Dominion Law Reports

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ANNOTATED

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VOL. 69

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CITY OF MONTREAL v. WATT & SCOTT.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Parmoor and Lord Phillimore. August 3, 1922.

MUNICIPAL CORPORATIONS (§ II G—236)—CONSTRUCTION OF SEWER—DEFECTS—NEGLIGENT CONNECTION WITH CELLAR—UNUSUAL FLOW OF WATER—FLOODING OF CELLAR—DAMAGES—LIABILITY—VIS MAJOR.

A rainstorm which is extraordinary but not unprecedented, nor of such violence that it could not reasonably have been anticipated, does not constitute *vis major* and a municipality in Quebec is liable under the Quebec Civil Code, arts. 1053, 1054, for damages caused by the sewer on the street overflowing and flooding plaintiff's cellar, such flooding being caused by improper connections, and failure to put in proper automatic closing and opening valves and to the inability of the sewer to carry off the unusual flow of water.

Failure on the part of the plaintiff to put in a resisting valve on the entrance drain to the building was negligence contributing to the accident which under Quebec law justified the Court in apportioning the damage.

[*Quebec Railway, Light, Heat and Power Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662, 26 Rev. Leg. 244, explained and applied; *Watt & Scott* v. *City of Montreal* (1920), 58 D.L.R. 113, 60 Can. S.C.R. 523, affirmed.]

APPEAL by defendant from the judgment of the Supreme Court of Canada (1920), 58 D.L.R. 113, 60 Can. S.C.R. 523, in an action for damages caused by defendant's sewer overflowing and flooding plantiff's cellar. Affirmed.

The judgment of the Board was delivered by

LORD DUNEDIN:—The City of Montreal by its charter was empowered to construct and did construct a sewerage system. One of its sewers ran along Commissioners St., on which the premises of the respondents are situated. These premises have a cellar, from the floor of which a drain is laid which connects with the sewer in the said street. Before its junction with this sewer there is laid into it another drain which serves to carry away the water from the roof of the respondents' premises, the water therefrom being collected in the ordinary way by runnells or gutters which have perpendicular pipes laid into the drain. These connections were made with the sanction and approval of the city authorities.

On the night of July 29 and the early morning of July 30, 1917, a very heavy rain storm occurred in the city; in consequence thereof, the sewer in Commissioners St. became full and was unable to carry away all the rainwater brought to it from various sources. The result was that the respondents' cellar was flooded to a depth of about 2 feet and some goods stored therein were damaged.

The present action was raised by the respondents against the appellants—the city of Montreal—to recover the value of the

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CITY OF MONTREAL, v. WATT & SCOTT.
Lord Dunedin.

damage so suffered. The action was tried by Weir, J. without a jury. It was tried simultaneously with another action raised in respect of the flooding of the same cellar in March, 1917. That action is, however, not the subject of this appeal. The Judge found, in fact, that the sewer had become full during the storm and that in consequence the water in the sewer had regurgitated and flooded the cellar. He then in law found the city liable and rested the liability on three grounds:—(1) He held that the sewer as constructed was insufficient to cope with such rain storms as might well be expected. (2) He held that the city, having power to place automatic valves at the junction of the premises drained with the sewer, which valves would have prevented regurgitation from the sewer, had failed to do so. (3) He found that they had failed to put in operation a pumping station which would have relieved the pressure in the sewer.

On appeal to the King's Bench (1919), 29 Que. K.B. 338, that Court, while affirming the conclusion in fact that the flooding was caused by regurgitation from the sewer, held that the storm in question was so exceptional as to amount to a *cas fortuit* or *force majeure* and that that circumstance destroyed all the grounds of liability above specified.

Neither the trial Judge nor the Judges of the King's Bench made any allusion to art. 1054 of the Code. It is right, however, to point out that both judgments were pronounced before the case of the *Quebec Railway, Light, Heat and Power Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662, 26 Rev. Leg. 244, had been decided by this Board. Appeal was then taken to the Supreme Court of Canada. That Court, by a majority of 4 to 1, held that the rainfall was not so exceptional as to constitute a *cas fortuit* or *force majeure*, 58 D.L.R. 113, 60 Can. S.C.R. 523. Inasmuch, however, as they considered that the plaintiffs might themselves have avoided some of the damage by installing a block valve at the entrance to the cellars, they halved the damage found due by the trial Judge. From that judgment, appeal has been taken by the city to the King in Council.

