. You will consider them with as much carefulness. I think perhaps a jury would be inclined to consider them perhaps even more carefully. This man is entitled to a fair, impartial trial; give to those arguments your best consideration.

As to question 5, the jury asked a question of fact, to which I replied. It is urged that I should have re-charged the jury on the subject matter of the question. I think not. Apart from

this, of course it was too obvious for comment that, if the jury believed the prisoner's statement as to the possession of the money order, that part of the Crown's case was fully met, and this question was left to them.

As to question 6, the fixing of the date of the terms of the Court is part of the constitution and organization of a provincial Court, and, therefore, sec. 27 of ch. 155, Revised Statutes of Nova Scotia, 1900, is not *ultra vires*.

I have no doubt as to any of the questions raised, and, therefore, refuse to reserve a case as to any of them.

The Court en banc.

The prisoner now moved the Court of Appeal for leave to appeal following the refusal to reserve a case.

The material portions of the evidence and of the charge to the jury are set out in the opinion of Graham, E.J.

The application was refused.

W. J. O'Hearn and *James Terrell*, for the prisoner.

Stuart Jenks, K.C., Deputy Attorney-General, and *A. G. Morrison*, K.C., for the Crown.

TOWNSHEND, C.J.:—I had not intended to put in writing my reasons for dismissing this appeal, but, in case it should go further, I desire to say that I am in complete agreement with the trial Judge, who refused a reserved case. There is, in my opinion, nothing in any of the grounds put forward demanding the serious consideration of this Court. Townshend, C.J.

I shall only refer to one of the grounds, the third, because it seemed to make some impression on one of the members of the Court as to the right of counsel to read to the jury legal works or reports on trials in cases of homicide. I do not doubt the learned trial Judge was perfectly correct in interfering with the counsel for prisoner. I hold that he had no such right, and that in all such matters, how far any comments on the law of the case, especially reading from legal works, are permissible, is entirely in the Judge's discretion. Some American cases were cited for counsel for prisoner in support of his right. I should regret very much to see this Court follow or be influenced in any

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way by the course of procedure in American criminal trials, for, high as many of the Judges stand, no one deprecates more severely than many of the same Judges and eminent members of their bar the frequently gross failure of justice in administering the criminal law resulting from their course of procedure.

Our Code, however, I think disposes of the question, if there be any question, by providing that the prisoner's counsel, at the close, may address the jury on the evidence (sec. 944): "When all the evidence is concluded, to sum up the evidence." This right has only been allowed by statute in comparatively modern times, and cannot be extended as claimed here apart from the statute. It would be highly inconvenient and calculated to mislead the jury if counsel on each side had the right to read from books the law as laid down in other cases, where the facts and issues were not the same. It would not be possible for untrained laymen to understand all those nice distinctions which are present in most cases. On the Judge, and on him alone, lies the responsibility for directing the jury in point of law, and, if he goes wrong, he can always be corrected. If the jury must take the law from him, what good can come from counsel reading and interpreting the law in any other way? It can have but one result, if it is of any weight—that would be to confuse the minds of the jury, and, therefore, should not be permitted.

But if there should be any doubt in the matter, I apprehend that counsel must go further than here, and convince the Courts that the prisoner has suffered or has been prejudiced by the refusal. I refer to the general clause in the Code, sec. 1019:—

"No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted, or rejected, or that something not according to law was done at the trial or some misdirection given, or unless, in the opinion of the Court of appeal, some substantial wrong or miscarriage was thereby occasioned in the trial."

Here nothing of the kind has been shown or even pretended.

Graham, E.J.

GRAHAM, E.J.:—The jury has convicted the defendant of the crime of murder, and he has applied to the learned trial Judge to reserve a case for the full Court upon several points, which the learned Judge has refused to do. That has brought the

defendant to the full Court, by way of appeal under the Criminal Code, to require the learned Judge to state a case for the full Court.

The evidence against the defendant was wholly circumstantial evidence. The body of Asaff, the pedler, who was shot, was found about a month after the shooting, or, rather, after he had been missed, off Cook's Road, at Sheet Harbour, sixty-six feet distant from the road. It was covered with bushes. It was not far—703 feet—from the house in which the defendant, a youth, lived with his uncle and aunt. He had been shot from behind with a rifle bullet, through the head, and, while there was a small amount in change on his person, his money was gone.

Previously to the finding of the body, the defendant had been attempting to get a Post Office order for $15 cashed at the post office, and this Post Office order is in evidence. And the deceased is proved to have had this Post Office order in his possession, having cashed it for the payee. The wallet in which the deceased pedler had been seen to place that Post Office order was not found on the person of the defendant when he was arrested. A wallet which was found on his person is identified as the wallet of the deceased.

Then the defendant had told untruths about how he came to be in possession of the Post Office order when he was attempting to get it cashed.

There was, after the alleged shooting, some spending of money at Truro, which was in excess of the usual means of the defendant.

The defendant's counsel apparently relied upon the inconclusiveness of the proof that the greater offence of killing had been committed by the defendant, and presented other theories as to how the defendant might have become possessed of the wallet, Post Office order and money, as taking it from the dead body (that has happened in one reported case), or receiving it from the person who did kill the pedler.

The learned Judge refused to allow the counsel for the defendant, in the course of his address, to read to the jury Alderson, B.'s, opinion in the case of *R.* v. *Hodges*, 2 Lewin C.C. 228, as follows:—

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Alderson, B., told the jury that the case was made up of circumstances entirely, and that, before they could find the prisoner guilty, they must be satisfied, not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

It was never contended that this was an incorrect statement of the law, or that it was not relevant to the facts in this case and very much in point. Neither was it the fact that in this case the Judge had already made a ruling at variance with it or a ruling in the same sense.

Then the learned counsel, at the close of the Judge's summing up (after the jury had retired), apparently thinking that the equivalent or sense of this passage quoted from Alderson, B., had not been put before the jury, requested the Judge in the following terms. I copy the stenographer's note:—

After the jury retired, Mr. *O'Hearn* asked the Court to instruct the jury that, besides being satisfied that the facts were consistent with the prisoner's guilt, they must also be satisfied that they were incapable of any other explanation or hypothesis. The Court declined to call the jury for this instruction.

I shall deal presently with what the learned Judge had told the jury. The passage from Alderson, B., has passed into almost invariable use, and it now constitutes one of the rules of evidence: 1 Taylor on Evidence, sec. 69.

In Wills on Circumstantial Evidence, 262, we have:—

Rule 4.—In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The author adds:—

This is the fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated. . . .

Later, in referring to what Lord Chief Baron MacDonald had said in *Patch's* case:—

That the nature of circumstantial evidence was this, that the jury must be satisfied that there is no rational mode of accounting for the circumstances but upon the supposition that the prisoner is guilty.

The author adds:—

Mr. Baron Alderson, with more complete exactness, said that, to enable the jury to bring in a verdict of guilty, it was necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw.

Later the author states:—

Rule 5.—If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted. . . .

He continues later:—

In questions of civil right, the tribunal will often decide according to the greatest amount of probability in favour of one or the other of the litigant parties, but, where life or liberty are in the balance, it is neither just nor necessary that the accused should be convicted but upon conclusive evidence.

Then he cited what Lord Justice Clerk Cockburn told the jury in *Madelein Smith's* case:—

I wish you to keep in mind that, although you may not be satisfied with any of the theories that have been propounded on behalf of the prisoner, still, nevertheless, the case for the prosecution may be radically ineffective in evidence.

I think that there was no valid objection to the learned counsel stating the passage in question to the jury. I refer to a case in which counsel for the prosecution was doing this same thing before Tindal, C.J., and Baron Parke, and, on objection, it was permitted. *Regina* v. *Courvoisier*, 9 C. & P. 362 at 363, in which Mr. Adolphus (who was, for the Crown, prosecuting the prisoner for murder), was proceeding to read the observations of Lord Chief Baron MacDonald, who tried the case (of a man named Patch, see Wills on Evidence, p. 390), upon "the nature and effect of circumstantial evidence." Phillips, for the prisoner, objected "to his reading to the jury the observations of a Judge in a particular case tried many years before."

Tindal, C.J.: "He has the right to use them as his own opinions; there is no objection to his using them as part of his own speech."

It is true this case was before Denman's Act, but counsel, in summing up the evidence, cannot very well make an argument to the jury in some cases if he is not allowed to state the principle within which he is trying to bring the evidence. If it could be done in the case of the prosecutor, it could be done in the case of the defendant.

But the answer to this contention, and also to the contention that the learned Judge should have put this rule before the jury is, that the prisoner has not been prejudiced if something to the same effect, the sense of that, has been put before the jury.

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The learned Judge, at the outset, after dealing with their duty to the Crown, said:—

Your duty, on the other hand, to this man is to give an absolutely fair and impartial trial, and if, after careful and conscientious consideration of the whole evidence, you have a reasonable doubt as to his guilt, then your absolute duty to him is to give him the benefit of that doubt and acquit him.

Gentlemen,—The first thing that occurs in this connection is, what is a reasonable doubt? I say to you that it does not mean the mere possibility of a doubt. It has been defined by a very able Judge, Chief Justice Shaw, of Massachusetts, in the case of *The Commonwealth* v. *Webster*, and I am going to read it to you and adopt the words of that learned Judge as my own in giving you a definition as to what is meant when a Judge talks to a jury about the reasonable doubt which a person is entitled to.

"Then what is a reasonable doubt? It is a term often used—probably pretty well understood but not easily defined. It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favour of innocence; and every person is presumed to be innocent until he is proved guilty. If, upon proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt, because, if the law which most depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether."

You have here it laid down, and, I think, after giving it a good deal of consideration, correctly laid down, that what is meant is that you must have that certainty that directs and convinces your understanding and satisfies your reason and judgment, although that may not be *an absolute certainty*. If you are reasonably satisfied, if your reason and judgment are satisfied beyond a reasonable doubt, explained as I have explained it to you, if you are so satisfied, you will find this man guilty, and, if you are not so satisfied, as I have said, it is your bounden duty to act on the convictions produced by the evidence.

Later the learned Judge said:—

Now, there are two kinds of evidence, direct and circumstantial evidence. Direct evidence, as you no doubt know, is where, for instance, a man sees another fire a gun and kill somebody and comes and swears to it—that is direct or positive evidence. Circumstantial evidence is where

there is not direct evidence as to the fact to be proved, but a series of other facts are established by evidence which are so associated with the fact in question that they lead to a satisfactory and reasonable conclusion.

Again, I think I cannot do better than quote again from the judgment of Chief Justice Shaw in this case:—

"The distinction, then, between direct and circumstantial is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial. That is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or the force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death and, of course, there is nobody that can be called to testify to it. Is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case—that is, that a body of facts may be proved, of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be most injudicious to the best interests of society if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts in the community, destructive to its peace and subversive of its order and security, would go wholly undetected and punished?

The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes and about the execution of criminal acts, seek the security of secretness and darkness. It is, therefore, necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions, and, thanks to a beneficent providence, the laws of nature and the relation of things to each other are so linked and combined together that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

Later, in dealing with the facts of the case, he said:—

Three different stories—got it from the pedler, the old man, his uncle, got it from Murphy for working for him, then he got it from Murphy himself. Of course, he lied about it. But you don't punish him for that. You don't find him guilty because he is a liar, but you say to yourselves, from the conduct of this man, from the different stories he has told as to the possession of the Post Office order, are we irresistibly drawn to the conclusion that he murdered this man? That is for you. Of course, if he had given any reasonable explanation about it, that would have disposed of it. If he had stuck to his story that he got it in change, and if he had called his aunt and his uncle to produce the goods that he bought from the pedler, there would have been an explanation. It is for you to say what inference you draw from it.

From that it might be implied that, unless they were irresistibly drawn to the conclusion that the defendant murdered the man (though the use of the word "irresistibly" was hardly accurate), they were to acquit.

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In respect to the quotation from the summing-up of Chief Justice Shaw's amplification upon reasonable doubt, Wigmore, in his work on Evidence, sec. 2497, says:—

> Then, in Mr. Starkie's classical treatise, "Moral certainty to the exclusion of all reasonable doubt is given vogue. From time to time various ill-advised efforts have been made to define more in detail this elusive and indefinable state of mind. One that has received frequent sanction and has been quoted innumerable times is that of Chief Justice Shaw, of Massachusetts, on the trial of Dr. Webster.

And he gives the quotation:—

> "Nevertheless, when anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion or at least continued incomprehension. . . . The effort to perpetuate and develop these unserviceable definitions is a useless one, and seems to-day chiefly to aid the purpose of the tactician. It should be wholly abandoned.

In *Reg.* v. *White*, 4 F. & F. 383, there is a note containing a criticism of the dictum, and characterizing it as a "dangerous doctrine" that "jurors might convict prisoners upon such an amount of proof as they would act upon in any of the affairs of life, in which it is notorious men daily act, and necessarily act, without any proof at all." And in respect to something said by Pollock, C.J., to the jury in *Rex* v. *Manners*, 7 C. & P. 801, namely:—"You are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life, etc." The note adds: "No case was cited and no such dictum can be found in the books."

Something to that effect is contained in the passage from Shaw, C.J., uttered in 1850, though not mentioned in this note.

However, I think that within the four corners of the passages from Shaw, C.J., and the comments of the learned Judge in this case, there is involved all that was enunciated in the rule laid down by Alderson, B., although, perhaps, it is not stated so fitly for practical use by a jury.

If there is proof to a moral certainty, and beyond reasonable doubt, this is involved that it must be proof which precludes every other rational hypothesis than that of his guilt. All that the jury in this particular case had to be satisfied of, in order to convict the defendant, was that he and no one else killed the pedler. Was a theory that someone else did it a reasonable

one? If they had any reasonable doubt about it, they should acquit. And I think that must be included in the passages from Chief Justice Shaw, although that was a more complicated case and required more statements.

In *Commonwealth* v. *Costley*, 118 Mass. 24, Gray, C.J., says:—

> Proof beyond a reasonable doubt is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent—each has been used by eminent Judges to explain the other, and each signifies such proof as satisfied the judgment and consciences of the jury as reasonable men and applying their reason to the evidence before them *that the crime charged has been committed by the defendant*, and so satisfies them as to leave no other reasonable conclusion possible.

In *State* v. *Overson*, 8 A. & Eng. Annotated Cases, p. 796 (*n*), this general rule is given:—

> It has long been the law in some jurisdictions that to justify a conviction on circumstantial evidence alone, the facts relied upon must be absolutely incapable of explanation upon any other reasonable hypothesis than that of guilt.

I think that agrees with *R.* v. *Hodges*, 2 Lewin C.C. 228:—

> Since this is the law a jury called to pass upon a case wherein the evidence is wholly circumstantial should be informed of the rule as a part of the law of the case. The ordinary charge upon the law of reasonable doubt is considered to be ineffectual to convey to the minds of the jury a clear conception of this exaction of the law when a conviction is sought upon circumstantial evidence alone.

But I think the concluding sentence is at variance with what I have quoted from Gray, C.J., and I think that the passages quoted from Shaw, C.J., while dealing with the law of reasonable doubt, really also deal with it as a case of circumstantial evidence, and, therefore, were sufficient.

I think that there is not sufficient ground for requiring a case to be stated for further argument.

The other points raised at the hearing did not suggest anything which required a case.

The appeal must, therefore, be dismissed.

RUSSELL, J.:—This is an appeal from the refusal of the trial Judge to reserve a case after the conviction of the defendant for the murder of Charles Asaff.

One of the grounds for appeal is that the learned trial Judge

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did not permit counsel for the prisoner to read from the reported charge of the trial Judge in *Rex* v. *Hodges*, 2 Lewin C.C. 228.

No doubt the charge was an excellent one, but it must, I think, be in the discretion of the trial Judge to determine to what extent, if any, he will permit counsel to go in presenting to the jury the principles of law by which the case is to be determined. In some cases—perhaps in many cases—the facts cannot be adequately explained to a jury without so far explaining the law as to enable the jury to appreciate the relation between the facts and the legal principles which are involved in the issue. I do not think that any Judge would ever prevent such a statement, and, if such a case should occur, I would not care to say that it might not be such an error as would warrant a new trial of the cause. But no such case is here presented. Cases were cited at the argument in which legal authorities were referred to by counsel for the prisoner, but no case that is binding upon this Court was cited or referred to in which a new trial was granted because the trial Judge prevented counsel from reading reports or text books to the jury. The statute which enables a prisoner to be defended by counsel, which is now sec. 944 of the Criminal Code, expressly defines the function of counsel in addressing the jury by saying that he is to "sum up the evidence," thus apparently recognizing the clear distinction between the functions of counsel and those of the Judge.

A previous section (942) provides that "every person tried for any indictable offence shall be admitted after the close of the prosecution to make full answer and defence thereto by counsel learned in the law." There is, I think no special force in these words beyond the intended effect of providing that the defendant may be assisted by counsel, and has the right, with such assistance, to make full defence to the indictment.

The clause that deals particularly with the functions of counsel in addressing the jury seems to confine him to the duty of dealing with the evidence. I must confess, however, that in determining this point I do not attach as much importance to the particular wording of these sections as I do to the well-established principle that it is the function of the Judge to give the law to the jury, and, if, in his judgment, they are likely to be misled, bewildered or befogged, as they might well be by dis-

sertations from opposing counsel and citations from legal authorities, I cannot doubt that it is within his discretion to confine the counsel on both sides to their proper functions.

Some minor criticisms were made of the charge of the learned Judge on the ground that he had mis-stated the evidence to the jury. I cannot find that he has done so in any slightest respect. It was said that he had confused in some manner two things referred to in the evidence as a wallet and a "purse"—that the wallet was the article identified by the sister of the deceased as his property, and which was proved to have been taken from the pocket of the prisoner; while it was the "purse" that contained the prisoner's money. It was pointed out by counsel for the Crown that these terms had not been so consecrated that they might not be used interchangeably. But, apart from that altogether, I have not been able to find that any possible prejudice could be caused by the misnaming of the articles referred to—if they were misnamed. The trial Judge did speak of the wallet being filled to overflowing with money. Suppose it was the "purse" and not the "wallet" that was filled, what difference could it make? The only significance of this fact was that which was properly attributed to it by the trial Judge, namely, the circumstance that the victim had money in his possession, and that the defendant, soon after the killing, was freely expending money, while little or no money was found upon the body of the deceased when it was discovered buried in the woods. The Judge has nowhere, that I can find, referred to this "wallet" containing money as the article that was found in the pocket of the defendant, and it would not have made any difference in the effect of the evidence if he had done so. The essential circumstance in that relation was that the wallet, as the counsel for defendant insists upon our naming it, which was identified as the property of the deceased was found in the defendant's pocket, and the effect of the evidence would be precisely the same whether it was called a wallet or a purse.

It is also complained that the Judge spoke of three spots of human blood, when he should have spoken of one only. He did so, if the charge has been correctly copied, but in the very same sentence he explained that the reaction shewed human blood in only one of them and not in the other two. Even with-

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out this explanation, the difference between one drop of blood and three would be of no possible consequence. One drop of human blood would be as damning a circumstance as three, and three drops could be as easily explained by nosebleed as one drop.

When the jury returned to the court-room, one of their number asked if there was any evidence that the deceased had been at Cook's house. The Judge seems to have referred to the statement of the prisoner that he got the money order from Asaff by way of change for a twenty-dollar bill on a purchase of some goods as bearing on the question, and the complaint, if I understood it, was that the Judge should have pointed out that, if this statement was accepted, it would eliminate the circumstances connected with the money order as one of the proofs of prisoner's guilt. It is true that it would do so, but the Judge immediately reminded the inquiring juror that the statement of the prisoner in this regard could not be depended upon. He gave them all the facts within his recollection that bore upon the inquiry, and left the jury to draw their own inferences.

The only remaining ground that was seriously argued was the refusal of the learned Judge to recall the jury for the purpose of instructing them, that, besides being satisfied that the facts were consistent with the prisoner's guilt, they must also be satisfied that they were incapable of any other explanation or hypothesis. This would have been a proper enough instruction (provided the adjective "rational" were inserted before the substantive), which was, no doubt, understood and intended by the prisoner's counsel. But it was unnecessary. The jury had been instructed already more than once that they must be satisfied beyond a reasonable doubt, and the learned Judge had, more than once, cautioned them to the effect that they should not convict unless the evidence produced an irresistible conviction upon their minds. It could not produce an irresistible conviction of guilt if any rational hypothesis could be suggested by which the circumstances could be accounted for. He began his charge with a citation from the charge of Chief Justice Shaw in the celebrated trial of Dr. Webster for the murder of Parkman, which is the *locus classicus* on the subject of circumstantial evidence. I do not see how he could have chosen a safer guide for his footsteps.