Mignault, J., with whom Anglin, J. agreed (58 D.L.R. 123 *et seq.*), expressed the view that the liability of the city depended upon art. 1054 of the Code inasmuch as the damage, in his view, was caused by a thing, to wit, the sewer, which was under the control of the appellants. In so holding, their Lordships think that he was clearly right. The fact that liability depends upon the words of the Code renders quite inappropriate many of the cases which were cited to their Lordships decided under other systems of law, such as *e.g.*, *Blyth* v. *Birmingham*

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Waterworks Co. (1856), 11 Exch. 781, 156 E.R. 1047, 25 L.J. (Ex.) 212. In systems not regulated by the Code or by legislation or decision equivalent to the Code, there can be no liability without proof of fault or negligence; mere ownership or control cannot be enough to infer liability. Fault or negligence consists in the breach of a duty and what that duty is will vary according to circumstances. Reference may be made to what was said in the judgment of the Board in the case of the *Dominion Natural Gas Co., Ltd.* v. *Collins et al*, [1909] A. C. 640, 79 L.J. (P.C.) 13, 25 Times L.R. 831, 101 L.T. 359. The Judge (58 D.L.R. at p. 127) then cited the judgment of the Board in the *Vandry* case, 52 D.L.R. at pp. 143, 144, and particularly that passage in which it was said that the first paragraph of art. 1054:—

"does not, in the case of damage caused by things which a person has under his care, raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless in cases where the exculpatory paragraph applies the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage."

Mignault, J., goes on to state a view which their Lordships think is clearly erroneous as regards the considerations which moved the Board to give the opinion they did in the said case and which, in order to prevent misapprehension in subsequent cases, their Lordships think it their duty to correct. The Judge says as follows (58 D.L.R. at p. 127):—

"Their Lordships also hold that by the 'exculpatory paragraph,' the penultimate paragraph of art. 1054 C.C., 'the responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage,' applies to the first paragraph of the article as well as to the four next succeeding paragraphs concerning the vicarious liability of fathers and mothers, tutors, curators, school masters and artisans. This is an absolutely new construction, and in adopting it preference was given to the French version of art. 1054 C.C. without apparently considering the rule of construction laid down by art. 2615 C.C., that when a difference exists between the English and French texts of any article of the Code, 'that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded.' Hitherto it had always been considered that the 'exculpatory paragraph' of art. 1054 C.C. referred merely

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to the specific cases mentioned in the four preceding paragraphs, this being more consistent with the provisions of the existing laws (see Pothier, Obligations, Bugnet ed. no. 121)."

It must be noticed, as will be clearly seen by a perusal of the judgment in the *Vandry* case, that there had been a sharply marked divergence of opinion among the Judges in Canada as to the interpretation of art. 1054 and that that divergence of opinion had been clearly expressed in the conflicting opinions delivered in *Shawinigan Carbide Co.* v. *Doucet* (1909), 42 Can. S.C.R. 281. Their Lordships had, in *Vandry's* case, to decide in favour of one view or the other and they did not disguise from themselves either that the question was one of nicety, as indeed was shewn by the division of opinion above mentioned, or that when one view had been taken criticism might yet remain based on various expressions in the section concerned. Now in this divergence of opinion it was not permissible to treat the scope and ambit of the exculpatory paragraph as a question separate in itself. Yet to do so is what Mignault, J. (58 D.L.R. at p. 127) infers when he says "They *also* hold, etc." That the exculpatory paragraph should apply to things is indeed a necessary corollary to what had already been said when the liability imposed is described as a liability defeasible by proof of inability to prevent the damage. Furthermore, their Lordships consider that the Judge was completely in error when he supposed that the result arrived at was reached by preferring the French version to the English without adverting to the rule of construction laid down by art. 2615. In the first place, as already stated, the paragraph had to be considered not in the isolation of its own expression but as part of the whole scheme of the section. But further this was not a case where art. 2615 could come in. What is the meaning of the expression "difference between the French and English texts"? Obviously not that one is in French and the other in English, because then there would be a difference in every article. It must mean, therefore, that the plain meaning of the French words is one thing and that of the English another. But when the words in either language are capable of two meanings, it is perfectly legitimate to look at the other language to throw a light on the construction of the first. Now the English word "cases" does not necessarily mean "special cases," so as to be only applicable to the four paragraphs dealing with specified cases, but it is also quite apt to include all the instances general and special which the article so far contains. It is, therefore, quite legitimate to turn to the French and to say that "ci-dessus" seems to indicate that it had applied to all that had preceded it in the