The result of my consideration of the points presented is to leave me under no doubt whatever that the prisoner has had a fair trial, and, that being the case, I do not think it would be proper to allow the appeal from the refusal of the trial Judge to reserve a case for this Court.

LONGLEY, J.:—This is a capital case, and, therefore, all points possible for the hearing and determining of questions of law are open to consideration, and must be considered fairly and fully. In this case the application to reserve a Crown case was made to the Judge who tried the case, and he declined the application. Then the counsel for the accused appeared before this Court, and asked to have a case reserved on one or each of the several points. Frankly speaking, there is nothing in the matters of complaint made in respect to the charge of the Judge to the jury that is worthy of any possible consideration. The charge is before us, and I am satisfied that it was an eminently fair charge, strictly impartial on all points and quite as favourable to the prisoner as could possibly be desired. The only point made that is worthy of serious consideration was in the third clause:—

3. Was I right in stopping counsel for the prisoner and preventing him from referring to the charge of Baron Alderson in his charge to the jury?

The question whether the counsel for either the prisoner or the Crown can submit, to the jury, cases, is entirely one for the discretion of the Judge. The plaintiff can read the section of the Criminal Code Act, under which the offence is committed, and I suppose the prisoner can do the same; but in this case the charge is that the Judge did not allow the counsel for the prisoner to quote the opinion of Baron Alderson, which was on the question of circumstantial evidence, to the jury. I think, beyond all question, that the Judge is entirely justified in preventing counsel from doing so. There are different kinds of Judges. Some permit cases to be submitted to the jury and some do not. The law only allows counsel for the prisoner to "sum up the facts" to the jury. In this case the Judge on the trial of the cause thought it would be awkward to him to permit any of the counsel to read from books when he was to give the law himself, and the law, as given by him, must be accepted as

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final by the jury, and he undertook to prevent counsel from reading law. Some other Judge may possibly have allowed him, but no instance has been found or given in any Court in the English jurisdiction which makes that a mistake on the part of the Judge. The learned counsel was asked to cite any case tending to have such an effect, and he cited two cases, one in 93 Michigan and the other 74 Michigan.

We know that they have various statutes regulating the rules of the Court in this respect in Michigan and other American States, and, therefore, any judgment which would appear on the point must be taken with the greatest possible care. In this case, in examining the cases cited 93 and 74 Michigan, it is apparent that they are both civil causes, and do not refer to criminal trials, and do not cover any point upon which authority was asked. No English Judge has for a single moment admitted the necessity of admitting such things, and, if they were admitted, then the trial of a cause would be so awkward that it would be difficult to progress to its conclusion.

I have, therefore, reached the conclusion that the grounds set forth in this third paragraph are not tenable and not worthy of consideration. It is, of course, necessary that the counsel should take all points possible in a capital case, urge them with persistency and with force, but, with the exception of the point reserved in the third section, I fail to see anything in the grounds whatever.

I, therefore, have to give judgment refusing the application.

Judgment for the Crown.

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CALDWELL v. COCKSHUTT PLOW CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. TRIAL (§II E—195) — SPECIAL INTERROGATORIES — GENERAL VERDICT — EFFECT.

Under sec. 112 of the Ontario Judicature Act a general verdict will be disregarded where special questions are submitted to and answered by the jury. (*Per* Riddell and Leitch, JJ.)

2. SALE (§II C—35) — WARRANTY — OF FITNESS.

A warranty that an engine was "capable of doing good work" is not a warranty that it was "capable of filling silos," a work requiring greater power than the engine was warranted to have. (*Per* Riddell and Leitch, JJ.)

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Statement

APPEAL by the defendants from the judgment of the Judge of the County Court of the County of Peel, in favour of the plaintiff, upon the findings of a jury, in an action for rescission of a contract for the purchase of an engine for cutting corn, on the ground that it did not work properly, for the return of the cash paid and promissory notes made and delivered by the plaintiff, or for damages for breach of warranty.

The appeal was allowed, with leave to plaintiff for a new trial on amended pleadings.

J. Harley, K.C., for the appellants.

B. F. Justin, K.C., for the plaintiff, the respondent.

Riddell, J.

December 23. RIDDELL, J.:—The plaintiff, a farmer, had some work to do for which he required an engine—to cut corn and fill his silo. He met, on the 12th February, 1912, Barnes, the local agent of the defendants, who was then with one Rowe. He says that he told Rowe what he wanted the engine for, and that Rowe advised him to get a 12 H.P. engine, but this he cannot say was in Barnes's presence, and he cannot say that Barnes heard it. Thereupon he signed an order "for Mr. Rowe."

An engine was shipped to Bolton, the plaintiff's station, about a month after it had been expected. The plaintiff did not accept it, and the defendants sent their agent Barnes and another agent, Mr. McIntosh, who, on the 26th March, went to the plaintiff's place, and the following took place according to the plaintiff:—

"Q. What took place when they came? A. He wanted me to take the engine and try it.

"Q. What position did you take? A. I didn't want it then at all; I had nothing to do with it.

"Q. And you did not want to take it, and what else? A. I did not need it till the corn season came along. I had done work with the horse-power that I expected to do with the engine.

"Q. Then what took place? A. They induced me to give them another order by paying the freight.

"Q. You were to pay the freight under the first order? A. Yes, and meet the payments a little later, so that I would only have a small payment last fall and the large ones later on.

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"Q. They made the first payment smaller? A. Yes.

"Q. And that is the payment on the 1st December, 1912? They made that $75 instead of $172?

"Mr. Harley: It is $64. A. That is with the freight off.

"Q. Is that all that took place that day? A. We went up to the station and loaded it on to the sleigh and brought it down.

"Q. Was that before or after you signed the order? A. That was after."

Before giving this second order, the plaintiff told McIntosh that he wanted an engine to fill his silo, and McIntosh said that it would blow the corn all over the barn, and, relying upon McIntosh's word that it was sufficient for the purpose for which he wanted it, he signed the order. This provided for three notes, one for $75 due on the 1st December, 1912, one for $250 due on the 1st December, 1913, and one for $250 due on the 1st December, 1914, which were delivered to the agent shortly after.

The plaintiff tried the engine for grinding feed, cutting wood, etc., during the summer, and when the season came round for filling his silo he tried it for that purpose. It proved too weak to do the work, whereupon he wrote to the defendants: "I have tried the engine to cut corn and to blow into the silo, and it failed to do it. I bought it expecting to do that with it." A reply was sent the next day: "We make no guarantee about the filling of silos, as it would be impossible to do so. We guarantee the engine will develope the horse power we sold it to you for, but we could not make any guarantee about it filling your silo." The plaintiff also gave notice to Barnes, the local agent, and he failed to make the engine do the work.

Nothing further was done, so far as appears, till the plaintiff consulted his solicitor, who, on the 19th November, wrote the defendants as follows: "Mr. W. F. Caldwell . . . has consulted me in reference to your letter of 30th October and in reference to a gas engine purchased by him through your agent, F. McIntosh, at Bolton. The principal purpose for which Mr. Caldwell purchased the engine was to cut his corn and put it into a silo, and it was represented at the time as being sufficient for that purpose. I understand from your letter that you yourselves do not consider it sufficient for that purpose, and it is

entirely useless to my client. Consequently, we decline to keep it; and, unless you take it back and return our notes, or give us an engine that will sufficiently answer the purpose, we will seek our remedy in Court. Trusting that we may be able to reach an amicable settlement of this matter, I remain, yours truly."

Fully to understand this letter, it may be noted here that in the contract was a provision that if the engine "cannot be made to do good work . . . a new implement will be given in its place, and the notes and money, if given, will be refunded."

The defendants answered saying that Mr. McIntosh made no such promise: "We do not claim it had power to fill any silo, but what we did claim for the engine was that it would develope 12 H.P., which we will guarantee it to do at any time, and are prepared to shew that it will . . . We must request that Mr. Caldwell pay for this engine according to the terms it was sold on, but if he wants a larger engine to do his work we would be pleased to exchange with him and allow him for his engine what it is worth. Of course, we would have to be paid for the depreciation in value of engine he now has, but we would make the best allowance possible and would give him a larger engine if he has to have one."

The plaintiff seems to have submitted; at all events he retained possession of the engine and sent to Toronto for an expert to test the power. This expert reported the engine not up to 12 H.P. and, on the 20th December, the plaintiff's solicitor wrote the defendants: "In addition to the position previously taken by me on behalf of Caldwell, I now take the position that the engine supplied by you is not a 12 H.P. engine . . . We have had it tested; and I now notify you that I propose to take whatever proceedings may be necessary to assert my client's rights. If you return the notes, we will return the engine to you. If you will not do this, I am instructed to bring an action against you to compel what I believe my client is entitled to in the matter."

The defendants wrote at once offering a joint test, saying: "It is unnecessary for . . . your client to resort to law to

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compel us to fill the warranty on the order . . . and if the engine will not develope 12 H.P., we will be pleased to return Mr. Caldwell's notes . . ." The solicitor answered: "When the matter first came to my attention, I told Caldwell that, in my opinion, if the engine was a 12 H.P., he would not have any difficulty in pulling the corn into the silo with it; and it was on my advice that it has been tested . . . You may rely upon it that my client will not accept your demonstration, but will issue a writ against you and fight the matter out. I would suppose that you would not take any exception to a test made by the School of Science, and I do not think any other test will avail you in the slightest degree before any Court. I would suppose that your man might possibly be able to prove anything from his point of view, but we know from actual experience what the result has been, and an independent test has demonstrated what the facts are."

The defendants replied, again offering to send a representative to make a test jointly with the Toronto expert, and added: "If we cannot demonstrate to him or to any one else that this engine will develope 12 H.P., we will return Mr. Caldwell's note."

The plaintiff's solicitor wrote, on the 28th December, 1912, asking what position the defendants took as to expenses; the defendants replied that they would pay their own representative, and again asserted that the engine was of 12 H.P. On the 11th January, the plaintiff's solicitor wrote that "Caldwell purchased chiefly for the purpose of corn cutting and filling his own and his neighbours' silos. I think it beyond dispute that when machinery is sold for a specific purpose it must be sufficient for that purpose; and, therefore, Caldwell is entitled to succeed against you entirely apart from the question as to what horse power the engine will develope. On the other hand, it will be established that the engine did not develope 12 H.P., in the hands of the recognised and experienced expert of the School of Science . . . My instructions are to commence proceedings against you unless you return the notes and make good the loss we have sustained . . ."

The defendants answered, on the 14th January, 1913, that

they could prove the engine to be a 12 H.P., and that it would be unnecessary to issue a writ, as they had just sued Caldwell on his note due on the 1st December, 1913. They did sue him, and he paid the amount with costs, by his solicitor's cheque, to the Clerk of the Division Court, $67.04: "Cockshutt v. Caldwell, paid under protest as per letter."

No judgment was entered, as the money was paid before the expiration of the time allowed by the summons for dispute-note. The letter is not produced.

This action was begun on the 28th February, in the County Court of the County of Peel. The statement of claim sets out the purchase on the 26th March, 1913, by a written contract, of the engine, with terms of payment; that, in the negotiations for the purchase, the plaintiff informed the defendants of the purpose of which he required the engine, and the defendants represented that a 12 H.P. was ample for such purpose; that he, relying on their representations and advice, agreed to buy the engine; that the contract warranted the engine to do good work, and provided "that, in the event of failure to do so, the money paid and the notes given would be returned to the plaintiff; that the engine is not capable of doing good work," and "was not and is not sufficient for the purpose for which the same was so sold and purchased;" that the engine is not a 12 H.P.; that, when he found the "engine was incapable of doing the work as aforesaid, and was insufficient for the purpose aforesaid, he duly notified the defendants of the fact, but the defendants refused to take the said engine back or to make good the loss sustained by the plaintiff;" he offered "to return the said engine to the defendants upon receiving the moneys paid by him and the promissory notes given by him; that he has suffered damage." No allegation is made of fraud. He claims:—

(1) Rescission of the contract and a return of his two unpaid notes and the cash he has paid in, that sued for in the Division Court, also the money paid by him for freight, etc. (2) $100 damages for the engine not working properly. (3) In the alternative, damages for breach of warranty. (4) Costs. (5) General relief.

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The defendants plead the contract and delivery of a 12 H.P. engine; the suit in the Division Court and payment; that the engine was a 12 H.P.; and they deny making a representation that it would fill the silo, etc., or any warranty other than that under the contract, which is set out in full.

The case came on for trial before the County Court Judge of the County of Peel with a jury. The jury found as follows:—

"(1) Q. Was there a verbal agreement separate from and independent of the written agreement between the plaintiff and the agents of the defendant company, at the time the order of the 12th February was signed, that the engine would be fit for the purpose of cutting corn and filling the silos of the plaintiff and his neighbours? A. Yes.

"(2) Q. Was there a similar agreement made at the time the order of the 28th March was signed? A. Yes.

"(3) Q. In making the contract, did the plaintiff rely upon the skill, judgment, and advice of the agents of the defendant company and the representations made by them that the engine would be fit for that purpose? A. Yes.

"(4) Q. Was the engine fit for that purpose? A. No.

"(5) Q. Was it the verbal agreement that induced the plaintiff to enter into the written agreement? A. Yes.

"(6) Q. Did the plaintiff understand that he was to have one day in the fall to try the engine cutting corn and filling the silo? A. Yes.

"(7) Did the agents of the company fraudulently represent to the plaintiff that the engine was fit for the purpose of cutting corn and filling silos therewith? A. We believe the agents stated that the engine would cut corn and fill the silo, but not with the intent to defraud.

"(8) Q. Was the engine delivered to the plaintiff in accordance with the written agreement? A. Yes." (This was originally written, "Was the engine delivered to the plaintiff a 12 H.P. engine?" but it was altered so as to be perfectly general before being left to the jury.)

"(9) Q. Is the plaintiff entitled to a return of the money paid under protest and the promissory notes now held by the defendant company? A. Yes.

"(10) Q. Over and above the money paid, and the promissory notes held by the defendant company, did the plaintiff sustain any special damage, and, if so, what? A. Ten dollars for specialist, fifteen dollars, help and feeding same."

The jury add: "We are of opinion that the plaintiff should take the engine back to Bolton station. We bring in a verdict in favour of the plaintiff."

Judgment was then entered for the plaintiff for a return of the notes still unpaid, and costs.

The defendants now appeal. There is no cross-appeal.

In the consideration of the case, we must wholly disregard the general verdict for the plaintiff added by the jury to their answers. Section 112 of the Judicature Act, R.S.O. 1897, ch. 51, provides that "the Judge . . . may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict."

At the trial the learned County Court Judge seems to have intended to leave the matter to the jury generally; but, after his charge was concluded, it was decided to submit questions to the jury. Considerable discussion took place between the Judge and counsel as to the questions to be submitted, but at length they took the form we have seen. Objection was taken to QQ. 9 and 10, but overruled, the objection to question 9 being that it was matter of law and not matter of fact.

Again, an appeal being against the judgment and not against the reasons for it, the precise form of the judgment must be regarded. It is simply for a return of the two unpaid notes (and costs) without any other relief to either party. No judgment is given for the return of the money paid in the Division Court action, and rightly so. Ever since *Marriott* v. *Hampton* (1797), 7 T.R. 269, it has been consistently held that where an action is brought in good faith, and money is paid by the defendant and with his eyes open in order to settle it, he cannot recover the money back: *Hamlet* v. *Richardson* (1833), 9 Bing 644; *Davis* v. *Hedges* (1871), L.R. 6 Q.B. 687, at p. 692, *per* Lush, J.; *Moore* v. *Vestry of Fulham*, [1895] 1 Q.B. 399. And he is not at all assisted by the fact that the payment is "under

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protest:" *Brown* v. *McKinally* (1795), 1 Esp. 279; *Davis* v. *Hedges*, *supra*, at p. 692; see also *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265. If the claim be fraudulent, the result is different: *Duke de Cadaval* v. *Collins* (1836), 4 A. & E. 858; *Thomas* v. *Brown* (1876), 1 Q.B.D. 714, at p. 722.

The judgment for return of the notes can, in my view, be supported only on a rescission of the written contract, into which admittedly the plaintiff entered on the 26th March, 1912, the former contract of the 12th February having already gone by the board. Subject to what will be said later, the notes cannot be returnable under the terms of the contract itself, because it has been found that the engine was in accordance with the contract. The finding that the engine is in accordance with the contract is fully borne out by the evidence. Braddon, the maker of the engine, who has made between 2,500 and 3,000, tested it late in February or early in March, and it developed 12 4/5 horse power, and says that, unless the adjustments were improperly changed, it would be better in the fall, and that, if it has not been ill-used, it will now develope 12 H.P. Hall, a machinist and gasoline expert, tested it before it left the factory, and found it 12 4/5 H.P. He says that, with fair usage, it ought to increase in power. It is true that Arekley, from the School of Practical Science, found, when he tested it, that it shewed only 7 7/10, but he does not seem to find fault with the method of testing at the shop; and it may be that some adjustment was necessary before his test, which he did not make. At all events, the case was fairly one for the jury, and it was left to them by the Court after a charge unexceptionable in this respect. The article supplied answered then the description by which it was ordered, "one 12 H.P. portable engine," and there is no fundamental misdescription.

The warranty reads: "This implement is made of good material and with proper management it is capable of doing good work." No fault is found with the material; that it could and did do good work is plain. While at first there was some dissatisfaction, after a "jack" had been supplied it was satisfactory (p. 29); it would do grinding (p. 30); and cut

wood (p. 14). It was only when it came to filling the silo that the engine was found not up to what was expected, and that only because of want of sufficient power. The jury were perfectly justified in finding, as they have found in effect, that the engine answered the description and the warranty, but that the work of filling silos required more than 12 H.P. It was suggested that the warranty that the engine was "capable of doing good work" might mean "capable of filling silos;" that, however, in my view, cannot be the case. The trouble about filling silos was not the manner in which an engine might work but the amount of power it developed, and the representation that it would fill silos is not as to its manner of working, but as to its power. In the circumstances of this case, "capable of doing good work" must mean "capable of doing well the work of a 12 H.P. engine."

If, however, the contention should prevail, the plaintiff is met by the difficulty spoken of at the trial.

The agreement reads: "The purchaser shall have one day to give it a fair trial, and if it should not work well he is to give written notice . . . and allow reasonable time to get to it and remedy the defects . . . when if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good a condition as when received, except the natural wear, and a new implement will be given in its place or the notes and money, if given, will be refunded."

Even if we assume that all the use made of the machine at various times by the plaintiff, before his trial in October, did not exhaust the "one day to give it a fair trial;" assuming also that the jury meant by their answer to the question that the "one day" was "one day in the fall at filling a silo," and that it was so agreed, and not simply "understood" by the plaintiff; assuming, further, that they were justified in so finding, and that such an agreement would be effective—the plaintiff was first to give notice, which he did; and then, when it was found that the engine was not capable of doing good work, he was to return it, free of charge, to the station, in as good condition as when received; then, and only then, the defendants were either to give him another engine or return him his notes. No complaint can

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be made (in the plaintiff's view of his bargain) that the defendants had not by the 19th November a reasonable time to "remedy the defects," and their letter of the 30th October was such as to entitle the plaintiff to say that the engine could "not be made to do good work." He was consequently in the position, in this view, of being entitled to take the engine to Bolton free of charge. He does not take it to Bolton; he calls upon the defendants "to take it back," and says: "Unless you take it back and return our notes or give us an engine that will sufficiently answer our purpose, we will seek our remedy in Court." There is nowhere an offer to take the engine, free of charge, to Bolton. The defendants, on the 20th November, assert their position that the engine is as sold, and request payment, but offer to make a new bargain for another engine. They do not say or suggest that the plaintiff need not deliver the engine at Bolton if for any reason he is entitled or called upon to do so. The plaintiff makes even more clear in his next letter what his position is: "If you return the notes, we will return the engine to you. If you will not do this," an action will be brought; thus making the return of the notes the condition precedent instead of the consequence of returning the engine. There is nothing further said about returning the engine till action brought. On the 11th January, 1913, the solicitor writes: "My instructions are to commence proceedings against you unless you return the notes and make good the loss we have sustained;" but there is no offer to take the engine to Bolton. Even when action is brought, the statement of claim does not contain an offer to take the engine to Bolton, or even an unconditional offer to return it, but (par. 10) "the plaintiff now offers to return the said engine upon receiving the moneys paid by him and the promissory notes given by him to the defendants therefor." We have seen that in no case is he entitled to receive back the money he paid; this offer has the double objection that it is conditional, and conditional on a condition which the plaintiff has no right to in any case.

No doubt, "a positive absolute refusal by one party to carry out the contract is, in itself, a breach of the contract on his part, and dispenses the other party from the useless formality

of tendering the performance of a condition precedent:" *McCowan* v. *Mackey* (1901), 22 C.L.T. Occ.N. 100;* but it must be something of a positive unequivocal character, equivalent to a statement by the one that, even if the other should perform his part, he himself would not perform his. Such a case was *Withers* v. *Reynolds* (1831), 2 B. & Ad. 882, where the substance was, "You may bring your straw, but I will not pay you upon delivery, as under the contract I ought to do." But everything which the one party may consider to be a breach of the contract or a waiver of a condition precedent is not so; there must be something unequivocal and clear. The authorities are summed up in *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (1884), 9 App. Cas. 434.

Under the contract, the plaintiff must draw the engine to Bolton, a matter which would cost the defendants some expense; he must give the defendants a reasonable time to examine the engine, to determine whether it was in fact in as good a condition as when received, except the natural wear (*Isherwood* v. *Whitmore* (1843), 11 M. & W. 347); and then the defendants would be bound either to give him another engine or return his notes. How can it be said that there was a waiver of all this—the offer, so far as it went, never going beyond an offer for them to take the engine where it was?

The return of the notes can, as I have said, only be awarded following a rescission of the agreement. The jury have found that an innocent misrepresentation on the part of the defendants' agents brought about the contract. I think that the first branch of this finding may be supported; *i.e.*, (1) that the contract was procured by misrepresentation.

The defendants are bound by the misrepresentation of their agent in the course of his employment, even if fraudulent: *Lloyd* v. *Grace Smith & Co.*, [1912] A.C. 716; and "where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract,

*Also reported in 13 Man. L.R. 590, *sub nom. McCowan* v. *McKay*.

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having been obtained by misrepresentation, cannot stand:" *per* Lord Herschell in *Derry* v. *Peek* (1889), 14 App. Cas. 337, at p. 359.

But, where the misrepresentation is innocent, "it is not a ground for rescission, unless it was such as that there is a complete difference in substance between the thing bargained for and that obtained so as to constitute a failure of consideration:" *per* Armour, C.J., in *Northey Manufacturing Co.* v. *Sanders*, 31 O.R. 475, at p. 478, referring to *Kennedy* v. *Panama, etc., Mail Co.* (1867), L.R. 2 Q.B. 580. Other cases are *Mackay* v. *Dick* (1881), 6 App. Cas. 251, at p. 265, *per* Lord Blackburn; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326. This law has never been questioned, and it is quite settled.

Unless we are prepared to overrule the judgment of the very strong Court which decided *Northey Manufacturing Co.* v. *Sanders*, 31 O.R. 475, we must hold that such a representation as was made in the present case is not sufficient ground for rescission. A one horse power engine was bought on a contract not dissimilar to the present. It was "subject to the following warranty and agreement," as this is "subject to the clause of warranty and agreement endorsed hereon:" it was "made of good material and with proper management . . . capable of doing good work," as this is; trial, notice, etc., were the same; the property was not to pass till full payment, etc. etc. (see p. 479); there, as here, after the warranty appeared: "No agent has authority to change the above warranty." The contract had been induced by the representation "that the engine in question would do the work required by the defendant to be done in the matter of pumping sufficient water for his stock . . .;" it was deficient in power, and could not pump sufficient water. McDougall, Co.C.J., held that "there was no right . . . to rescind the contract except upon the terms of the (written) warranty;" and this was affirmed by a Divisional Court (Armour, C.J., and Falconbridge and Street, JJ.); "nor were the representations, if made, such representations as would enable the defendant to rescind the contract" (p. 478.)

The case in the Court of Appeal of *Canadian Gas Power and*

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Launches Limited v. *Orr Brothers Limited*, 23 O.L.R. 616, is cited as laying down the law differently. The defendants had bought on a written contract signed by them under circumstances not wholly dissimilar to those in the present case; and the Court, Clute, J., and the Court of Appeal, held that there was an implied representation (or warranty) that the dynamo was to be fit for the purpose for which it was bought. There the purpose required a noiseless engine, producing steady electric light. Here the purpose requires a strong engine producing power sufficient to fill a silo. I am unable to distinguish the cases; there are minute differences, but subtle distinctions are not to be drawn in ordinary business transactions. So far as the case differs from the *Northey* case, it must be taken to have overruled it. *Alabastine Co. of Paris Limited* v. *Canada Producer and Gas Engine*, 8 D.L.R. 405, 4 O.W.N. 486, and *Eisler* v. *Canadian Fairbanks Co.*, 8 D.L.R. 390, are in the same direction. These cases seem to establish that, if the article supplied will not do what it was bought for, the purchaser may rescind the contract.

Granting that the right to rescind did at any time accrue, I think that the plaintiff, by his conduct, has lost it. His claim is, that he was induced to believe that the engine would fill a silo. As early as the 29th October, he knew that it would not, and so said. He knew as early as the end of October that the defendants asserted that they had made no guarantee that the engine would do the work required. Then he should have taken his stand, "The contract is void, the engine is yours," and stuck to it. He does not do that. He first claims his notes or a new engine, *i.e.*, under the contract; and then, when that is not acceded to, he treats the engine as his own by having it tested, *i.e.*, worked sufficiently to shew its horse power by an outsider. He had no right to do this unless the contract was in force; and he thereby asserted the existence of the contract; in other words, he dealt with the engine in a manner inconsistent with the rescission of the contract. The letter of the 11th January is consistent with this view rather than with the view that he considered the contract at an end. When he discovered (if he did discover) by the expert's test that the

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engine was not 12 H.P., this did not give a new right to rescind: *Campbell* v. *Fleming* (1834), 1 A. & E. 40, at p. 43; *Walton* v. *Simpson* (1884), 6 O.R. 213; *Webb* v. *Roberts* (1908), 16 O.L.R. 279. Moreover, the jury have found that the engine was 12 H.P.

The above would be sufficient to dispose of the appeal from the judgment as it stands; but it must not be forgotten that the action is in the alternative form; either for rescission with consequent relief, or for damages for breach of warranty; and, if the later claim could succeed, we should, in allowing the appeal, either find the damages or direct a reference on that matter.

The jury have found that an agreement was made that this engine would be capable of filling silos; and the learned County Court Judge in beginning his charge told them: "In this case the plaintiff wishes to recover on a written agreement and on a collateral verbal agreement; that is, an agreement made at the same time and not embodied in the written agreement."

Nothing is better established than that where a description or representation is made concerning the subject-matter of a contract, which, being untrue, entitles the purchaser to rescind the contract, if he receives the article sold and deals with it in such a way as to lose the right to rescind, that description or representation becomes a stipulation by way of agreement, for the breach of which compensation may be sought in damages: *Behn* v. *Burness* (1863), 3 B. & S. 751 (Cam. Scace). See cases cited in *New Hamburg Manufacturing Co.* v. *Webb*, 23 O.L.R. 44, at pp. 53, 54.

Such a stipulation, however, has no such effect "unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue:" *Behn* v. *Burness*, 3 B. & S. 751 (head-note); *Newbigging* v. *Adam* (1886), 34 Ch.D. 582, at p. 592, *per* Bowen, L.J.; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308; *Whittington* v. *Seale Hayne*, [1900] W.N. 31.

Here the jury have found that the actual misrepresentation by the agent was not fraudulent; this express representation must prevent any implied representation in the same matter. "*Expressum facit cessare tacitum.*" The only stipulation that

was made was (say the jury) innocent, and was not such as that under the authorities an action could be founded thereon.

We have not to deal with the question as to whether the evidence of such oral representation was properly received. That I understand to have concluded by the judgment of the Court of Appeal in the case in 23 O.L.R.; otherwise we might have had trouble with *Ellis* v. *Abell* (1884), 10 A.R. 226; *Betts* v. *Smith* (1888-9), 15 O.R. 413, 16 A.R. 421; *McNeeley* v. *McWilliams* (1886), 13 A.R. 324; *Sawyer & Massey Co.* v. *Ritchie* (1910), 43 S.C.R. 614.

Nor is there any difficulty in the plaintiff's way from the Division Court action. There was no adjudication by a Court as to his rights, and his voluntary payment only deprived him of so much money without the chance of recovering it back.

On the case as it stands the appeal should be allowed with costs and the action dismissed with costs.

But there are two matters that require consideration:—

(1) The jury have found (A. 7), on evidence which is sufficient, that "the agents stated that the engine would cut corn and fill the silo," as is sworn to by the plaintiff (p. 14). The agent McIntosh says (p. 65) "that the engine was not big enough;" (p. 61) that he "never asserted that twelve horse power would run a blower;" (p. 65) that he did not know the plaintiff wanted it to fill a silo; (p. 66) that "there was nothing said about what power was required for or what it would do;" and (p. 71) "I knew it wouldn't cut the corn."

On this evidence it must be manifest that, if McIntosh made the representation the jury find he did make, he made it knowing that it was untrue. This is fraud. The answers of the jury are not satisfactory, although perhaps not absolutely contradictory.

It is true that fraud is not charged in the pleadings; even before us no amendment was asked for; and it is not too much to require any one who intends to charge another with fraud or dishonesty to take the responsibility of making that charge in plain terms: *Low* v. *Guthrie*, [1909] A.C. 278, at p. 282, *per* Lord Loreburn, L.C.; *Badenach* v. *Inglis* (1913), 29 O.L.R.

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165, 14 D.L.R. 109. It is not unusual for a plaintiff, who expects or wishes to succeed on fraud, to avoid using the word lest, in case of failure to prove fraud, he may suffer in respect of costs. This practice is not to be fully approved, and a plaintiff must not expect to be allowed to amend as of right.

If, however, the plaintiff is willing squarely to take the attitude on the record that the defendants were guilty of fraud, I think he may have an opportunity of doing so. If he elects to do this, the judgment below will be set aside and a new trial ordered; costs of the former trial and this appeal to be in the cause, unless otherwise ordered by the trial Judge. If such an election be made, the other matter referred to may be fully developed, *i.e.*, a few days after the second contract was written, the agents of the defendants were desirous of obtaining the notes promised; the plaintiff demurred, and, as he says, was promised (in effect) that the defendants would make the engine right, whereupon he gave the notes.

The facts as to this are not fully brought out, and we express no opinion upon this point; but the plaintiff may, if he is so advised, set up in his amended pleadings a new contract entered into at that time.

If the option we offer the plaintiff be not accepted, the appeal should be allowed and the action dismissed, both with costs.

That an action lies for fraud, even when the contract is not set aside, appears from such cases as *S. Pearson & Son Limited* v. *Dublin Corporation*, [1907] A.C. 351.

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

MULOCK, C.J.EX., and SUTHERLAND, J., agreed in the result.

Leitch, J.

LEITCH, J., agreed with RIDDELL, J.

Judgment accordingly.

DE ST. AUBIN v. BINET.

IMP. P. C.

Judicial Committee of the Privy Council, Lord Moulton, Lord Sumner, Sir Charles Fitzpatrick, and Sir Arthur Channell. July 27, 1914.

1. BILLS AND NOTES (§ V B—147)—RENEWALS — TAKEN AS COLLATERAL SECURITY—ORIGINAL NOTE FOR SAME DEBT HOLDING OTHER PARTIES.

A "renewal" of a promissory note under the terms of a security given in respect of its endorsement is not necessarily restricted to another note made by the same parties, but may be shewn by the attendant circumstances to include within the protection of the security, the promissory note of another party; this result will follow where the latter had received the benefit of the original transaction and was obtained to substitute his direct obligation for the first note as a continuation of the original transaction and not with any intention of creating a novation, and where the endorser of the original note had endorsed the substituted note on the faith of such security with the concurrence of all the parties.

[*De St. Aubin* v. *Binet*, 22 Que. K.B. 564, affirmed.]

Statement

APPEAL by the plaintiff from the judgment in appeal of Quebec King's Bench, involving the effect of a renewal note alleged to have been taken as collateral security for an antecedent debt evidenced by an original note, and holding liable certain parties to the original note who had not actually executed the renewal.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Sumner

LORD SUMNER:—Madame Georges St. Pierre sues in her maiden name of De St. Aubin for a declaration that an instrument, which she made in favour of the defendant, dated August 27, 1909, is void and should be annulled. Both before the trial Judge and in the Court of King's Bench for the Province of Quebec (Cross, J., dissenting), she failed.

At Fraserville, in the district of Kamouraska, a business was carried on in the name of Georges St. Pierre et Cie., which belonged to this lady, but was managed for her by her husband. It is not clear what it was, though it is vaguely described as that of contractors. Monsieur St. Pierre held a power of attorney from his wife of limited scope, dated September 20, 1884, and on January 31, 1892, she made a declaration, as a married woman with separate estate, that she was solely responsible for the purchases, sales and transactions of her husband on her behalf under the signature of "Georges St. Pierre et Cie."

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On February 11, 1909, Georges St. Pierre et Cie. and six other firms or persons formed a company called the "Fraserville Navigation Co., Ltd.," of which Georges St. Pierre was to be sole manager, and it was duly incorporated. Its capital was five hundred shares of $100 each, and in the first instance $4,900 was subscribed, $2,000 by Georges St. Pierre et Cie., and the rest by four other parties. This company owned the S.S. "Canada," and traded or tried to trade with her.

Within three or four months the company was in want of money for the payment of sundry debts. Georges St. Pierre, as manager of the company, applied to the defendant on its behalf for a loan of $12,000 dollars, and in the result, money was procured for its necessities in the following way. On August 25, 1909, the plaintiff's husband, signing on her behalf as Georges St. Pierre et Cie., made a promissory note at four months, payable to the order of the defendant for $12,000, and the defendant endorsed it payable to the order of La Banque Nationale, which bank he had ascertained to be willing to discount paper endorsed by him. Both Georges St. Pierre et Cie. and the Fraserville Navigation Co. had accounts with this bank. On the same day the note was discounted and the proceeds were credited to the account of Georges St. Pierre et Cie., and were then all applied by various withdrawals to the purposes of the company. In a few weeks the money was exhausted. The defendant was informed that the money was wanted for the purposes of the company, but he took no part in its disbursement.

On the same 25th August, 1909, the company passed a resolution granting to Georges St. Pierre et Cie. a lien on the "Canada" in consideration of the sum thus furnished to the company by that firm, and on the following day a mortgage of the ship for $12,000 was granted to the plaintiff personally, which she registered on September 17, and subsequently transferred to the defendant, but not until March 12, 1910.

Having thus secured herself, the plaintiff proceeded to secure the defendant. She was principal debtor to the bank as holder of her promissory note, and the defendant had endorsed it and had made himself liable to the bank as her surety. Though the

object of borrowing the money and its destination were known to all parties, this fact did not alter the relations between the plaintiff and the defendant, nor were they modified by the rights which the plaintiff had as a general creditor against the company. For the purposes of this case, as between the plaintiff and the defendant, the rules of law which govern the relations of co-sureties *inter se*, or the liabilities of sureties after dealings between principal debtor and principal creditor, are neither applicable nor afford any useful analogy.

On August 27, 1909, the plaintiff signed and gave to the defendant an instrument called a "vente a réméré." Its terms are in some respects special and must be scrutinized. Its nature and use are well-known. Though in form a contract of sale, it operates when so intended as a security, and the contract is subject to be annulled by redemption. It is common ground, that in the present case it was only intended to be a security. The question here is for what was it a security? and the answer to this question is the crux of this appeal. Upon it depend the plaintiff's claim to have the security annulled as spent and the defendant's claim to retain it and have the benefit of it as a continuing security.

The condition of redemption in this instrument of "vente" is thus expressed:—

> Enfin cette vente est faite avec réserve et faculté de la part de la dite Dame venderesse de rémérér les prémisses sus-vendues d'hui en deux ans, en par la dite Dame venderesse remboursant le dit acquéreur du dit prix de vente avec intérêt au taux de six pour cent par année.

The "prix de vente" is named in the earlier part of the instrument as $12,000.

The plaintiff, "la dite Dame venderesse," has never paid to the "acquéreur," the defendant, the named sum of $12,000, but she pleads that the "vente a réméré" was given to secure the defendant for his endorsement of the promissory note of Georges St. Pierre et Cie., that he is no longer liable for his endorsement of that or any note made by that firm, and that the liability being extinguished the security is discharged. This it is for her to make out. Some reliance was placed on an answer given by the defendant in re-examination.

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"Q. Mais la garantie que vous donnaient Georges St. Pierre et Cie. c'etait en garantie des douze mille piastres qui étaient déposées ou devaient être déposées pour la Fraserville Navigation Co.?

"A. C'etait en garantie d'un billet pour mon endossement sur un billet et dont le produit devait aller à la Fraserville Navigation Co."

In their Lordships' opinion this answer carries matters no further. It is in accordance with the facts as far as it goes, but it did not purport to be an admission of the plaintiff's contention, and even if it could be pressed so far as to make it a statement of the exact transaction, which the "vente a réméré" was to secure, it would at most be a layman's opinion on a legal question and a very uncertain one into the bargain.

The consideration moving from the defendant is stated in the instrument in a two-fold form, first as a purchase price of $12,000 *in presenti*, "argent courant que la dite Dame venderesse reconnait avoir reçues du dit Sieur G. A. Binet dont quittance," and secondly as a promise by the defendant *de futuro* "à endosser les billets de la dite Dame venderesse et leurs renouvellements, jusqu'à concurrence de la dite somme de douze mille piastres, et ce jusqu'à l'expiration du dit réméré, c'est-à-dire pendant deux ans." Except perhaps for the expression "argent courant" there is nothing substantially mis-stated here. The plaintiff's contention is (1) that the obligation secured by the "vente a réméré" was limited to her obligation towards the defendant, arising because he had become endorser and guarantor of promissory note of August 25, 1909, and of such other notes of her making as were "renouvellements" of it; and (2) that on May 2, 1910, a transaction took place, by which she was discharged from any obligation on any promissory notes of her making, and so, her obligation being discharged, there was nothing further for the defendant to guarantee, and her security so given him, to wit the "vente a réméré," was therefore spent. True, that the plaintiff's discharge was entirely at the defendant's expense, and that he had no intention of discharging her

and no notion that he could be said to have done so. Still, if he did not appreciate the legal consequences of his act, that is his affair.

Their Lordships are not concerned to examine how far, if at all, the first of these propositions needs to be amended, for they are of opinion that both the Courts below were right in holding that the second proposition is wrong. The material facts are these. The promissory note of August 25, fell due on December 28, 1909, and was renewed by another four months' note, made by Georges St. Pierre et Cie., endorsed by the defendant and delivered to the Banque Nationale as before. This note had to be met on May 2, 1910. It was not convenient for the Fraserville Navigation Co. to repay the plaintiff's loan. Its business was going from bad to worse. M. Binet, who had now become a shareholder, had lent it considerable sums and its steamer was mortgaged several times over. It was equally inconvenient for Georges St. Pierre et Cie. to meet the note, but fortunately the bank was not pressing either the company or the firm. St. Pierre went to the bank with a blank form of promissory note, presumably to renew the note just maturing on behalf of the firm. The bank manager suggested that the name of the Fraserville Navigation Co. should be substituted for that of Georges St. Pierre et Cie. as makers of the new note. St. Pierre signed as the company's manager without objection, sending also for M. Hamel, the president of the company, who came obediently and signed it with St. Pierre for the company. St. Pierre says he did not know why he was asked to do this, but he can hardly have failed to see that the change was for the firm's benefit, and to understand the reason for it. The bank manager said that he made the suggestion to St. Pierre, and explained why, and the trial Judge accepted his evidence. The reason was this. If the note was made by the firm, the bank, on discounting it, would charge its amount to Georges St. Pierre et Cie., and *pro tanto* would put the account in debit or at least diminish its credit balance, and so limit the amount of further accommodation that it could give to the firm. The bank manager knew that the original advance had gone to the company, and that no fresh advance was in contemplation. He knew that the defendant

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had endorsed so that the advance might be made on the credit of his endorsement, and he knew that the defendant held security from the plaintiff. In making his proposal he had no idea of altering the legal relationships or liabilities of the parties. He simply saw his way to enlarging the margin of credit of Georges St. Pierre et Cie., and so increasing his bank's turnover. No doubt the prospect of further credit attracted St. Pierre also. Accordingly the new note was made without the name of Georges St. Pierre et Cie. appearing on it, and the old one of December 28, 1909, was returned by the bank to St. Pierre. The manager afterwards sent for the defendant and pointed out the change in the maker's name, and the defendant endorsed the new note without objection. It was afterwards renewed once or twice, and then the defendant had to meet it, for the company had become insolvent.