article. Their Lordships, therefore, think it better to repeat emphatically that the exculpatory paragraph applies to the first paragraph as well as to the 2nd, 3rd, 4th and 5th, and that that is a necessary part of the interpretation given to the article in *Vandry's case* (52 D.L.R. 136). It is indeed obvious that if this was not so then the first paragraph would, as regards the damage done by things, impose a most onerous liability on those who had those things under their control. The only addition to the views expressed in *Vandry's* case, which was not necessary there but is necessary here, is that in their Lordships' view "unable to prevent the damage complained of" means unable by reasonable means. It does not denote an absolute inability. If, therefore, the storm in question could be described as a *cas fortuit* or *force majeure*, and if the appellants had shewn that they had constructed the sewer of a size sufficient to meet all reasonable expectations there would, in their Lordships' view, have been a case where the exculpatory paragraph would have applied.

This brings them to a consideration of the facts, and here they agree with the trial Judge and with the majority of the Supreme Court (58 D.L.R. 113). They think that the duty of the defendants was to construct sewers which were sufficient to cope with the amount of water which might be expected from time to time in the course of years. As was pointed out in the case of *Great Western R. Co. of Canada* v. *Braid* (1863), 1 Moo. P.C. (N.S.) 101 at p. 121, 15 E.R. 640, by Lord Chelmsford, the works must be constructed "in such a manner as to be capable of resisting all the violence of weather which, in the climate of Canada [by which he obviously means that part of Canada] might be expected, though perhaps rarely, to occur," and the same view was taken by nearly all the learned Lords in *Corp. of Greenock* v. *Caledonian R. Co.*, [1917] A.C. 556. Judged by this standard, it is evident that at least on two occasions before and one after the storm in question there was a rainfall of at least as great intensity. So far, therefore, the appellants have not made good the exculpatory paragraph. There might have been another way of avoiding the damage, viz., by the insertion of stop valves at the junction of the sewer to the drain. This the appellants did not do, so here again they fail.

Their Lordships agree with the majority of the Court in considering that the damage was done by the sewer which was obviously under the control of the appellants. It was indeed argued that the water which did the actual flooding was water from the respondents' own roof and not water regurgitated from the sewer. It is practically impossible to say how much of

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the water in the cellar was water of the one class or the other, but as Mignault, J. (58 D.L.R. at p. 123 *et seq.*) says, it matters little, for if the sewer had been running free, the water from the roof would have got away and could not have regurgitated along the connection drain.

It only remains to be considered, although the point was scarcely argued before their Lordships, whether the Supreme Court (58 D.L.R. 113) was right in apportioning the damage caused by the failure of the respondents to adopt the precaution of putting a resisting valve on the entrance drain to the building. Their Lordships think that they were. As was admitted in *C.P.R. Co.* v. *Frechette*, 22 D.L.R. 356, [1915] A.C. 871, 18 C.R.C. 251, 24 Que. K.B. 459, the law of Lower Canada, unlike the law of England, enjoins apportionment of the damage where there has been a negligence of the plaintiff contributing to the accident. Their Lordships agree that the doctrine is applicable to modify a liability established by art. 1054 of the Code.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

OMAND v. ALBERTA MILLING Co.

Alberta Supreme Court Appellate Division, Stuart, Beck and Clarke, JJ.A. October 13, 1922.