In this transaction St. Pierre acted partly as the plaintiff's business manager and attorney, and partly as the company's treasurer and gérant. In the first capacity he went to give a renewal note, and brought away the old one; he signed the new note in the second capacity. If the trial Judge had expressly found as a fact that he assented to what was done as manager of Georges St. Pierre et Cie., that is as agent for his wife, and that his knowledge of what was done was his wife's knowledge, the finding would have been warranted by the evidence, and could not have been impeached. The knowledge and assent obviously extended to the request subsequently made to the defendant to endorse the new note, for without that endorsement the new note was valueless, and it was explained to him that the only change to be made was the substitution of the company's name for that of Georges St. Pierre et Cie. In substance this finding is involved in the actual finding of the trial Judge. It is certain that for more than six months St. Pierre had no idea that his wife's obligation or the defendant's rights upon the "vente a réméré" had been affected by what had passed. He wrote letters to the defendant on July 30 and September 30, 1910, which substantially recognized the original obligation as subsisting. He and his wife were parties to an "acte" on De-

cember 15, 1910, which formally recognized it. In fact, the plaintiff's present point was obviously suggested by her lawyer some time after that day and before December 24, and was then put before the defendant to the latter's great surprise. Further, on November 9, 1910, the defendant again and for the last time, endorsed the Fraserville Navigation Co.'s note for $12,000 in renewal of the note of May 2, and if the trial Judge had found as a fact that this was done in reliance on the representation in St. Pierre's letter of September 30, that "notre billet de $12,000" was a subsisting obligation, and that he wrote as manager of the business of Georges St. Pierre et Cie., the makers of the original note, and so estopped the plaintiff, the owner of the business and the principal of Georges St. Pierre, from denying that it subsisted, that finding also would have been unimpeachable.

What the trial Judge actually found is thus expressed in the judgment of the Court on June 26, 1911:—

> Considérant que le défendeur a endossé, tel que voulu par l'acte, les billets au montant chacun de $12,000 de la demanderesse et leurs renouvellements, et en particulier celui du 2 mai 1910, comme il avait endossé ceux du 25 août et du 28 décembre 1909;—
>
> Considérant que le billet du 2 mai 1910 n'a pas fait novation entre le défendeur et la demanderesse des deux précédents, mais il était un renouvellement des précédents aux termes et dans le sens du dit acte du 27 août 1909 . . . et considérant que l'endossement donné par le défendeur au dit billet du 2 mai 1910 et aux renouvellements de celui-ci a continué d'être et est encore sous la garantie prise par le dit défendeur par le dit acte du 27 août 1909.

And these findings were affirmed by the Court of King's Bench in Appeal, by a majority of four Judges to one, in the judgment of the Court on April 23, 1913.

In face of these concurrent findings, the only questions of law open to the plaintiff are these: (*a*) was her liability to the bank upon the note of December 28, 1909, discharged as against the defendant by the making and delivery of the note of May 2, 1910? and (*b*) was the endorsement of that note by the defendant the endorsement of a "renouvellement" of the plaintiff's original note of August 25, 1909, for $12,000, within the meaning of the "vente a réméré"?

Upon the first question it is to be observed that no actual

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authority was ever given by the defendant for the return of the note of December 28, 1909, to its maker so as to discharge it, nor is there any finding that, as against him, it was discharged; but it is not necessary to examine the effect of this, for their Lordships agree with the Courts below that the answer to the second question is "yes." It was argued that in the "vente a réméré," "renouvellement" meant and meant only a renewal of the first note in the strictest sense of renewal with the same names on the note. No doubt the word includes this, but the whole course of the case shews that, as a matter of interpretation, it is not limited to this. The word, as a word, is apt to describe the note of May 2, in its actual relation to its predecessors. The bank manager so uses it in his evidence on pages 121 and 123, and the objection then taken on the plaintiff's behalf is not that the word "renouvellement" is not apt to cover the substitution of the earlier note by the latter, but that the note speaks for itself and shews a change of maker whatever the legal effect of that may be. The plaintiff's own counsel in cross-examining the bank manager on page 125, calls the note of May 2, 1910, a "renouvellement," and the judgment of the Court after the trial, and the notes of Mr. Justice Cimon, the trial Judge, and of Mr. Justice Gervais in the Appeal Court, shew that the word was, without question, considered apt and sufficient to describe the transaction of May 2, in spite of the change in the maker of the note. The original financial transaction was continued. The old advance remained outstanding. The new note was a "renouvellement" of the old ones. The real point debated was whether the plaintiff's liability terminated at that point of time, either because her note of December 28, 1909, was then discharged without any new liability being assumed, as the dissentient Judge thought, or because a true novation was brought about and the Fraserville Navigation Co.'s liability to the defendant was substituted for the plaintiff's with the consent of all parties, a contention which both Courts rejected.

Their Lordships are of opinion, that the note of May 2, 1910, being a "renouvellement" as that term is used in the "vente a réméré," the endorsement of it was such as the defendant was bound to give by his promise therein contained; that it was asked

of him by the bank manager with the consent, previously given, of the plaintiff's husband acting for her and within the scope of his authority as manager of her business; and that the defendant gave it on the faith of his being obliged to do so by the "vente a réméré," and of his being secured thereby; that as, in consequence of this endorsement, he has had to pay the $12,000, which by endorsing the original note he enabled the plaintiff to obtain and by endorsing the subsequent notes he enabled the company, for which she obtained it, to retain, he is entitled to the benefit of the "vente a réméré" by way of security for his reimbursement. They think, therefore, that the judgments of both the Courts below were right, and they will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Appeal dismissed.

SPORLE v. EDMONTON EXHIBITION ASSOCIATION.

Alberta Supreme Court, Scott, Stuart, Simmons and Walsh, JJ. October 21, 1914.

1. PRIZE CONTESTS (§ I—5)—EXHIBITION ASSOCIATION—HORSE RACE—CONDITIONS OF QUALIFICATION—"TRAINED" IN SPECIFIED DISTRICT—MEANING OF.

Where one of the conditions of a horse race held in connection with an exhibition or fair conducted by an incorporated Exhibition Association was that the race was open only to foals owned and foaled in Western Canada raced and trained in that territory, the training referred to means the entire training of the horse, and if the horse which came in first was taken outside of the territory mentioned and trained elsewhere to any substantial extent, a disqualification resulted upon which the owner of the second horse in the race may recover by action the first prize awarded at the race to the owner of the disqualified horse, although the plaintiff's protest made to the race officials was overruled by them, if the contestants are not shewn to have been subject to any rule or racing regulations making the decision of the race officials final.

[*Sporle* v. *Edmonton Exhibition Assocn.*, 14 D.L.R. 769, affirmed; *Jones* v. *Davenport*, 7 B.C.R. 452, distinguished; *Marryat* v. *Broderick*, 2 M. & W. 371, applied.]

Statement

APPEAL from judgment of Beck, J., in plaintiff's favour, *Sporle* v. *Edmonton Exhibition Assocn.*, 14 D.L.R. 769.

The appeal was dismissed.

Frank Ford, K.C., and *I. B. Howatt*, for plaintiff, respondent.

J. C. F. Bown, K.C., and *S. B. Woods*, K.C., for defendant, appellant.

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Stuart, J.

The judgment of the Court was delivered by

STUART, J.:—This is an appeal by the defendant from a judgment of Mr. Justice Beck given in favour of the plaintiff against the defendant for the sum of $950.

The action is a somewhat unusual one. In his statement of claim the plaintiff alleges that during the year 1910 the defendant offered $1,000 as a purse to be raced (*sic*) at the Edmonton Exhibition Association meeting, 1913, open to mares that were bred in 1909 for foals of 1910; that it was a condition of the race that the entry to the said race closed on November 1, 1910, and that the said race was open only to foals owned and foaled in Canada west of the Great Lakes and raced and trained in the above territory; that it was a further condition of the said race that the said sum of $1,000 be divided as follows: 60% to the winner of the first money, 25% to the winner of the second money, and 15% to the winner of the third money, $100 to be added to the breeder of the dam of the winner; that the plaintiff entered two horses in the said race prior to November 1, 1910, namely, "Cyclone" and "Cylla Man"; that at the said Edmonton Exhibition Association meeting, 1913, the defendant permitted one J. C. Bremner, of Edmonton, to race a colt named "Ben More," which was not entered for the said race on or prior to November 1, 1910, and notwithstanding that the said colt "Ben More" was trained and raced in the United States of America, and awarded to the said colt "Ben More" first money; that on August 13, 1913, and immediately after the said race was run, the plaintiff by notice in writing protested the awarding of the first money to the said colt "Ben More"; that the plaintiff's horses, the said "Cyclone" and "Cylla Man" were awarded second and third money, whereas the plaintiff claims that the said colts should have been awarded first and second money; that the plaintiff was the owner of the dam of the winner and that therefore the plaintiff claimed $950. In its statement of defence the defendant pleaded by denying all the allegations in the statement of claim and beyond these denials merely added the allegation "that the said colt 'Ben More' was raced and trained in Canada west of the Great Lakes and that the said 'Ben More' was entitled to first money."

Upon these pleadings, which are apparently characterized more by the technical words of the race track than by those of pleading, the parties went to trial. There was there no objection made by the defendants that the statement of claim disclosed no cause of action, although it is not there alleged even that the plaintiff's horse ran in the race at all. The case was tried and was argued before us on appeal upon the basis of an alleged contract between the defendant and the plaintiff which was consummated by the acceptance by the plaintiff of the general public offer made by the defendant. It is quite clear that both at the trial and before us the appellants assumed that the plaintiff would be entitled to bring an action for the prize money against the defendant and to succeed upon shewing the general public offer, the acceptance of it by the plaintiff by entering a qualified horse and running the race and winning it, if nothing more appeared. The real contest at the trial was over the question whether the plaintiff's horses really won the race, that is, whether they came in first and second among the qualified horses which entered the race, and this involved the enquiry whether the horse "Ben More" which came first in fact was a qualified horse according to the conditions of the race which were a term of the general contract. It was clearly assumed at the trial that if "Ben More" was not a qualified horse then the plaintiff's horses won first and second place in the race and should have been awarded the first and second prizes. The question of "Ben More's" disqualification was determined by the trial Judge in favour of the plaintiff, and he gave the plaintiff judgment for the amount of the first and second prizes and for the $100 offered to the owner of the dam of the winner.

It was the first ground of appeal that the learned trial Judge was wrong in deciding that the horse "Ben More" was not qualified according to the conditions of the race. The matter turned upon the proper interpretation to be put upon the expression "trained in the above territory." The fact was that for about two months in the early summer preceding the race "Ben More" had been sent to Cœur d'Alene, Idaho, in charge of some horsemen and had there undergone what the plaintiff alleged to have been

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"training" within the meaning of the word in the condition. Evidence of expert horsemen was given, and I think properly given, as to how the word "training" in such a case would be understood by horsemen taking part in such races. In view of this evidence, and considering the evidence of what was actually done with the horse in Cœur d'Alene, I am of opinion that the learned Judge was right in his view that there had been training in Idaho within the meaning of the condition. This, however, was not very seriously contested by the appellants. But they contended that although there may have been training in Idaho, there had also been training in the stipulated territory and that, therefore, the condition was fulfilled. The condition read as follows:—

CONDITIONS OF RACE.

For foals of 1910—open only to foals owned and foaled in Canada, west of Great Lakes, raced and trained in the above territory.

The view taken by the trial Judge was that by the expression "trained in the above territory" it was meant to be stipulated that the entire training, looked upon as a single indivisible and continuous operation, should have taken place in the territory mentioned, and that, inasmuch as it was shewn that a substantial portion of the training undergone by the horse had taken place in Idaho, therefore, the condition had not been fulfilled. Speaking at the end of the plaintiff's case during the trial the learned Judge said:—

Trained means, I think, in this condition, the entire training. It seems to me that if the horse was trained down in Cœur d'Alene to any extent, to any substantial extent, that there was a breach of the condition.

And he acted upon that view in giving the plaintiff judgment at the end of the trial. With that view I entirely concur. It is scarcely necessary to travel outside the terms of the offer itself, an offer made by an Exhibition Association, one of those associations with whose objects every one is familiar, to discern the purpose of the offer which was made. The horse had to be "foaled, owned, raced and trained in the territory." The purpose to encourage local horse owners is revealed in the very language of that offer. Evidence was given, however, of the origin of the offer, of how it came to be made and of the purpose of it. It

seems to me that, assuming that the meaning of the words in question is uncertain or ambiguous, evidence was admissible, not for the purpose of shewing any individual agreement between the plaintiff and the defendants nor for the purpose of getting any direct prior parol expression of meaning or intention before the Court, but simply to shew the surrounding circumstances, to shew why the defendants came to make the offer which they did and the purpose they were endeavouring to accomplish so that in the light of these surrounding circumstances and of that purpose the Court might interpret the words they used in making the offer to the public. Any other interpretation than that adopted by the trial Judge would have made it possible to take a colt shortly after being foaled in the territory to the United States, have it trained there, passed from one hand to another and then shortly before the race brought back, sold to a person here, trained for a day or so, and then qualified for the race. It is evident even from the document itself that this would have defeated the real purpose of the association. This first contention of the appellants must, therefore, in my opinion, fail.

The appellants also contended that the evidence shewed that the plaintiff had, by filing a protest with, and paying a protest fee of $5 to the officers of the association, thereby submitted himself to their jurisdiction and could not now have recourse to the Courts.

With regard to this contention, it is to be observed in the first place that there was no such contention raised at the trial and it is not referred to in the notice of appeal. In the second place, a similar argument could, I think, with much more force be advanced against the defendants who, when brought into a Court which certainly has a general jurisdiction to try and decide the rights of the parties to the contract themselves assented to having the matter determined there and fought it out upon the broad ground with which I have already dealt. Furthermore, there is really nothing in the evidence to shew that the protest filed by the plaintiff amounted to anything more than an objection that the persons with whom he had made a contract

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were not properly fulfilling it according to its terms. Surely by such a protest or objection a person does not bind himself to accept the decision of the person with whom he has contracted as to the question of the fulfilment of its terms. It is true a fee of $5 was paid, but there is nothing to shew significance of that payment.

The contention I am now considering is really but a form of the further contention that, although no amendment was asked for at the trial and none called for in the notice of appeal, the appellants should be allowed to amend their defence by setting up the plea that

> the race and the regulations under which the race in question was conducted looked to the determination of any such matter as is raised in this action being decided by a committee of the association and that in fact a protest had been lodged and an application had been made to such committee to determine the matter in dispute in this action and that such committee had determined that the horse "Ben More" was not disqualified, but in fact was the winner of the race and that, such determination having been made, it was not competent for the ordinary Courts of justice to reverse the same and that the plaintiff is estopped by his conduct from alleging otherwise.

This passage I have quoted is the form in which the appellants put their requested amendment in a communication to the respondent before the hearing of the appeal. Upon the argument what was asked for was leave to amend and to go to a new trial upon a plea that the rules of the race provided that the decision of the judges or committee should be final. It is to be observed, however, that the proposed amendment as drafted does not so put the matter, but merely uses the very mild expression that rules "*looked to* the determination of the matter by a committee."

There are many difficulties in the way of the appellants. The cases cited in support of the application were either cases of applications before trial or, if on appeal, were cases in which the necessary facts had been proven at the trial, but had unfortunately not been pleaded. The one exception is *Jones* v. *Davenport*, 7 B.C.R. 452, but in that case the fact was admitted upon the argument of the appeal. In the present case the rules were not put in evidence. We do not know what they provide. We

have even now no assertion in any definite form that they, in fact, contain any such provision as it is sought to plead. Judging by the vagueness of the wording of the amendment as proposed in the communication referred to, I should think the probability is that there is no such definite provision at all. In reality we are asked to grant a new trial and allow an amendment merely upon the suggestion that the appellants may possibly be able to establish the plea.

Furthermore, the matter was definitely referred to at the trial. It was suggested by the trial Judge and counsel for the appellants said, referring to the hearing of the protest by the committee, "I do not suppose the hearing would be final." In these circumstances I do not think the application should be allowed.

There is no doubt of the Court's jurisdiction to try such an action. In *Marryat* v. *Broderick*, 2 M. & W. at p. 371, Parke, B., said:—

> The stake, therefore, remains in the defendant's hands until it be determined by due course of law who is the winner—that is, by the stewards, if they are competent to determine it; if not, *by a jury*.

In all the racing cases cited by the appellants there was proven a definite rule that the decision of the stewards should be final. In the present case there was no such rule proven. And for reasons I have given I do not think any opportunity should now be given to offer such proof. The appellants are themselves really in the unfavourable position in which they seek to place the plaintiff. They submitted to the jurisdiction of the Court which undoubtedly had general jurisdiction to try such a matter and said nothing of the existence of another tribunal. They went to trial upon the substantial issue involved. They took their chance of a favourable decision. And now, when the decision is unfavourable, they attempt to say, "Oh, there was another tribunal to which this matter was submitted and the Court should not try it at all." And even to substantiate their assertion that the Court had no jurisdiction, they neither allege nor in any way prove to the Court even by an affidavit the existence of a rule to the effect that the decision of the committee should be final.

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

Appeal dismissed.

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PETERS v. SINCLAIR.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Moulton, Lord Sumner and Sir Joshua Williams. August 4, 1914.

1. EASEMENTS (§ II A—5)—RIGHT OF WAY—BY EXPRESS TERMS—IMPLICATION—SCOPE OF AS TO APPURTENANT LAND.

A right of way will not pass by implication as appurtenant to the land specifically conveyed under the general words of conveyance which under the Transfer of Property Act (Ont.) include all ways, easements and appurtenances belonging to or appertaining to the land where the strip over which the way is claimed adjoins the parcel specifically conveyed, and the fee thereof was in the grantor, if the strip had not been in use as a way *de facto* to the specific parcel, although a right of way over it had been expressly granted to purchasers from the same grantor of lands on the other side of the strip and at the end of same.

[*Peters* v. *Sinclair*, 13 D.L.R. 468, 48 Can. S.C.R. 97, affirmed on appeal.]

2. HIGHWAYS (§ I A—7)—DEDICATION—INTENTION—EASEMENTS.

Dedication as a public street is not shewn in the absence of express grant as regards an unimproved strip forming a *cul de sac* in a sub-divided tract by references to it in conveyances made by the common owner to purchasers of lots on one side thereof as a "street" over which an express right of way was granted to each, while no reference was made either to a street or right of way in the conveyance of land in one parcel abutting on the other side of such strip made by the common grantor.

[*Peters* v. *Sinclair*, 13 D.L.R. 468, 48 Can. S.C.R. 97, affirmed on appeal.]

Statement

APPEAL by the defendant from the judgment in appeal of Supreme Court of Canada, *Peters* v. *Sinclair*, 13 D.L.R. 468, denying defendant's claim to a right of way either by implied grant or by dedication.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—This was an action of trespass brought to determine the claim of the defendant to open a gate from his property into Ancroft Place in the City of Toronto (the solum of which belongs to the plaintiff in fee), and to pass freely, in and out, to Sherbourne St. and the rest of the city. In substance, the defendant's case was either that Ancroft Place had been dedicated as a public street, or alternatively that he had a right of way over it, appurtenant to his house and grounds, resting on prescription. Thrice he was defeated; before Sutherland, J., the trial Judge, in the Court of Appeal of Ontario, by the unanimous judgment of four members of the Court, and in the Supreme Court of Canada, two members of that Court out of five dissenting.