EVIDENCE (§ IV D—405)—CONTRACT FOR SALE AND PURCHASE OF FLOUR—KNOWLEDGE OF SELLER OR PURCHASER'S INTENTION TO SHIP TO ENGLAND—IMPLIED CONDITIONS OF CONTRACT—PAYMENT BY PURCHASER OF CLAIMS OF WHEAT EXPORT CO. & CANADIAN WHEAT BOARD, FOR INFERIOR QUALITY AND SHORT WEIGHT—RIGHT TO RECOVER FROM SELLER—ADMISSIBILITY OF GOVERNMENT RECORDS, AS TO QUALITY AND QUANTITY.

Where in a contract between a miller and a grain exporter for the sale and purchase of flour the evidence shews that the miller knew that the flour was being purchased for export to England, and the correspondence shews that it was an implied term of the contract that the seller would repay to the purchaser whatever claims he was compelled to pay to the Wheat Export Co. and the Canadian Wheat Board for inferior quality, moisture claims, and short weight claims, and the purchaser is compelled to pay such claims, he is entitled to recover the amount so paid from the seller, and the Government inspection reports are admissible in evidence to enable the superintendent of the Flour Inspection Department under whose supervision they were made to refresh his memory as a witness, in regard to the quality and quantity of the goods sold, and to establish the plaintiff's claim.

APPEAL by plaintiff from the trial judgment dismissing his action to recover damages alleged to have been suffered by him by reason of certain shipments of flour sold to him by the defendant being of inferior quality. Reversed.

The facts of the case are fully set out in the judgments following.

Frank Ford, K.C., and *S. B. Smith*, for appellant.

S. W. Field, K.C., for respondent.

STUART, J.A.:—I would allow this appeal with costs and direct judgment to be entered for the amount of the plaintiff's claim and costs.

In my opinion, the records were, under a proper exception to the hearsay rule, admissible in evidence as proof of the facts stated therein.

There is first the necessity principle. No one but the officials at Montreal who were testing flour regularly for the Canadian or British Government could possibly give any evidence on the points involved. Those officials did such an enormous amount of testing that they could not possibly remember the result of the test in each individual case. It is really absurd even to talk about their memory being refreshed. Everyone knows perfectly well that it could not be. So that the necessity arises not merely from death (as it did in *Reid's* case) or from absence(as in *Grant's* case) but from the sheer impossibility of memory even in the case of the witnesses produced, viz., Shutt and Flavelle.

Then there is the circumstantial guarantee of trust worthiness arising from (1) complete disinterestedness, (2) duty to test, (3) duty to record the test at the time, this duty being to superior authorities who would be liable to punish or reprimand for failure to perform it.

The whole subject is fully discussed in Wigmore on Evidence, Can. ed., vol. 2, paras. 1420 and 1521-1532, and I think the principles there suggested as sound should be so treated and adopted by the Court.

Of course it may be suggested that the plaintiff should have had his own special expert to do his testing so that there could be an individual memory of the result, but I think that the defendant company must be held to have impliedly agreed, in view of all the correspondence, to abide by the result of the Government tests and Government records. This last ground alone must support the evidence as to weights because no witness gave any evidence at all as to these. But I think in all the circumstances it should be considered sufficient.

BECK, J.A.:—This is an appeal from the judgment of Tweedie, J. at the trial in which he dismissed the plaintiff's action with costs.

The plaintiff's action is for damages alleged to have been suffered by him by reason of certain shipments of flour sold to him by the defendant being of inferior quality, containing excess

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moisture, and being short in weight and thereby not complying with the conditions and warranties contained in the contracts of sale between the plaintiff and the defendant.

In the alternative the plaintiff alleges that the defendant accepted and agreed to be bound by the findings of the Wheat Export Co. and the Canadian Wheat Board as to quality, weight and moisture content of the flour, and as to the difference in value between the flour agreed to be supplied by the defendant and the flour which was supplied by the defendant, and in the further alternative alleges that the defendant is estopped from denying that there were such defects and that the value of the flour supplied was $3,457.92 less than the flour agreed to be supplied.

The plaintiff is a flour and grain dealer in Toronto and the defendant operates a flour mill in Edmonton. During the war and after the armistice the plaintiff was engaged in exporting flour, and exported many thousands of barrels through the medium of the Wheat Export Co., and later the Canadian Wheat Board. The Wheat Export Co. was apparently the agent of the British War Office.

During the time the plaintiff was purchasing flour from the defendant, there was no other avenue for the sale of export flour than through the Wheat Export Co. and the Canadian Wheat Board. I copy as a sample the second contract made between the parties.

"Toronto, Nov. 22nd, 1918.

Messrs. Alberta Milling Co.,

Dear Sir: I have this day purchased from

Quantity: 4,200—140 lb. bags. Goods: Government Standard 74% extraction Manitoba Flour in my bags branded 'Breadalbane.' Shipment: December from the mill. Price: Ten twenty-five ($10.25) per bbl. f.o.b. West St. John, all rail basis. Payment: Sight draft with documents attached. Conditions: Moisture content not to exceed 13½%. Remarks: Kindly put 139 lbs. of flour into each bag, making each bag weigh 140 lbs. gross, and bill me for exact quantity of flour used. Please see that bags weigh 140 lbs. to avoid claims for s/weight.

W. C. Omand."

Upon shipments arriving at seaboard, samples were taken immediately from the cars by the inspectors of the Wheat Export Co. and later the Canadian Wheat Board, and tested for quality; other samples were sent to Dr. Shutt, at Ottawa, for moisture test, and a number of bags from each car were weighed. These tests determined whether the flour was equal to the Government standard, whether it contained more than 13½% moisture,

and whether the bags were the proper weight, and from the tests was determined the difference in value between the flour shipped and the proper amount of Government standard flour containing 13½% moisture. The shippers were obliged to pay this difference in value and in the present case the plaintiff has paid the Wheat Export Co. and the Canadian Wheat Board $3,473.86 for quality claims, moisture claims and short weight claims in respect of flour which he purchased from the defendant.

It is contended on behalf of the plaintiff and it seems clear from the correspondence that the defendant was aware that the flour sold by it to the plaintiff was for export and that it was to be exported through the Government mediums, the Wheat Export Co. and the Canadian Wheat Board. For instance, the first letter from the plaintiff to the defendant is as follows:—

"Messrs. Alberta Milling Co.

Dear Sirs: I am indebted to Messrs. Bemis Bro. Bag Co., Winnipeg, for your name as being probably interested in export business for the Government. I have been working this business with the Government for some considerable time now, and find that we can use all the Straight Run Manitoba Flour that we can secure. The grade I want is simply a Straight Run Manitoba Flour with about 2% Reddog taken out, and I can pay $10.10 f.o.b. seaboard in my bags, for any quantity you can sell for shipment within the next 30 days.

Although we are not allowed to buy beyond 30 days' shipment at one time, I will be in the market the whole season, as long as you have flour to ship, and I do not anticipate that there will be any change in the price unless feed prices should change.

My terms are *Sight Draft* with *Bill of Lading* attached for full amount of invoice.

As I have contracts for bags with the various companies in Winnipeg, I can have them shipped out right away, immediately I hear from you either by wire or letters. Yours truly,

W. C. Omand."

There were 10 contracts between the plaintiff and the defendant. By each of the first 7 contracts the defendant agreed to supply 74% Extraction Government Standard Manitoba Flour, moisture content not to exceed 13½% and to put 139 pounds in each bag, making each bag weigh 140 pounds. On all of these 7 contracts, except the first, a note was put by the plaintiff: "Please see that bags weigh 140 lbs. to avoid claims for short weight." The first contract is dated October 30, 1918, and the seventh May 17, 1919. The seventh contract is addressed to Messrs. Campbell & Ottewell, but was taken over by the defendant.