Three judgments of three Courts have decided that in fact there was neither dedication nor user giving a right by prescription. Leave to appeal to their Lordships' Board was granted on the suggestion that the case raised important questions of law as to the right of purchasers of building plots to have access to the roads adjoining them. No doubt such questions are of wide interest and considerable importance, if the facts raise them for decision, but whether they are raised or not is the real question in the present case. Ancroft Place is a *cul de sac* about fifty feet wide and about thrice as long, which forms part of what was originally lot 22 on a certain registered plan of land in the outskirts of Toronto. Roughly its direction is east and west. The defendant's property is on its northern side. He derives his title to it by various mesne assignments from one McCully, to whom a Mrs. Patrick sold it in 1887. The question on this appeal depends on the condition of Ancroft Place (then known as Rachael St.) and of the neighbouring plots in 1887, and on what McCully thought and was told about them at and before the time of the purchase. The evidence on this question was but a small and very subordinate part of the whole case presented to the trial Judge.

Mrs. Patrick, or her deceased husband before her, had at one time owned the whole of lot No. 22. Before 1887 it had all been sold, except the site of Ancroft Place and the plot which McCully bought. Three separate plots had been created and disposed of, two on the south side of Ancroft Place and one which was reached from its eastern extremity, and all three enjoyed rights of way over it by express grants in which it was called a "street" or "road." After the transaction with McCully, Mrs. Patrick had no further interest in lot 22 except her ownership of the solum of Ancroft Place, which in itself as subject to these servitudes was probably of little or no value. Of course it was of value to the owners of the plots to the south and east of it, and in fact the respondent did, not long before his action was begun, get in Mrs. Patrick's title to the site of Ancroft Place for a nominal consideration and claims it to be private and free from any servitude or right in favour of the defendant.

The argument for the appellant rests (*a*) on an estoppel *in pais*, consisting of parol statements made by Mrs. Patrick's selling agent to Mr. McCully, his predecessor in title, just before

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the sale in 1887; (*b*) on an estoppel, arising at the same time, out of the alleged fact that this *cul de sac* then looked like a street and apparently accommodated the plot, which McCully proceeded to buy; and (*c*) on the existence of a way *de facto*, which, being enjoyed with that plot as parcel thereof, would pass with it under ch. 119 of the R.S.O., sec. 12 (R.S.O. 1914, ch. 109, sec. 15). These arguments require as their foundation that certain facts should be established, namely, (*a*) that Mrs. Patrick's agent said what he is alleged to have said and had her authority to do so; (*b*) that the *locus in quo* bore the appearance alleged and that McCully bought on the footing of it; and (*c*) that there actually was a way from Ancroft Place on to the plot now owned by the defendant which was enjoyed with it. The trial Judge did not find any of these facts in the defendant's favour, and it is doubtful if he was ever asked to do so as separate issues. The further the case was carried the more concurrent findings there were against the defendant on the issues really pressed, to wit, dedication and prescriptive right, and the more it became worth while to make these matters separately prominent, and eventually the dissentient members of the Supreme Court treated them, or some of them, as established by the evidence. It is not necessary to examine the appellant's legal argument resting on these facts until it is clear how far this basis of fact is made good, and how far it fails.

McCully, who was examined 24 years after the event and apparently had never had any occasion to recur to this aspect of it in the meantime, testified that he went to Mrs. Patrick's agent, a lawyer whose name and address he was quite unable to recall, having seen this place, "which was being laid off as a street then." He says that he asked if it was a street and got the answer "yes"; that he said, "if I purchase it, it won't be any difficulty about it at all," and was told "No difficulty." Only one thing about this latter statement is clear, namely, that whatever it meant it was a statement *de futuro* and apparently in the nature of a promise. The conveyance contained no such promise and expressed no undertaking with regard to Rachael St. as it was then called, nor did it even name it. This representation may, therefore, be disregarded. The other statement, that it was a street, is very inconclusive. As the "street" was then

"being laid off as a street," this also seems to be a statement about an intention *de futuro*, but it is enough to say that there is no evidence that, if the statement was made at all, the agent had any authority to make it. Nobody called this nameless agent or gave evidence that he might have been traced. Nobody called Mrs. Patrick. As the conveyance said nothing about this "street" or any rights over it, the inference, if any, would be that the vendor had not authorised her agent to say anything about it, for rights over it formed no part of what she wished to sell. Idington, J., and Duff, J., for reasons which seem to their Lordships anything but cogent, accept McCully's evidence as given, press it somewhat to extremity and then infer this anonymous agent's authority in fact, because the plaintiff called no one to prove that he had none. The trial Judge and all the other members of both the Courts of Appeal either ignore this evidence or treat it as inadequate, and, in their Lordship's opinion, it fails to establish the facts required to raise the first point (*a*) above mentioned.

What this "street" looked like at the time of McCully's transaction in 1887 is left very vague. Though there is plenty of evidence about its subsequent state, given because the defendant's chief case was dedication, its state at this date was spoken to by very few of the witnesses. The conveyances of the plots previously sold speak of it as a fifty-foot street, and one of them has a plan, on which it is so laid out. In 1887 it would seem, from the evidence of Mr. Unwin and of McCully, who alone really deal with it, that it was neither macadamised nor planked; there was a track for waggons up the middle but no sidewalk, and there were fences on each side, north, south, and east. It was Unwin himself who, without authority from or communication with the owner, then not even resident in Toronto, for his own convenience dubbed it "Rachael Street," whether just before or soon after McCully's purchase is not clear. Previously the place was called "69 x 370," which might mean anything. James Dickson, McCully's successor in title, says that when he bought in 1888 "it was a kind of a mud road," and that "there were no improvements done to it at the time." It may be assumed that at some time prior to the end of 1884 Mrs. Patrick or her husband intended this rough cartway to be a street sometime and contemplated that an access over it might be granted to the property abutting on it,

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which McCully afterwards bought. By 1887 she may have changed her mind. Certainly she named neither street nor right of way in her conveyance to McCully. Afterwards acts were done which were no doubt some evidence of a user of the "street" by McCully's successors as of right, and might serve to shew that she had not changed her mind between 1884 and 1887 as she never objected to them. Still it must be remembered that the sale to McCully finally disposed of the original lot 22 as far as she was concerned; that she could not sell the site of the street for building purposes as it was subject to three rights of way by express grant; and that accordingly it was a matter of indifference to her who used the street and whether it was done as of right or by indulgence.

The appellant's point on this part of the case was that McCully saw marked out on the ground what he took to be a street, and what was planned as a street, that he bought the property abutting on it upon the faith that it was a street in being, to which his purchase would have an access as of right, and that accordingly Mrs. Patrick and those who claim through her cannot deny to him and his successors in title the full benefit of this apparent accommodation.

The value of the facts which have been supposed to raise this argument may be tested by referring at once to the appellant's remaining point. He alleged that just before McCully bought the property in 1887 there was a way of communication actually existing and in actual use between Rachael St. and the site in question, so that, although Mrs. Patrick enjoyed it as proprietor of both pieces of ground and not as one entitled to a servitude over another's soil, it would actually be appurtenant to the plot, which McCully bought, because it existed and did appertain to it, and so by force of the statute passed under the general words of the conveyance or merely by implication.

Now there was no such way, and even McCully did not pretend that he had seen one. Rachael St. was not a way to the appellant's plot but a way past it to other people's plots. The appellant's plot was fenced off from Rachael St.; the fence, if rotten, was continuous and unbroken; there was neither gate nor gap in it. The fences on the other side of Rachael St. had gates in them, because the plots on the other side enjoyed easements over the street appurtenant to them. The northern plot had no gate and it had no communication or way either. The evidence is quite

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clear as to this, and, except for one witness, a vague and self-contradictory person, it was uncontradicted.

Not only does the argument (*c*), based on this supposed third fact, fail *in limine* for want of foundation, but the truth about it greatly strengthens the conclusion, already pretty clear, that there was really no such demarcation of a street or appearance of one on the ground, as would be necessary to raise the appellant's contention (*b*), whatever it may be worth. What McCully saw was merely an oblong strip of ground, open at one end and fenced on three sides. There were two or three gates in the fences, but none in the northern one which alone concerned him, and the surface was somewhat cut up with cart wheels, and consisted of mud. This could not in law entitle him to assume that what his proposed purchase abutted on was a road or street, to the use of which he would be entitled, if he bought the plot; nor can his successors in title eke out some right to use this access from the fact that Mrs. Patrick granted to others an express right of way, which McCully either did not venture to ask for or at any rate did not get.

Their Lordships are of opinion that this appeal raises no question of law requiring examination, but that it fails on the facts. They are not disposed to draw conclusions in the appellant's favour from the evidence, which should have been drawn by the trial Judge, if at all, nor, if they were, could they find sufficient materials for such conclusions in the evidence as it stands. They will accordingly humbly advise His Majesty that this appeal ought to be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. CONTRACTS (§ III C 5—262)—OF PUBLIC OFFICERS — COMPENSATION — SPECIALTY CONTRACT—STATUTE OF LIMITATIONS.

A claim for unpaid salary by a public school inspector is a claim in debt on the statute, hence a specialty contract and not barred for twenty years under 10 Edw. VII., ch. 34, sec. 49, although the facts bringing the defendant within the liability of the Act may be *dehors* the statute.

[*Cork and Bandon R. Co.* v. *Goode* (1853), 13 C.B. 826, *Shepherd* v. *Hills* (1855), 11 Ex. 55, 105 R.R. 386, followed; *Ross* v. *Grand Trunk R. Co.*, 10 O.R. 447, *Essery* v. *Grand Trunk R. Co.*, 21 O.R. 224, *Beatty* v. *Bailey*, 26 O.L.R. 145, *Magherafelt* v. *Gribben*, 24 L.R. Ir. 520, referred to.]

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2. OFFICERS (§ II B—80)—SALARY — PAYMENT AND ACCEPTANCE OF A SMALLER AMOUNT—EFFECT—ESTOPPEL, HOW NEGATIVED.

A public school inspector appointed prior to the Public School Consolidation Act, 1896, is entitled to remuneration at the rate of $5 for every teacher occupying a separate room with a separate register, and the fact that he has accepted a different rate of pay for many years, does not estop him from suing for his arrears of salary, his rate of pay being a fixed one, as well known to the council as to himself, and the council not prejudiced by reason of his conduct in the matter.

3. OFFICERS (§ II B—82)—COMPENSATION—INCREASE OR REDUCTION OF—AGREEMENT AS TO—VALIDITY.

The Public School Consolidation Act, 1896, makes it obligatory on the County Council to pay public school inspectors a fixed rate and no agreement with the inspector as to salary is necessary, nor would such an agreement be legal, if made for a smaller remuneration than the statute provides, as defeating its purposes.

4. SCHOOLS (§ I—1)—THE WORD "SCHOOL" DEFINED—ONTARIO PUBLIC SCHOOL ACTS.

The word "school" as used in the Ontario Public School Acts prior to that of 1896 is not *primâ facie* to be interpreted as meaning "department" for which there is a teacher occupying a separate room with a separate register, but is to be given its ordinary and popular meaning—a place or establishment for instruction.

Statement

APPEAL by the plaintiff (by revivor) from the judgment of BRITTON, J., at the trial (without a jury), dismissing the action, which was originally brought against the Corporation of the County of Oxford by William Carlyle, who was public school inspector of the county of Oxford from the 1st July, 1871, to the 31st January, 1910, to recover arrears of salary alleged to be due to him for the years 1876 to 1904, both inclusive, and interest on the arrears.

William Carlyle died pending the action, and it was continued by his widow as administratrix of his estate, and, upon her death, by the appellant as administratrix *de bonis non*.

The defendant corporation denied that anything was due to the deceased, and pleaded the Statute of Limitations.

The deceased was appointed inspector by by-law of the defendant corporation, passed on the 8th June, 1871, which provided that his remuneration should be $5 per school per annum and a stated allowance for travelling expenses.

By sec. 10 of the Public Schools Act then in force, 34 Viet. ch. 33, it was provided that the remuneration of a county inspector should be not less than $5 per school per annum, and the council was given authority to determine and provide for the allowance of travelling expenses.

The principal point in controversy was as to the meaning of the word "school" in sec. 10 and subsequent enactments.

The appeal was allowed.

W. M. Douglas, K.C., and *W. T. McMullen*, for the appellant.

James Bicknell, K.C., and *S. G. McKay*, K.C., for the defendant corporation, the respondent.

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January 12, 1914. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 30th May, 1911, which was directed to be entered by Britton, J., after the trial of the action before him, sitting without a jury, on the previous day.

The deceased William Carlyle was public school inspector of the county of Oxford from the 1st July, 1871, to the 31st January, 1910; and the action was brought by him to recover arrears of salary alleged to be due to him for the years 1876 to 1904, both inclusive, and interest on the arrears.

The respondent, besides denying that any arrears of salary were due to the deceased, pleads the Statute of Limitations in bar of the action.

Pending the action, William Carlyle died, and it was continued by his widow as administratrix of his estate, and upon her death the action was continued by the appellant as his administratrix *de bonis non*.

The deceased was appointed to office by by-law passed on the 8th June, 1871, which provides that his remuneration shall be $5 per school per annum and a stated allowance for travelling expenses.

By the school law then in force, 34 Viet. ch. 33, sec. 8, every county council was required to appoint a public school inspector, subject to dismissal at the pleasure of the council; and by sec. 10 it was provided that the remuneration of a county inspector should be not less than $5 per school per annum, and the council was given authority to determine and provide for the allowance for travelling expenses.

The main question to be determined is as to the meaning of

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the word "school" as used in sec. 10 and in the provisions as to the remuneration of county inspectors in the various Public Schools Acts, down to that of 1896.

It appears that from the year 1871 the Department of Education treated every department of a school for which there was a teacher occupying a separate room with a separate register as a "school," within the meaning of the Acts, and the Government grants were paid on that basis.

The respondent appears in the earlier years to have taken the same view, and the deceased was paid accordingly, although some question appears to have arisen before 1876 as to the proper basis for determining the remuneration. In 1876, the council came to the conclusion that the basis which had been adopted was erroneous, and directed the treasurer to pay for schools only, and not for departments; and from that time on, during the whole of the period for which the claim is made, the deceased was paid on that basis.

The public school law was consolidated in 1874 by 37 Vict. ch. 28 (The Consolidated Public School Act of 1874), which made no change in the provision of the existing law to which I have referred, except as to the tenure of the office; and the provision as to it was, that an inspector should be subject to dismissal by a majority of the council in case of misconduct or inefficiency or by a vote of two-thirds of the council "without such cause" (sec. 105).

No change in the law was made in the consolidation of 1885, 48 Vict. ch. 49 (The Public Schools Act, 1885), except that the provision as to the remuneration of county inspectors was recast (sec. 182), and was made to read: "It shall be lawful for the Lieutenant-Governor to direct the payment, out of the Consolidated Revenue Fund, of a sum, not exceeding five dollars per school per annum, to each county inspector, and the county council shall pay quarterly at the rate of not less than an equal amount per school, and in addition thereto the reasonable travelling expenses of such county inspector, the amount to be determined by the county council."

In the revision of 1887 (The Public Schools Act, R.S.O.

1887, ch. 225), the provisions of the Act of 1885 were re-enacted as secs. 176, 180, and 181.

The public school law was again consolidated in 1891, 54 Viet. ch. 55, but no change affecting the question under consideration was made in these sections, which appear in the Consolidated Act as secs. 150, 152, and 153.

In the consolidation of 1896 (The Public Schools Act, 1896), 59 Viet. ch. 70, no change was made except as to the remuneration, and the provision as to it (sub-sec. 8 of sec. 82) was, that "the county council shall pay quarterly to every county inspector at the rate annually of $5 for every teacher occupying a separate room with a separate register, and, in addition, reasonable travelling expenses, such expenses to be determined by the county council."

It is unnecessary to trace further the subsequent consolidations of the public school law; but for the purposes of the case it is sufficient to say that no change affecting the question between the parties was made, and that in the Act of 1901 the provisions as to the dismissal and remuneration of county inspectors are substantially the same as in the Act of 1896.

Why, after the passing of the Act of 1896, which required the council to pay the inspector at the rate annually of $5 for "every teacher occupying a separate room with a separate register," the deceased was not paid on that basis, does not appear, but the fact is that he was not so paid, but was paid according to the number of schools only, not departments.

After the action of the council in 1876 to which I have referred was taken, until the year 1909, beyond a protest in 1876 or the following year, nothing was done by the deceased, at all events by way of formal protest, to indicate that he did not acquiesce in the conclusion to which the council had come as to the measure of his remuneration; but, on the contrary, he accepted payment throughout on the basis that it was to be paid according to the number of schools only, not departments; and, according to the testimony of the treasurer, the practice was for the deceased himself to "figure out" the amount to which he was entitled and for the treasurer to pay him "according to his own statement;" and in the case of substantially all the payments

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the deceased gave receipts acknowledging the sums paid "as salary" for the periods for which they were made, and in some cases stating that the payment was in full.

It was contended, without success, before my brother Britton, that the word "school," as used in the Acts prior to that of 1896, is to be interpreted as meaning "department" for which there is a teacher occupying a separate room with a separate register, and the same contention was made on the argument of the appeal.

I am of opinion that this contention is not well-founded, and that the word "school" is to be given its ordinary and popular meaning—a place or establishment for instruction (the Oxford English Dictionary). According to the same authority, the word is "applied (with defining word as upper, lower school) to a division of a large school comprising several forms or classes."

The word "department" involves the idea of something which forms part of a larger thing, and, in the case of a school, of part of a school, just as in the case of a "departmental store" there is but one "store," although it comprises several departments, or in the case of a faculty of a college or university there is but one faculty, although it comprises several departments. So, in the case of a school, there is but one school, although it may comprise several departments.

If once the primary meaning of the word "school" is departed from, where is the line to be drawn? What part of a school is embraced in the term? Why a department for which there is a teacher having a separate room and with a separate register? Why not a class or form? And what is a "department?" It will be observed also that, when the law was amended in 1896, nothing was said about "departments," but the provision is that the $5 per annum shall be paid for "every teacher occupying a separate room with a separate register," and I think it is quite impossible to give that meaning to the word "school" as used in the previous Acts.

That it was the duty of the respondent, after the Act of 1896 was passed, to have paid the deceased $5 for every teacher occupying a separate room with a separate register is not open

to question; and the appellant is entitled to recover the amount claimed for arrears from the time that Act came into force, unless the Statute of Limitations is a bar to her action, or the conduct of the deceased was such as to estop him and his personal representative from making the claim, or the receipt of what was paid to him operated by force of para. 8 of sec. 58 of the Judicature Act (R.S.O. 1897, ch. 51)*, to extinguish the obligation of the respondent.

If the claim of the appellant is upon a specialty, her cause of action is not barred, for the period of limitation is 20 years: 10 Edw. VII. ch. 34, sec. 49(*b*).

Under the old forms of pleading a declaration in debt upon a statute was a declaration upon a specialty (*Cork and Bandon R.W. Co.* v. *Goode*, 13 C.B. 826), and "not the less so because the facts which bring the defendant within the liability, are facts *dehors* the statute:" *per* Maule, J., at p. 835; or because assumpsit or case would also lie (*ib.*)

That case was followed in *Shepherd* v. *Hills*, 11 Ex. 55, 105 R.R. 386, in which it was held that an action for the recovery of rates and duties which were imposed by the trustees for the improvement of Ramsgate Harbour, under the authority of a statute which provided that the rates and duties should be paid by the master or owner of every ship or vessel of a certain burthen passing to, from, or by Ramsgate, being an action on a specialty, the period of limitation was 20 years. In delivering judgment Parke, B., said, p. 67: "There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for recovery, unless the Act contains some provision to the contrary;" and, referring to the defence of the Statute of Limitations, "according to the case of *The Cork and Bandon R.W. Co.* v. *Goode*, this being an action on a statute, there is the same period of limitation as in an action on a record or specialty."

Cork and Bandon R.W. Co. v. *Goode* has also been followed

*Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

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and applied in this Province, in *Ross* v. *Grand Trunk R.W. Co.*, 10 O.R. 447, and *Essery* v. *Grand Trunk R.W. Co.*, 21 O.R. 224, in the case of claims for compensation for lands taken by railway companies; and in *Beatty* v. *Bailey*, 26 O.L.R. 145, in the case of a covenant included or implied by virtue of the Land Titles Act; and was also followed by an Irish Court in *Guardians of the Poor of the Union of Magherafelt* v. *Gribben* (1889), 24 L.R. Ir. 520.

There are, no doubt, cases in which a statute enables an action to be brought which nevertheless is not an action on the Act of Parliament, as was said in *In re Manchester and Milford R.W. Co.*, [1897] 1 Ch. 276, 282, by Stirling, J., who treated *Tobacco Pipe Makers' Co.* v. *Loder* (1851), 16 Q.B. 765, as an illustration of this, and as having been decided on the ground that "the defendant had incurred the liability of the penalty" for the recovery of which the action was brought "by becoming a member of the company, and thus impliedly contracting to fulfil the obligations imposed by the by-laws on the members of the company," and added: "If in the present case it had been necessary, in order that the Manchester and Milford Railway Company should incur liability, that that company should do some Act, as, for example, use the joint line or station, then there would have been much ground for contending that the case fell under the principle of the *Tobacco Pipe Makers' Co.* v. *Loder*; but the decision of the Queen's Bench Division shews conclusively that the liability of the Manchester and Milford Railway Company became absolute without any act on the part of that company."

As I understand the judgment in *Tobacco Pipe Makers' Co.* v. *Loder*, the conclusion was, that the liability of the defendant was grounded on the consent to become a member of the company so as to incur the liability imposed upon its members; that such consent was in effect a contract without specialty; and so action thereon was barred in six years after the cause of action was complete. See 10 Edw. VII. ch. 34, sec. 49(*g*).

In *Thomson* v. *Clanmorris*, [1900] 1 Ch. 718, the question was as to the limitation of time for bringing an action against

directors of a company to recover damages, on the ground that untrue statements were contained in the prospectus of the company, on the faith of which the plaintiff had subscribed for shares. By sec. 3 of the Directors' Liability Act, 1890, the liability is to pay compensation to all persons who subscribe on the faith of a prospectus for the loss or damages sustained by reason of untrue statements in it. It was unnecessary to decide whether the period of limitation was 20 years or 6 years, but the Master of the Rolls (Lindley) and Vaughan Williams, L.J., expressed the opinion that, under the old form of pleading, an action on the case for breach of duty would have been the proper remedy, and 6 years the period of limitation. After expressing that opinion, the Lord Justice went on to say (p. 728): "But it is said that this is not an action on the case, but an action on the statute, and *Cork and Bandon R.W. Co.* v. *Goode* is relied on. But it must be remembered that there the action was for a statutory debt, and the sole question was whether that debt was, within the terms of sec. 3 of the Statute of James, 'grounded on a contract without specialty.' . . . Maule, J., pointed out that there is a difference between an action which is given by a statute and an action on the statute. *Cork and Bandon R.W. Co.* v. *Goode* was an action of debt on the statute. And, as I have already said, the only question there really was whether the action came within the words of sec. 3 of the statute of James. In the present case it seems to me that a new duty of accuracy in respect of the preparation and issue of prospectuses is created, and an action on the case is given to those persons who are injured by the breach of that duty."

In *Mayor, etc., of County Borough of Salford* v. *County Council of Lancashire*, 25 Q.B.D. 384, the liability of the defendant, if it existed, was to pay out of a particular fund, and Lord Esher said (p. 388) that such a liability "is enforced by action on the case, and not by action for debt on the statute," and that "to such an action the six years' limitation of the Statute of Limitations would apply." The view of Lindley, L.J. (pp. 389—390), was that, "unless these Justices are incorporated, there is no simple obligation to pay, enforceable

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by an ordinary action. It is said that the plaintiffs have a right to this money; this may be true; but their right is not an absolute right in the sense in which a creditor is entitled to be paid by a debtor—but a right under certain circumstances and under certain conditions, and those circumstances and those conditions modify the remedy and affect the right materially." And Lopes, L.J., was of opinion (p. 391) that, if an action had lain, the proper mode of proceeding would have been by an action on the case, not of debt, and that the Statute of Limitations would have been an answer to any claim arising more than six years before action.

The case at bar falls, I think, within the principle of *Cork and Bandon R.W. Co.* v. *Goode*. The obligation to pay imposed by the statute of 1896 is absolute, and does not depend upon contract. "The county council shall pay to every county inspector." The inspector is not an ordinary officer of the corporation, and his only duties are those imposed upon him by or under the Public Schools Act. The county council has nothing to do with the conduct or management of the public schools, but a duty is imposed upon it to appoint a public school inspector, and the council is required to pay him the remuneration for which the statute provides, and no arrangement between the council and the inspector as to salary is necessary. Having appointed the inspector, the operation of sec. 82 is automatic, and the command of the Legislature is that the council shall pay him as sub-sec. 8 provides.

It is to be observed that, so far from there being any contract to pay the remuneration provided for by sub-sec. 8, the by-law under which the deceased held his office from 1896 to 1904—by-law number 316, passed on the 17th June, 1889—provides that "the sum of $5 per school per annum be paid quarterly by the county treasurer to the said inspector of public schools as remuneration for his services as such inspector."

Upon the whole, I am of opinion that the action is an action of debt on the statute, and that 20 years is the period of limitation applicable to the appellant's claim.

I am also of opinion that the appellant is not estopped

from asserting her claim for the arrears. What the deceased was entitled to be paid was as well known to the respondent as to him, and the respondent did not act to its damage in consequence of anything said, done, or omitted by the deceased.

I agree with the contention of Mr. Douglas that an agreement for the payment to an inspector of less than the statute provides shall be paid to him would be an illegal agreement. It is manifest that the Legislature, no doubt having in view the importance of proper inspection of the public schools, was not willing to leave it to the county councils to determine the amount of the remuneration to be paid to the inspectors, and the purpose of the enactment would be entirely defeated if it were open to a county council to contract with its inspector that he should serve for a less remuneration than that for which the statute provides.

The principle upon which *Corporation of Liverpool* v. *Wright* (1859), 28 L.J. Ch. 868, was decided by Wood, V.-C., is, in my opinion, applicable. In that case, acting under the authority of a statute, the plaintiff had appointed the defendant clerk of the peace to the borough. Besides having the power of appointment, the plaintiff had also power under the statute to prescribe the fees pertaining to the office. In making the appointment, it was made a term of it that the defendant should be paid a stated salary, and that, if the fees of the office, after deducting disbursements, should exceed the amount of the salary, the surplus should be placed to the credit of the borough fund. The defendant having refused to pay the surplus as he had agreed, the plaintiff filed a bill for an account of the fees. The bill was demurred to, and the demurrer was allowed, because the agreement was void on two grounds of public policy: (1) because a person accepting an office of trust can make no bargain in respect of that office; and (2) because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office.

Although the nature of the employment, the tenure of office, and to some extent the manner in which the defendant was to

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be remunerated, differ from the nature of the employment, the tenure of office, and the manner of remunerating public school inspectors, the cases are alike as to the appointing power, and as to the remuneration being in the nature of a fee or allowance for services performed, and in the case at bar there is the additional reason which I have mentioned for holding that an agreement to pay less than the prescribed remuneration would be contrary to public policy, viz., that it would be prejudicial to the public interest and would have the effect of frustrating the object which the Legislature had in view to accomplish by prescribing what should be the remuneration of the public school inspectors, and the differences to which I have referred are not, I think, sufficient to prevent the principle of the Vice-Chancellor's decision being applicable to the case at bar.

If I am right in this view, the defence founded on the alleged estoppel fails on this ground, as well as for the reasons I have already mentioned, and the provisions of para. 8 of sec. 58 of the Judicature Act (R.S.O. 1897, ch. 51), even if otherwise applicable, cannot be invoked to defeat the appellant's claim.

For these reasons, I am of opinion that the appeal should be allowed and the judgment of my brother Britton reversed, and that judgment should be entered for the appellant for the amount of the arrears claimed for the years 1896 to 1904, both inclusive, without interest, and that the respondent should pay the costs of the action and of the appeal.

Appeal allowed.

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Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 30, 1914.

1. APPEAL (§ VII L 2—477)—CRIMINAL LAW—REVIEW OF CONVICTION ON QUESTION OF LAW—SUFFICIENCY OF EVIDENCE.

Although the evidence of theft is contradictory and unsatisfactory in the opinion of the Court determining merely the question of law on a case reserved as to the sufficiency of the evidence to sustain a conviction, the Court will uphold the finding of guilt if supported by sufficient legal evidence.

CROWN case reserved on a charge of theft.

The conviction was affirmed.

E. B. Cogswell, K.C., for the Crown.

J. M. McDonald, for the accused.

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The judgment of the Court was delivered by

STUART, J.:—It seems to me after reading the evidence in this case that the only way in which an inference of guilt could be made is by finding some facts which tend to prove that the three loads of hay which the accused was seen to be drawing did not belong to him; in other words, that there could not possibly have been at that date any hay at the stacks in question which belonged to the accused. The fact that the complainant Pugh did not get all the hay he expected is of no weight when it is admitted that he was not there from October to January and that fifteen tons in any case had been eaten by cattle. Other people may have taken the hay.

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Now, in the first place, the evidence is very meagre from which the Court was asked to infer that at the so-called division, there was ever any definite assignment of certain stacks as belonging to each of the parties. At that time stack three had been drawn away by the accused and part of stack one. These two together would give just about the amount of hay that the accused was to get. I think the evidence was perhaps sufficient to justify an inference that these two stacks were considered as constituting the share of the accused. It would be one ton short, but the complainant managed to buy that ton from the accused leaving it on the other stacks. If it were not for the possibility of making this inference (though the fact was not directly stated by Pugh) I think there would be nothing in the case at all, because in my opinion everything depended on that fact being established. If it were not established, then there would be nothing to shew that the three loads the accused drew in February might not have been really his own; because the balance of stack one might have been eaten up by cattle or stolen by some one else for that matter. It is true that Pugh said the balance of

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this stack was drawn away by the accused within a week or ten days after the 21st of October, but he admitted that he was not there again until January 1st or 4th, and, therefore, his evidence on that point must have been hearsay. He said the balance of stack one was gone on January 4th but there is really nothing to shew who took it. It is, therefore, really only upon the fact that the balance of stack one was assigned and appropriated definitely to the accused that the case against him depends. Yet Pugh never swore directly to that fact.

With regard to the inference to be drawn from Pugh's calculations and statements of the amount he was short, in my opinion, they are absolutely worthless. He admits himself that fifteen tons of the hay was eaten by cattle. How does he know that some more might not have been eaten? There is nothing to shew this. In one place, also, he says he got 7½ tons from stack 4 and in another place that 7½ tons out of that stack were eaten by cattle. Yet there were only 10⅞ tons in it altogether.

However, if stack one was definitely assigned to the accused upon the so-called division and it was all gone in January, then it is possible to infer that the three loads he was taking in February did not belong to him and so to infer guilt. To me the evidence is, as I read it, most unsatisfactory, but it might, as I can easily understand, make a different impression on the mind of a trial Judge, who heard it given orally.

With some regret, therefore, I think the conclusion ought to stand. I may add that it is, in my opinion, very unfortunate that the accused was not permitted by his counsel to go into the box and tell his own story of the affair.

Conviction affirmed.

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Nova Scotia (County Court for District No. 6), MacGillivray, J. August 11, 1914.

1. JUSTICE OF THE PEACE (§ I—2)—APPOINTMENT—TERRITORIAL JURISDICTION.

Although the authority of county justices of the peace is confined to the limits of the county for which they are named, it does not necessarily extend to all places within the county, if there be any district therein which possesses a separate and exclusive jurisdiction; and if concurrent jurisdiction is to be exercised by the county judges in such separate jurisdiction the commission should so state in express words such as the phrase "as well within liberties as without."

[Paley on Convictions, 7th ed., 34, referred to.]

2. INTOXICATING LIQUORS (§ III J—91)—TRIAL OF OFFENDERS—EXCLUSIVE JURISDICTION OF TOWN STIPENDIARY MAGISTRATE — NOVA SCOTIA TEMPERANCE ACT, 1900.

The provision of the Towns Incorporation Act, R.S.N.S. 1900, ch. 71, secs. 233 and 234, whereby a police office is established where "all the police business of the town shall be transacted," and whereby the police court is presided over by a stipendiary magistrate for the town exercising therein "all the jurisdiction of two justices of the peace or a stipendiary magistrate" has the effect of establishing a separate and exclusive jurisdiction and of taking away the jurisdiction of county justices to try an offence against the Nova Scotia Temperance Act 1900, where the commissions to county justices do not expressly include the town, and this although the Temperance Act provides that prosecutions thereunder may be brought before "any magistrate" having jurisdiction where the offence was committed and defines magistrate as a "stipendiary magistrate or two justices."

3. INTOXICATING LIQUORS (§ III A—55)—UNLAWFUL SALES—PROVINCIAL CRIMINAL LAW—CRIMINAL OFFENCE.

The unlawful sale of intoxicating liquor in contravention of the Nova Scotia Temperance Act 1900, is a "criminal offence" against a provincial criminal law.

[*Re McNutt*, 21 Can. Cr. Cas. 157, 10 D.L.R. 834, 47 Can. S.C.R. 259, applied].

Statement

APPEAL by the defendant from his conviction for selling intoxicating liquor in his hotel in the Town of Inverness, contrary to the provisions of the Nova Scotia Temperance Act, 1910.

The conviction was quashed.

J. L. McDougall, for appellant.

Danl. McNeil K.C., for respondent.

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JUDGE MACGILLIVRAY:—The Town of Inverness, within the County of Inverness, is incorporated under the provisions of the Towns Incorporation Act, Chapter 71, R. Stats. N.S. 1900. The accused was tried and convicted by and before two Justices of the Peace in and for said county, sitting in said town.

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The defendant appealed from the conviction, and in his notice of appeal states a number of grounds, the first and principal of which is that:

"The Justices of the Peace who tried this cause and made the conviction had no jurisdiction to try the cause or make the conviction."

A number of other grounds are taken: that the Justices are resident ratepayers of the town; that the conviction is against law and evidence; no evidence; defendant not charged as "owner" or "occupant."

Under the procedure as provided by the Act, the evidence in the Court below is evidence on this appeal. On reading the evidence and applying the law, I find against all the grounds taken except the ground first above stated.

Counsel for the defendant in support of this ground contends that the Stipendiary Magistrate, a functionary presiding in the police office of the town, is the only tribunal which could legally take cognizance of any offence against the provisions of the Temperance Act. He cites the provisions of the Towns Incorpora, tion Act, respecting the erection and constitution of municipal courts-the provision of the Act respecting the appointment of Stipendiary and Deputy Stipendiary Magistrates for incorporated towns respecting the establishing of a police office in the town and the duty of the Stipendiary Magistrate to preside therein, and respecting the prosecution for criminal offences and penalties therefor.

He argues that the effect of all these provisions is that prosecutions for penalties, for violating the provisions of the Nova Scotia Temperance Act, should be brought before the town magistrate when the offence is committed within an incorporated town, who, he contends, has exclusive jurisdiction to try such offences.

Counsel for the Crown cites sub-section 2 of section 35 of the Act to the effect that, "such prosecution may be brought before any magistrate having jurisdiction where the offence was committed"; and refers to the interpretation clause of the Act which reads, "Magistrate means a Stipendiary Magistrate or two Justices of the Peace."

He argues that two Justices of the Peace have concurrent

jurisdiction with the Stipendiary Magistrate of the town to hear and determine the complaint against the defendant.

The question to be decided on this appeal is: Have the two Justices of the Peace who heard the complaint of John A. McLeod, Inspector of the Nova Scotia Temperance Act for the Town of Inverness, who says he has just cause to suspect and believe that Dan. R. Cody (the defendant) of said town "did unlawfully sell intoxicating liquor without the authority by law required and contrary to the provisions of the Nova Scotia Temperance Act and Acts in amendment thereof," concurrent jurisdiction with the Stipendiary Magistrate presiding in the town police office to hear and determine the charge preferred against the accused?

The offence charged is a criminal one committed within the incorporated Town of Inverness. In *Re McNutt*, 47 Can. S.C.R. 259, 21 Can. Cr. Cas. 157, 10 D.L.R. 834, the Supreme Court of Canada hearing an appeal from the Supreme Court of Nova Scotia affirming the judgment of the Judge who refused to discharge the appellant from imprisonment on a conviction for keeping liquor for sale in violation of the Nova Scotia Temperance Act, decided that such violation is a criminal offence.

"We have therefore in this case all the necessary elements of an offence against what has been not inaptly described as a provincial criminal law"—per Fitzpatrick, C.J., at p. 262.

During the argument on appeal in the above cited case a preliminary objection had been raised that the offence charged was a criminal offence, and that the charge in that case was a criminal charge, and that an appeal is given by sec. 39 (c) of the Supreme Court of Canada Act only from a judgment in any cause or proceeding for or on a writ of *habeas corpus* not arising out of a criminal charge.

The offence charged against the appellant being a criminal offence, triable summarily, it is claimed that the accused should be tried in the police office established in the Town of Inverness, and before the Stipendiary of the town presiding therein. Sections 233 and 234 of the Towns Incorporation Act provides that:

"233. There shall be in the town a police office to be established by the Town Council where all the police business of the town shall be transacted.

"234. The Stipendiary Magistrate shall attend at such police

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office daily or at such times or at such periods as are necessary for the disposal of the business brought before him as a Justice of the Peace or a Stipendiary Magistrate, and shall have, possess, and exercise within the town all the jurisdiction, power and authority of two Justices of the Peace, or a Stipendiary Magistrate, for the apprehension, committal, conviction and punishment of criminal offences, and to carry into effect the provisions of this chapter and of the laws in force, and the by-laws and ordinances of the Town."

It may be here observed that temperance legislation in this and several other provinces in the Dominion had the effect, in many countries, of prohibiting the sale by retail of intoxicating liquors, excepting for medical, mechanical and sacramental purposes.

In the early days of Confederation it was contended that such legislation was in restraint of trade, and consequently *ultra vires* of the Provincial Parliament.

But the constitutionality of this legislation, by the Provinces, was upheld on the ground that the object of such legislative enactment was to ensure peace and good order in the community, which were matters of police regulation.

As far back as 1876 in the case of *Keefe* v. *McLennan*, 11 N.S.R. 5, the full Bench decided that the local Legislature had not exceeded its powers in legislating that the Court of Sessions of a county could refuse to grant licenses within the county for the sale of intoxicating liquors; that such legislation was not in contravention of the provisions of sec. 91 of the B.N.A. Act, respecting the regulation of trade and commerce which are within the exclusive powers of the Federal Parliament. Ritchie E. J., delivering the judgment of the Court at p. 10 says:—

"It will be borne in mind that the enactment is not one whereby *all trade* in intoxicating liquors is, or can be wholly prevented. The sole object of the Legislature was unquestionably the promotion of temperance and the protection of the health and morals of the people, and the preservation of the peace and good order of the community, matters of police."

The decision of the courts in the various Provinces, from time to time, upheld the *prohibitive* clauses of temperance legisla-

tion; and finally the point was settled by the Privy Council in *Hodge* v. *The Queen*, 9 App. Cas. 117, upholding the validity of the Ontario Liquor License Act.

Sir Barnes Peacock delivering the judgment of the Board, at p. 160 says:—

"Their Lordships consider that the powers intended by the Act in question when properly understood are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of towns, etc."

The provisions of the N.S. Temperance Act when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of the Town of Inverness as well as for other towns and municipalities in the Province, to which the Act applies. The town has, under the provisions of the Towns Incorporation Act, a court or police office presided over by the Stipendiary Magistrate of the town, who has unquestionable jurisdiction to cause to apprehend, and to convict and punish for criminal offences, and for carrying into effect the provisions of the laws in force in the town, any person contravening any of these laws. The Stipendiary Magistrate of the town had jurisdiction to try the defendant for the offence with which he is charged; and I am of opinion that the court presided over in the police office at Inverness was the proper tribunal before which he should be tried.

However, this determination does not dispose of the question raised at this trial, viz., had the two Justices of the Peace who heard the complaint of the informant against the defendant, concurrent jurisdiction with the Stipendiary Magistrate of the town to hear and determine the charge in the complaint?

On this branch of the case the question arises: what are the jurisdiction and powers of the two Justices of the Peace who presided in the Court below, if any, over offences committed within the Town of Inverness and summarily triable?

The town was incorporated in the month of April, 1904. I obtained from the Justices their commissions; and I find that they were appointed respectively on the 17th of May, 1904, and the 11th of March, 1909. They are appointed Justices of the

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Peace for the County of Inverness. The commission issued to William D. Lawrence, appointed on the first-named date, invests him "with all the powers and authorities specified and contained in a commission of the peace for the said county, bearing date the twentieth day of November in the year of Our Lord One Thousand Eight Hundred and Forty-eight, as fully as if your name had been inserted therein;" and the commission issued to Dougald A. Smith appointed on the last-mentioned date invests him "with all the powers, rights and privileges, immunities and advantages, which to the said office do or may lawfully appertain."

What were the rights and powers conferred on Justices of the Peace by the commission of the 20th of November, 1848, I am unable to find. In correspondence with the Deputy Provincial Secretary, he informs me that all Commissions of the Peace had been rescinded and a batch of Justices of the Peace for each county were appointed by a general commission of the date of the 20th November, 1848, and sent to the custos of each county; but none of the municipal clerks appear to have that commission. By the way, this is the year, 1848, that free parliamentary government was established beyond dispute by the granting of responsible government to Nova Scotia. The Municipal Clerk of the County of Inverness informs me that the office of the Clerk of the Peace for that county was destroyed by fire in 1862 and all county records of every kind were burnt. There is no record of the form of the commission in the books of the executive council of that date in the Provincial Secretary's office. Nor does the Act of 1880, chap. 17 (c. 38 R.S.N.S. 1900) define the rights, powers, etc., of Justices of the Peace appointed by the Lieutenant-Governor-in-Council under the provisions of that Act.

The provisions respecting such rights are contained in sec. 4 of the Act (recast by sec. 5 of c. 38) and read:—

"Every person so appointed and sworn shall be invested with all the rights, powers, privileges, immunities and advantages heretofore had, held, exercised and enjoyed by any Justice of the Peace heretofore appointed in this Province, and shall be entitled to the rights, privileges, immunities and advantages heretofore given, granted, extended to any Justice of the Peace as well by any statute in force in this Province or otherwise."

What these "rights, powers, etc" given, granted and extended to any Justice of the Peace at the time of the above cited statute were, can only be ascertained by reference to the commission issued to these Justices, if this provision of the statute contemplated the powers, etc., recited in the commission, and to those statutes, if any, defining their powers; and also statutes passed from time to time for the good of the peace, which, though not specified in their commission, yet were committed to their charge and care. I have obtained a commission of the peace issued to a Justice of the Peace for the said County of Inverness on the 5th of October, 1850, and I find that the appointee is "invested with all the powers and authorities specified and contained in a commission of the peace for the said county bearing date the 20th day of November, A.D. 1848, "in as full and ample manner as if your name had been inserted therein." It would seem that all commissions of the peace issued after the last-mentioned date incorporate by reference only "all the powers and authorities specified" in the commission of the said date. In view of Paley's statement of the law respecting jurisdiction of county Justices in incorporated towns within a county, it is necessary that the extent of the powers and jurisdiction contained in the commission to the Justices in the Court below be ascertained. Paley on Convictions, 7th ed., treating of the local limits of the jurisdiction of Justices of the Peace, at p. 34 *et seq.*, says:—

"Although on the one hand the authority of county Justices is confined to the limits of the county for which they are named, yet, on the other hand, it does not necessarily extend to all places within the county, if there be any district therein which possesses a separate and *exclusive* jurisdiction.

"The words of the commission, however, 'as well within liberties as without' are held to give the Justices of the county jurisdiction in such boroughs and towns corporate as are not counties in themselves, though they have a magistrate of their own, unless the charter by which they are constituted imports an express exclusion of the county magistrates by a clause of *non intromittant*."

"But where the jurisdiction of the county Justices is taken away by express and adequate words in the charter for that pur-

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pose, and there is a separate Court of Quarter Sessions, any act of theirs within the franchise is not only a contempt, but is wholly void."

I am convinced that the words of the clause of the Towns Incorporation Act in relation to the establishing of a police office in the town are *express and adequate words*, to take away the jurisdiction of the county Justices.

"There shall be in the town a police office to be established by the town council where all the police business of the town *shall* be transacted."

Such court is duly established in the Town of Inverness. It is presided over by a duly appointed Stipendiary Magistrate who possesses and exercises within the town "all the jurisdiction, power and authority of two Justices of the Peace, or a Stipendiary Magistrate, for the apprehension, conviction and punishment of persons charged with criminal offences."

It has been shewn that a violation of the provisions of Part II of the Nova Scotia Temperance Act is a criminal offence; and that these provisions are for the peace and good government of the town,—a police regulation.

The express mention of the tribunal before which such offence is to be tried, seems to me to exclude the jurisdiction of the county Justices: *expressio unius exclusio alterius*.

But it is contended that the interpretation clause of the Temperance Act defines Magistrate before whom prosecution for the offence with which the defendant is charged to mean a "Stipendiary Magistrate or two Justices of the Peace."

But the Magistrate must have "jurisdiction where the offence was committed."

As to the question of jurisdiction we are remitted to the commission issued to these Justices.

Do these commissions, incorporating the rights, powers, etc., contained in the general commissions of 1848, contain the phrase "as well within liberties as without?" These words are written in parentheses in the forms given in Burn's J. P. and Marshall's, J.P., indicating that they are not in all commissions of the peace. As the commission of 1848 is not available we have come to an *impasse*, so to speak.

But it is said that there is a way out of every difficulty if one

can find the way. The only way out of this difficulty, it seems to me, is to treat the rights, powers, etc., *specified and contained in a commission of the peace for the said county bearing date the 20th November, 1848*, as non-existent, when no record of these rights, etc., can be found; and treat the office of a Justice of the Peace in such case as a functionary deriving his powers by virtue of his office from the common law, and those conferred upon him by virtue of the statutes made for the better keeping of the peace and committed to him. To ascertain such powers and the ambit of his jurisdiction we must begin at the beginning.

The office of Justice of the Peace is one of great antiquity, and his jurisdiction has varied from time to time. Before the institution of Justices of the Peace there were conservators of the peace in every county, whose office was to conserve the King's peace and protect his subjects from force and violence. They were selected by the freeholders in the County Court, out of the principal men of the country.

This power to assign commissions of the peace was transferred from the electorate to the King by I. Ed. 3, c. 16.

"For the better keeping and maintenance of the peace, the King will, that in every county good men and lawful which be no maintainers of evil or barretors in the country, shall be assigned to keep the peace."

Appointees by the King under the provisions of this statute were termed Justices of the Peace. They had yet no judicial functions; they were officers at common law assigned to keep the King's peace within the territorial divisions for which they were appointed.

They were subsequently given judicial powers (vide 34 Ed. 3, c. I.) and numerous other Statutes giving them judicial powers, passed from time to time down within our own time).

The King delegated his prerogative power to appoint Justices of the Peace to the governors of his colonial possessions. This power he included in his commission. Governor Cornwallis, by virtue of his commission, after his constitution of the Council of Twelve, appointed four Justices of the Peace for Townships of Halifax, on the 18th of July, 1749, nine years before a Legislative Assembly was granted to Nova Scotia. (Vide N.S. Archives, vol. 1, p. 571.) The form of Justices of the Peace's commission

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was settled in Michaelmas Term, 1590, and the same was commanded to be used, and continues, with very little alteration, to be still used in England; and also in this Province at least down to 1848. Whether any change had been made in the form of the general commission of the peace issued to each county in that year, as already stated, I am not able to ascertain. I must therefore take it that the two justices who tried the charge against the defendant were Justices of the Peace at common law. I am strongly of opinion that the rights, powers, privileges, immunities and advantages with which Justices of the Peace are invested under the provisions of sec. 5, c. 38, R.S.N.S. 1900, on their appointment, are those held, had, exercised and enjoyed by Justices of the Peace at common law, and the statutes committed to their care. To expressly confer judicial powers and to enumerate offences over which they had power to punish under the form enlarged from time to time and finally the form settled upon in the reign of Elizabeth, was considered unnecessary in view of the fact that the statutes particularly given in charge to Justices of the Peace confer jurisdiction upon them by the provisions of such statutes. Indeed I think it is safe to state that all the powers exercised judicially by Justices of the Peace in this country are derived from the statutes committed to their charge, and provisions giving them judicial powers and authority in certain statutes. If this is the correct interpretation of the provisions of said section 5, it becomes unnecessary to trouble oneself with the rights, powers, etc., contained in the commission of the 20th of November, 1848.

The Justices who tried this case in the Court below were appointed Justices for the county after the town was incorporated.

In view of the duty of the Stipendiary Magistrate of the town to preside in the police office of the town where all the police business of the town *shall be transacted*, the Governor in Council, well knowing the effect of this provision in the Towns Incorporation Act, *ipso facto* confined the jurisdiction of these Justices of the Peace to the area of the county outside the incorporated Town of Inverness, particularly as to offences against the police regulations of the town.

This, I think, is the case with every commission appointing

Justices of the Peace in every county in the province within whose boundary there is an incorporated town.

Let me again refer to the provision respecting the tribunal before which proceeding for violation of the penal provisions of the Temperance Act may be brought:—

"Such prosecution may be brought before any Magistrate having jurisdiction where the offence was committed."

We have seen that "Magistrate" means a Stipendiary Magistrate or two Justices of the Peace.

There are two classes of Stipendiary Magistrates, Town and Municipal. The Stipendiary for a municipality—county or subdivision of a county—has no jurisdiction by virtue of his office to preside in the police office of an incorporated town. In certain cases he may be called in by the Stipendiary for the town. But two Justices of the Peace, the equivalent of a Stipendiary cannot be called in; and in no case can they be given jurisdiction to preside in a town police court, to dispose of the business brought before them as such Justices of the Peace in said office. To the Stipendiary Magistrate appointed for the town is given alone the power and authority to preside in such office. His deputy, or certain functionaries called in by him, may preside in his place. If the offence were committed in the county, outside the incorporated town, two Justices of the Peace would have jurisdiction as well as a Stipendiary for the municipality of the county to try and determine the same. This view of the law I apprehend explains the meaning of the phrase *having jurisdiction where the offence was committed*. Offences *sui generis* with the offence charged against the defendant are to be tried in the town police office. "There shall be in the town a police office to be established by the Town Council where all the police business of the town *shall* be transacted."

It will be seen that it is imperative that *all the police business of the town* is to be transacted in the police office.

It is not claimed that two Justices of the Peace have any authority to preside in the town police office. I am therefore of opinion that the effect of the provisions of the Towns Incorporation Act, respecting the constitution of a tribunal to try and punish summarily criminal offences committed with the town expressly,

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takes away the jurisdiction of the County Justices to try these offences; wherefore, I decide that the two Justices of the Peace who tried and convicted the defendant had no jurisdiction to entertain the charge preferred against him.

There was no reason alleged why the prosecution had not been brought before the Stipendiary Magistrate of the town, who is a practising barrister, and a man in every way competent for his office.

The conviction herein appealed from shall be quashed but without costs.

Conviction quashed.

B. C.

S. C.

TOPAY v. CROW'S NEST PASS COAL CO.

British Columbia Supreme Court, Gregory, J. October 13, 1914.

1. ALIENS (§ III—19)—ALIEN ENEMIES—DISABILITIES AND CAPACITIES—SUITS BY OR AGAINST—RESIDING HERE BY LICENSE.

The common law rule strictly limiting an alien enemy in his civil rights is now modified in his favour when he resides in this country by license or under protection of the Crown.

[Order in Council of August 15, 1914, considered.]

Statement

APPLICATION by defendant for a declaration that the plaintiff is, as an alien enemy, disentitled to appeal to our Courts for the enforcement of his rights, and involving the status of alien enemies residing here by license.

The application was dismissed.

E. V. Bodwell, K.C., for the application.

Maclean, K.C., *contra*.

Gregory, J.

GREGORY, J.A.:—Although there is no doubt that at common law an alien enemy was denied the right of appealing to our Courts for the enforcement of his contractual rights, etc., this rule has long been modified when he is resident in this country by license or under the protection of the Crown: see 1 Hals. pp. 20 and 310; and I do not think that the expression of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, is, when examined, at all inconsistent with this. He was then dealing with the circumstances of the case before him, and he cited *Le Bret* v. *Papillon* (1804), 4 East 502, as the case which established the rule, but an examination of that

case shews that the plaintiff there was resident in the foreign country at the date of his action, and he was suing on a judgment obtained in the Courts of his own country. In the present case the plaintiff has been resident in Canada for a long time and peaceably pursuing his usual occupation.

In *Alcenius* v. *Nygren* (1854), 4 E. & B. 217, the judgment of Lord Campbell, C.J., in giving judgment against the alien enemy shews clearly that he relied on the fact that the plaintiff though then in England was not there with the permission of any one entitled to act for the sovereign.

In the present case I am unable to read the Order-in-Council of August 15, 1914 (appearing in the Gazette of August 22, 1914, p. 617) together with that of August 7, 1914 (appearing in the Gazette of August 15, 1914, p. 531) as anything but an express permission to Germans and Austrians to reside in Canada so long as they pursue their ordinary avocations in a peaceful and quiet manner, etc. The Order of August 15, recites that there are many such

> persons quietly pursuing their various avocations in various part of Canada, and it is desirable that such persons should be allowed to continue in such avocations without interruption.

It then goes on to proclaim that all such persons, "so long as they quietly pursue their ordinary avocations be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested," etc.

In view of the foregoing it appears to me that it would be a denial of such protection to permit a coal miner, for example, to work at his usual occupation of coal mining and deny him the right to sue for his wages if they are not paid, or, as in the present case, to deny him the right to maintain an action for personal injuries sustained in his work as a miner, and caused, as he alleges, by the negligence of the defendant, as during times of peace he has enjoyed this privilege, and the order proclaims that he shall be allowed to continue, etc. The application will, therefore, be dismissed. Costs to the plaintiff in any event of the cause.

Application dismissed.

MAN.

K. B.

PESCOVITCH v. WESTERN CANADA FLOUR MILLS CO.

Manitoba King's Bench, Galt, J. November 11, 1914.

1. ALIENS (§ III—19)—IN WAR TIME—SUITS BY OR AGAINST—STATUS OF ALIEN ENEMY.

A person of German or Austro-Hungarian nationality, domiciled in Canada, as to whom there is no reasonable ground for believing that he is engaged in hostile acts or is contravening the law, may by virtue of the Orders-in-Council (Can.) of August 7 and 15, 1914, maintain an action in negligence against his employer for personal injuries sustained in following his avocation where such action would lie were his country not at war with Great Britain; and, *semble*, the onus is not upon the alien to prove, on the defendant's motion to stay proceedings in an action brought before war was declared, that he had not contravened the restrictions specified in the Royal Proclamation of August 15, 1914 (Can.).

[*Bassi* v. *Sullivan*, 18 D.L.R. 452, 50 C.L.J. 539, 7 O.W.N. 38, criticized; *Topay* v. *Crow's Nest Pass Coal Co.*, 18 D.L.R. 784, followed.]

Statement

MOTION to stay the plaintiff's action involving the right of an alien enemy to sue in our Courts and the onus of proof as to hostile conduct by such alien.

The motion was dismissed.

T. J. Murray, for the plaintiff.

E. A. Cohen, for defendants.

Galt, J.

GALT, J.:—This action was commenced on July 24, 1914, and the statement of defence was filed on August 12, and an amended statement of defence on October 2, 1914. The plaintiff claims damages for injuries sustained by him while in the employ of the defendants. The defendants now move to stay all proceedings in the action upon the ground that the plaintiff in an Austrian citizen and has not yet become a naturalized British subject.

The argument had been almost concluded before I ascertained that counsel were arguing the case upon mutual admissions made between themselves, and not on the usual sworn evidence. It occurred to me that, under such circumstances, the question was merely an academic one. I thereupon adjourned the argument, and gave leave to the defendants to establish the necessary facts by affidavit. I am confirmed in the view above expressed by the judgment of Kekewich, J., in *Williams* v. *Powell* (1894), W.N. 141, where his Lordship held that a declaratory order settling the rights of parties must be made on evidence, not on admissions.

War was declared between Great Britain and Austria-Hungary on August 12, 1914. The defendants contend that the plaintiff occupies simply the position of an alien enemy, and is thereby incapacitated from enforcing any rights in our Courts. By Royal Proclamation published at Ottawa on August 15, 1914, the Government has directed

that all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order-in-council or proclamation.

The plaintiff states in his affidavit:—

2. I am and have been for a period of more than five years past a resident of and domiciled in the city of St. Boniface in the Province of Manitoba.

3. For almost the whole of the past five years I have been employed by the defendant company as a labourer in their flour milling plant at the city of St. Boniface aforesaid.

4. Since the 21st day of February, A.D. 1914, as a result of the accident which occurred to me on that date, I have been unable to engage in any kind of work. During the whole of the period since the said date up to the present time, I have been giving my whole attention to the work of regaining my health and strength and, with that end in view, I have been living quietly at my home in St. Boniface aforesaid, leading a very simple life and indulging in light exercise.

5. I have, ever since the outbreak of the war between Great Britain and Austria-Hungary in August last, been quietly pursuing my usual and ordinary avocation as before mentioned, and have been conducting myself as a peaceful and law-abiding citizen. I have not engaged in espionage, or engaged or attempted to engage in acts of a hostile nature, nor have I given or attempted to give any information to the enemy, nor have I otherwise contravened any law, order-in-council, or proclamation.

The meaning to be given to the Proclamation of August 15 has been considered in other provinces of the Dominion already.

In *Bassi* v. *Sullivan*, 18 D.L.R. 452, 50 C.L.J. 539, decided in Toronto on September 11, the plaintiff, who was the holder of an unregistered chattel mortgage, had brought an action to set aside a chattel mortgage registered by the defendants against the same goods, and had obtained from the Local Judge at

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PESCOVITCH v. WESTERN CANADA FLOUR MILLS CO.

Galt, J.

Haileybury an injunction restraining their sale. A motion to continue the injunction came before Hodgins, J.A., and, amongst other things, it was contended by the defendants that the action was not maintainable because the plaintiff was an alien enemy, being an Austrian and not naturalized. In giving judgment, staying the action, Hodgins, J.A., said, 18 D.L.R. 452, at 455:—

In the present case the Court has no means of knowing whether this Proclamation, the terms of which are relied on as giving a right to maintain this action, covers this particular plaintiff. He may or may not be quietly pursuing his ordinary avocation, or he may be, for all that is before me, one of the class excluded by its subsequent provisions, or otherwise disentitled to take advantage of provisions intended for those who have resided here and engaged in business for some length of time. Nor am I at all sure that the proclamation has the effect contended for. It appears to have been issued under sec. 6, sub-sec. (*b*), rather than under sub-secs. (*c*) and (*f*) of the War Measures Act, 1914, and may well refer only to police protection. It is not incumbent on the Court to make, still less to act upon, any presumption in favour of natives of either of the two nations now at war with the British Crown; and I think that every facility should be afforded for local inquiry, so that the Court should be fully informed as to whether or not the plaintiff is in fact entitled to set up the protection extended by the Crown under the wording of the Proclamation. . . .

The injunction will be dissolved and the action stayed meantime, with leave to apply on notice to a Judge of the High Court Division to permit the action to proceed after time has been given to make the inquiries I have indicated.

In *Topay* v. *Crow's Nest Pass Coal Co.*, 18 D.L.R. 784, it was held in British Columbia by Gregory, J., on October 13, 1914, that an alien enemy resident in Canada may, by virtue of the Orders-in-Council of August 7 and 15, 1914, maintain an action for personal injuries sustained in following his avocation. Mr. Justice Gregory, after quoting the Proclamation above mentioned, expresses himself thus:—

In view of the foregoing, it appears to me that it would be a denial of such protection to permit a coal miner, for example, to work at his usual occupation of coal mining and deny him the right to sue for his wages if they are not paid, or as in the present case, to deny him the right to maintain an action for personal injuries sustained in his work as a miner, and caused, as he alleges, by the negligence of the defendant, as during times of peace he has enjoyed this privilege, and the order proclaims that he shall be allowed to continue, etc.

I cannot agree with the view expressed by Hodgins, J.A., that the Proclamation casts upon resident aliens the burden of

establishing that they are not engaged in espionage, etc., before allowing them the protection of the law; or, in other words, compelling them to prove their innocence. I think it is for those who assert such inabilities in the person affected, to prove them.

I see nothing in the War Measures Act, 1914, to justify the limitation which the same learned Judge seems disposed to place upon the "protection of the law" mentioned in the Proclamation, namely, that it may well refer only to police protection.

There is much force in the plea set up by Shylock,—

> You take my life,
> When you do take the means whereby I live.

I think the Proclamation was clearly intended as an assurance to Germans and Austro-Hungarians living in Canada that their rights would be respected and that they should have the protection of the law, so long as they quietly pursued their ordinary avocations. I agree entirely with the opinion expressed by Gregory, J., in the *Topay* case.

For these reasons, this motion must be dismissed with costs.

Motion dismissed.

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Galt, J.

SETTER v. THE REGISTRAR.

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Alberta Supreme Court, Harvey, C.J. May 26, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ VIII—80)—CAVEAT—"ASSURANCE FUND"—ERROR IN RECORDING CAVEAT—UNREGISTERED MORTGAGEE'S RIGHT TO COMPENSATION OUT OF "ASSURANCE FUND," HOW LIMITED.

Compensation is authorized out of the "Assurance Fund" under sec. 108 of the Land Titles Act, Alta., only where a certificate of title has been granted in respect of the land or interest in land of which the claimant has been deprived; and inasmuch as certificates are not granted under that Act to mortgagees to shew their interests, a mortgagee, or caveator under an unregistered mortgage, can obtain no compensation from the Assurance Fund for loss sustained through an error of the Land Titles office in recording the caveat against the wrong lot.

Statement

ACTION by an unregistered mortgagee against the Registrar as nominal defendant claiming compensation out of the "Assurance Fund" under Land Titles Act, Alberta, where the mortgagee's caveat had been ineffective through the inadvertence of the Land Titles Office.

The action was dismissed.

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SETTER v. THE REGISTRAR.

Harvey, C.J.

A. H. Clarke, K.C., and *A. L. Smith*, for the plaintiff.

E. B. Edwards, K.C., and *Duncan Stuart*, for the defendant.

HARVEY, C.J.:—In October, 1909, one Meyer gave a mortgage to the plaintiff on an undivided one-half interest in the S.E. 1-4 26-31-2, west of the 5th meridian, to secure $2,016, the purchase price of certain machinery. At the time the mortgage was given the title to the said land stood in the name of the Hudson's Bay Co., Meyer and another being the purchasers under an agreement of sale assigned to them upon which there was a small balance still unpaid. The plaintiff being unable to register the mortgage, caused a caveat to be filed under which he claimed to be interested as mortgagee under his unregistered mortgage. As required by sec. 86 of the Land Titles Act, the registrar caused a memorandum of the caveat to be entered on the certificate of title standing in the name of the Hudson's Bay Co., but by error the land was described as section 23 instead of section 26 and in consequence, when the transfer from the Hudson's Bay Co. to Meyer and his co-owner came in to be registered, the caveat was disregarded and no memorandum of it was noted on their certificate. The land was subsequently sold as unencumbered, but the mortgage was not paid though there was a small amount paid on it at one time. The plaintiff recovered a judgment against the mortgagor for the amount unpaid, but the sheriff has been unable to realize anything on the execution, to which he has made a return of *nulla bona*.

The notice provided by sec. 108 of the Land Titles Act (ch. 24 Statutes of Alberta, 1906) was given and this action was then begun against the Registrar as nominal defendant. At the conclusion of the trial I intimated that I feared that the provisions of the Act furnished no relief but I reserved judgment to see if I could reach a different conclusion. A careful consideration of our Act and a comparison with the Acts of Manitoba and Saskatchewan and of the Australian States have only confirmed the impression that I had at the close of the trial. The Torrens system is so called because it was first introduced by the South Australian Legislature in 1858 at the instance of Sir Robert Torrens.

Hogg, in his work on the Australian Torrens' System, says:—

> By Torrens systems generally are meant those systems of registration of transactions with interests in lands whose declared object is, under governmental authority to establish and certify to the ownership of an absolute and indefeasible title to realty and to simplify its transfer. An important feature of the system is an indemnity fund to compensate any one who may be injured by the operation of the Act.

This system was introduced into the Northwest Territories in 1886 and has ever since been in force. An indemnity fund under the name of the Assurance Fund was then provided and has ever since continued, and there is no doubt that the general opinion has always been that implicit faith might be given to any act of the registrar or any of his assistants, because if he made any mistake from which damage resulted to any one, resort could be had to the Assurance Fund for indemnity. I regret to have to come to the conclusion that under the Acts in force in Alberta and Saskatchewan, which are taken from the Act in force in the Territories, that opinion is not well founded.

Sec. 108, which is the only section under which it is suggested the claim might be supported is as follows so far as is applicable to the case:—

> Any person sustaining loss or damage through any omission, mistake or misfeasance of the inspector of Land Titles offices, or a registrar, or any of his officers or clerks in the execution of their respective duties under the provisions of this Act . . . may, in any case in which remedy by action for recovery of damages, hereinbefore provided is barred, bring an action against the registrar, as nominal defendant, for recovery of damages.

It then provides that the amount recovered shall be paid out of the Assurance Fund.

Now, it is apparent at once that not only a mistake causing loss or damage must exist to give a right of action, but that coupled with that it must be a case "in which remedy by action hereinbefore provided is barred."

Thom, in his work on the Canadian Torrens System, at p. 221 refers for the construction of this provision to *Morris* v. *Bentley* (1895), 2 Terr. L.R. 253, but an examination of that case and of the present statute as compared with the one then under consideration shews that the case is of no present assist-

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ance. In the statute then in question the words were "in any case in which the remedy by action for recovery of damages, as hereinbefore provided, is barred."

By a previous section it was provided that the registrar or any one acting under him should not be liable to an action in respect of any act *bonâ fide* done under the statute. The learned Judge, in that case, treated the words "as hereinbefore provided" as an adverbial phrase modifying the verb "is barred" and being of opinion that, but for the section mentioned "barring it" there would be an action against the registrar, he held that that constituted the condition giving rise to a right of access to the Assurance Fund.

This generous construction was, of course, in accord with what Hogg states to be one of the principles of the system and would have had the effect of allowing a right against the Assurance Fund in practically all cases of loss or damage through mistake in the Land Titles office.

Unfortunately for the application of that construction for future purposes, the Act was, even at the time that the decision was given, altered by the provisions of the Land Titles Act, 1894, which, on January 1, 1895, superseded the Territories Real Property Act. From that Act the little word "as" in the expression "as hereinbefore provided" was eliminated and the wording appeared as it is now. The section indemnifying the registrar and his officers was at the same time changed in location from the early part of the Act to the later part, so that its provisions were then "hereinafter" and not "hereinbefore." In both of these respects the Alberta Act now under consideration follows the Act of 1894.

It is apparent therefore that no assistance can now be had from that case and the words "hereinbefore provided" must be treated as an adjectival expression qualifying "remedy by action for recovery of damages."

Sec. 105 appears to be the only prior section which provides a remedy by action for recovery of damages to which this could apply, but it does provide such a remedy and that remedy is

barred by sec. 106 under the conditions therein specified. The remedy of sec. 105, however, is only available to "any person deprived of any land."

Sec. 108 sets out persons suffering loss through mistake and persons deprived of land as apparently separate classes, yet Hogg points out the difficulty of treating them as distinct classes and possibly in view of the definition given by the Act, as, amongst other things, "any interest in land, legal or equitable" even a mortgagee or an execution creditor whose right had been lost by reason of some mistake or omission in the Land Titles office might be said to be a person "deprived of land," but even if we get that far, we are not by the opening words of the section, which are "After a certificate of title has been granted therefor any person deprived of any land, etc." These are the exact words of the section in the Act of 1894, this again being an alteration from the former Act, the corresponding section of the Act of 1886 commencing with the words "Any person deprived of land."

The words of the Saskatchewan section are "After a certificate of title has been granted for any land, any person deprived of such land" which gave the same meaning as the Alberta Act, though perhaps a little more clearly expressed.

It seems clear that the only land the deprivation of which is provided for by this section is land for which a certificate of title has been granted. Inasmuch as certificates of title are not granted to mortgagees to shew their interests, a mortgagee is not deprived of an interest for which a certificate of title has been granted and cannot come within the provisions of this section and therefore cannot come within the provisions of sec. 108. Most of the Australian Acts contain sections similar to sec. 105, but in none of them does the section contain the provision for a certificate of title as ours does. By reason of this provision I find it impossible to give any construction to the provisions of the Act which will furnish any relief to the plaintiff, and I must therefore dismiss the action but without costs.

Action dismissed.

CAN.
S.C.

PRESCOTT v. TRAPP & CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. October 7, 1912.

[*Trapp & Co.* v. *Prescott*, 5 D.L.R. 183, affirmed.]

SALE (§ II A—27)—*Sale by auctioneer for unnamed principal—Implied warranty—Post-dated cheque.*]—Appeal from the judgment of the Court of Appeal for British Columbia, *Trapp* v. *Prescott*, 5 D.L.R. 183, 17 B.C.R. 298, affirming the judgment of Grant Co. J., in the County Court of Vancouver, which maintained the action of the plaintiffs (respondents) with costs.

An auctioneer sold two horses, by public auction, to a bidder who settled for the price by giving the auctioneer his cheque post-dated several days after the sale, and the auctioneer then gave his cheque for the purchase price, less his commission, to the owners of the animals. The purchaser took possession of the horses, but, on the following day, discovering that a third person held a lien on them, he stopped payment of the cheque which he had given at the time of the purchase. The plaintiff's action for the recovery of the amount of the cheque was maintained by the county court judge and his judgment was affirmed by the judgment now appealed from, Irving J. dissenting.

After hearing counsel on behalf of the appellant, and without calling upon the respondents for any argument, the Supreme Court of Canada dismissed the appeal with costs.

McCrossan, for the appellant.

C. W. Craig, for the respondents.

Appeal dismissed with costs.

HIRTLE v. BOEHNER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. May 6,1913.

[*Boehner* v. *Hirtle*, 6 D.L.R. 548, reversed.]

TRESPASS (§ I A—5) — *What constitutes — Overlapping of boundaries—Grants from the Crown.*]—Appeal from a decision of the Supreme Court of Nova Scotia, *Boehner* v. *Hirtle*, 6 D.L.R. 548, 46 N.S.R. 231, reversing the judgment at the trial by which the action was dismissed and ordering a judgment to be entered for the plaintiff (respondent).

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The plaintiff, Boehner, brought action for trespass on his wilderness land by cutting wood thereon. The defendant claimed that the wood was cut on his own land. Each party claimed title through allotment on the foundation of the township and by subsequent Crown grants.

The trial Judge held that the plaintiff's case depended on the properties overlapping and he could only succeed by establishing priority of title. He held as to this that the original party from whom the defendant claimed had an allotment possession before plaintiff's title originated and the allotment was confirmed by a township grant in 1784 and by a Crown grant in 1800, the latter reciting his possession for more than twenty years previous. The Supreme Court *en banc* reversed the judgment at the trial, holding that on the evidence plaintiff's title was prior and defendant's grant in 1800 derogated from it.

The Supreme Court of Canada after hearing counsel for each party and reserving judgment allowed the appeal and restored the judgment of the trial Judge dismissing the action.

Mellish, K.C. and *Matheson*, K.C., for the appellant.

Paton, K.C., for the respondent.

Appeal allowed with costs.

P.E.I.
S. C.

COLLINS v. KEENAN.

Prince Edward Island Supreme Court, Hon. W. W. Sullivan, C.J. January 28, 1914.

ASSAULT AND BATTERY (§ II—7)—*Reprehensible conduct provoking assault—Effect as to damages.*]—Action in damages for assault.

W. S. Stewart, K.C., for plaintiff.

A. E. McDonald, K.C., for defendant.

HON. WM. W. SULLIVAN, C.J.:—In this case, which was tried before me without a jury, I find on the evidence adduced at the trial that the defendant was guilty of an assault and battery in excess of what was necessary in the circumstances in which he was placed; and I am of opinion that the evidence of such excess was available to the plaintiff on the trial under the pleadings in

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the case without any new assignment. I should come to this conclusion on the law from a perusal of the pleadings as they appear on record; but I am strengthened in this view by the case of *Dean* v. *Taylor*, 11 Exch. 68, which was decided on the construction of similar pleadings under the English Common Law Procedure Act, which Act was identical with that in operation here. That case is consequently, an authority directly covering the point in question in this case. It is true that the decision in *Dean* v. *Taylor*, 11 Ex. 68, was not followed in *Rimmer* v. *Rimmer*, 16 L.T.N.S. 238, but the latter case was disposed of by a single Judge at *Nisi Prius*, and cannot be held to prevail against the considered judgment of the Court, such as decided *Dean* v. *Taylor*, composed of Chief Baron Pollock, and Barons Parke and Martin.

Were it not for the reprehensible conduct of the plaintiff, as disclosed by the evidence, in annoying the defendant, I should be disposed to allow him a considerable sum for damages. Such annoyance, however, was no justification for the defendant, to whom other remedies were at the moment at hand, in using a dangerous weapon and therewith causing to the plaintiff grievous bodily injuries and reducing him to the perilous condition shewn by the evidence.

I find a verdict for the plaintiff and assess the damages at $40, for which sum judgment will be entered.

Judgment for plaintiff.

MOLSONS BANK v. KLOCK.

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P. C.

Judicial Committee of the Privy Council, Lord Moulton, Lord Sumner, Sir Charles Fitzpatrick and Sir Joshua Williams. July 16, 1914.

[*Molsons Bank* v. *Klock*, 9 D.L.R. 877, affirmed.]

JUDGMENT (§ II A—66)—*Set-off—Res Judicata.*]—Appeal from Quebec King's Bench.

The judgment of the Board was delivered by

LORD MOULTON:—This is an appeal from three concurrent judgments in a case in which the decision must ultimately turn on the view which the Court takes of the facts. There is no question of law whatever involved in it, and, therefore, the decision can only be of interest to the parties.

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The facts are peculiar, but their Lordships do not think that they involve any serious difficulty when once there has been a pronouncement by the Court that has the best opportunity of judging of the reliability of the witnesses, and in this case the Judge of first instance has found the material issues in favour of the respondent. Their Lordships think, therefore, that there is no necessity for them to give a judgment dealing with the facts at length, but that it suffices to say they are thoroughly satisfied that the judgments of the Courts below are right and should be affirmed. The appeal has been, in the opinion of their Lordships, pleaded with very great ability. Everything that could be said in favour of the view of the facts which the appellants wished to put before their Lordships has been said, but they do not feel that that has been sufficient in any way to shake their opinion of the accuracy of the judgments appealed from.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed, and the appellants will pay the costs.

Appeal dismissed.

COLONIAL INVESTMENT & LOAN CO. v. WEIHE.

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S. C.

Saskatchewan Supreme Court, Haultain, C.J. November 28, 1914.

MORTGAGE (§ VI G — 100) — *Sale Under — Basis Necessary for Sale.*]—Action to enforce a mortgage by way of foreclosure or sale.

A. L. McLean, for plaintiff.

HAULTAIN, C.J.:—In this action, which was brought for the enforcement of a mortgage, the statement of claim asks for:—

1. Judgment for the amount due under the mortgage and interest; 2. Foreclosure on default of payment within a time to be fixed by the Court; 3. (Alternatively) Sale.

No appearance having been entered by the defendant, notice of motion for judgment was duly given on September 2, 1914. The notice of motion is for:—

1. An order *nisi* for foreclosure; 2. Judgment for claim and costs; and 3. For further or other relief.

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The motion came on before the Local Master at Swift Current and was dismissed by him. According to his written reasons for decision, the learned Local Master was under the impression that the motion was a motion for foreclosure absolute, and he accordingly refused foreclosure absolute and offered an order *nisi* for sale. In view of the form of statement of claim and notice of motion for judgment only an order *nisi* for foreclosure was asked for and could be asked for, and I think it is only reasonable to assume that the motion was made in the terms of the notice. In any event an order *nisi* for foreclosure should have been made, as that is what the notice of motion asked for, and there was no request for a sale and no material upon which a sale could have been ordered: *Canada Life Assurance Co.* v. *Vance*, 12 W.L.R. 231.

The order appealed from will, therefore, be set aside, and the plaintiff will have the usual order *nisi* for foreclosure and judgment for the amount of its claim and costs, including the costs of this appeal.

Appeal allowed; order foreclosing.

YOUNG v. BLAGDON.

Saskatchewan Supreme Court, Elwood, J. December 18, 1914.

LAND TITLES (TORRENS SYSTEM) (§ III—30) — *Execution — When registrable—Land Titles Act.*]—Application to remove an execution from the title to lands under Land Titles Act.

C. M. Johnston, for the plaintiff.

H. Ward, for the defendant.

ELWOOD, J.:—The execution creditor simply alleges that his execution was in the hands of the sheriff and the sheriff afterwards sent it to the registrar of land titles to be registered. . . . These matters are not in dispute and I am of the opinion that under the facts as stated the plaintiff is entitled to have the execution in question removed from the title to the lands as set forth in the statement of claim. In my opinion sec. 118 of the Land Titles Act, as enacted by ch. 16 of the Statutes of Saskatchewan, 1912-13, sec. 17, is not retroactive in its effect and that

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amendment having been passed after the transfer of the land in question to the plaintiff would not affect the land in question.

The only other question to consider is the question of costs. In the case of *Hamilton* v. *McCuaig*, 4 Sask L.R. 193, it was held that the defendant having attacked the right of the plaintiff to have the execution removed and having not merely submitted to the jurisdiction of the Court the plaintiff was entitled to his costs of action. In this case the defendant did not contest the right of the plaintiff to have the execution removed, but merely submitted to the jurisdiction of the Court. In the statement of claim the plaintiff alleges, however, that she requested the defendant to remove the execution from the land in the Land Titles Office, so far as it affected the land in question and that the defendant refused to do so. It seems to me on this state of facts that the plaintiff is entitled to her costs of removing the execution. It seems to me that while it is quite true that the execution was registered against the land by the operation of the Land Titles Act yet when it was brought to the attention of the defendant it seems to me that it was the duty of the defendant to take steps to remove the execution from these lands and, therefore, under all the circumstances I am of the opinion that he should have done so. There will be judgment for the plaintiff as prayed for in the statement of claim and costs of the action.

Judgment for plaintiff.

SAWYER v. CANADIAN PACIFIC R. CO.

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Ontario Supreme Court, Lennox, J. November 2, 1914.

DAMAGES (§ III I—171)—*Personal injuries—Wrong medical treatment, how negatived—Assessment of damages—Expert evidence.*]—Action for damages for personal injuries sustained by the plaintiff by reason of the defendants' negligence.

J. F. Faulds, for the plaintiff.

Angus MacMurchy, K.C., for the defendants.

LENNOX, J.:—At the close of the plaintiff's case, counsel for the defendants admitted liability and asked me to withdraw the case from the jury, submitting that a Judge could make a fairer

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assessment of damages than a jury. I directed that the application be renewed after expert evidence for the defendants had been put in. In the end I withdrew the case from the jury. The plaintiff did not seek out either a doctor or a lawyer for a long time. He knew that he was injured, but did not realise that his injuries were very serious, or likely to be permanent. He was not of the army of keen hunters of litigation who do so much to congest the business of the Courts.

I am inclined to think that more prompt medical treatment might have facilitated recovery, but I am not sure of this. The medical testimony left this point undetermined—a matter of speculation—and, in the circumstances, I am not called upon to be astute in marking this point against a litigant of a type so rarely found.

The defendants called two very distinguished medical men, specialists, upon the questions arising in this action. One of them was very positive in saying that the plaintiff should have been treated in a nursing home or institution of that character; and, with this treatment, pronounced, pretty positively, the certainty of speedy and complete recovery. I was much more impressed however by the thoughtful, cautious, and somewhat qualified statements of Dr. McPhedran, the other expert called by the defence.

On the other hand, it is not, and could not be, questioned that Dr. Clifford Reason, also an eminent specialist in nervous diseases, who attended the plaintiff, had opportunities for study of the plaintiff's condition and requirements not open to the defendants' witnesses. I have come to the conclusion that Dr. Reason was right in treating the plaintiff at his home, and that his recovery would not have been, and would not be, facilitated by removing him from his old surroundings. I am not satisfied that the plaintiff, under any kind of treatment, will recover as speedily as suggested by the evidence for the defence, or that he will ever completely recover from the effects of the defendants' negligence.

There will be judgment for the plaintiff for $2,300 with costs.

Judgment for plaintiff.

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