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The eighth, ninth and tenth contracts are dated respectively October 7, 1919, October 23, 1919, and November 7, 1919. By them the defendant agreed to supply Government Standard Manitoba Flour, moisture content not to exceed 13½%, and under each of them the defendant was to place 139 pounds in each bag, making each bag weigh 140 pounds gross. On each of these contracts also a note was added asking that the defendant "see that bags weigh 140 lbs. to avoid claims for short weight."

All shipments by the defendant were to be f.o.b. seaboard. The cars of flour were paid for by the plaintiff while they were in transit across the continent, for the reason that it was a term of the plaintiff's contracts with the Wheat Export Co. and the Wheat Board that they were to get the bills of lading as soon after the cars were rolling as they could.

When shipments of flour had been inspected at seaboard and the deficiency in value determined as against the Government standard, notification of the results of the test and the deficiency in value was sent to the dealer who had shipped to the Wheat Export Co. or the Wheat Board, who was in the present case the plaintiff. On February 11, 1919, the plaintiff received the first report on flour shipped under his contracts with the defendant. On that date he wrote the defendant as follows:

"Toronto, Feb. 11, 1919.

Messrs. Alberta Milling Co. Ltd.

Dear Sirs: I have to-day received inspection report for cars 552530 and 68324 shipped by you. You will notice from the reports that the quality of the flour is given as below standard, but so far they have not made any claim for inferior quality. They will, however, claim for excessive moisture and also for short weight, but I will not be able to send you claims for these until we receive their final adjustment. Yours truly,

W. C. Omand."

A large number of reports are in as exhibits. They are on a printed form headed "Flour Inspection Reports" and having at the foot either the printed names "Wheat Export Co. Ltd. Flour Dept.," or "The Canadian Wheat Board," or the written name "W. A. Flavelle" who was the Government Inspector.

The inference is that it was one of these reports, or a copy, which was enclosed to the defendant in the letter of February 11, 1919.

From February 11, 1919, to August 17, 1920, the plaintiff sent some 40 similar letters to the defendant with regard to other cars, promptly upon receiving advice from the Wheat Export

Co. and the Canadian Wheat Board. He also advised the defendant when there was no complaint in respect of a car. The defendant replied to the letters notifying it of the defects in the flour in some few cases.

On February 22, 1919, the defendant wrote that "last year we shipped over 40,000 bbls. and did not have any complaint along this line (i.e. as to the moisture content), possibly they were not as exacting as they are this year." To that the plaintiff replied on February 27, 1919: " . . . . . you are right, they are more exacting now than they were in connection with moisture."

Incidentally counsel for the plaintiff points out that the reason it was important to keep the moisture content down to 13.5 was that it was shipped to Great Britain where it might be stored for 6 months or a year, and it might be shipped to warmer climates where it would be apt to spoil if the moisture content exceeded 13.5 and that one shipment from Vancouver to Hawaii was lost in that way.

In three letters the defendant said something which, it is suggested, might be construed as a denial of liability for the defects found by the inspectors at seaboard. In the letter of April 12, 1919, it wrote that "for ourselves we feel that seeing there was nothing stated in any order as to what it should test, we do not feel that we have any obligation resting upon us along this line." That, however, was a denial based upon what was contrary to the fact for, as the plaintiff pointed out in his letter of April, 1919, the flour bought was to be Government standard Manitoba flour to contain 13½%. Samples of Government standard Manitoba flour were received by the defendant several times and samples could have been obtained at any time on request.

By letter dated July 14, 1919, the defendant said that it was unable to make the allowances asked for on 2 cars. Long after the last shipment had been made and after reports had been received on practically all the cars shipped, the defendant wrote on June 2, 1920: "Yours of the 28th ult. to hand re draft. We are in the habit of paying our debts but we do not consider we owe this. Our flour was milled and shipped according to agreements and we are not responsible for long delays at seaboard where it can absorb moisture."

It is contended by counsel for the plaintiff that the facts that the Wheat Export Co. and the Canadian Wheat Board were the only avenues through which wheat could be exported, that the defendant was aware that the plaintiff was buying for export and had expressly stated that he intended to export through

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those channels, that the flour was shipped f.o.b. seaboard and that the inspection reports and debit slips were forwarded to the defendant from time to time and practically admitted as being correct in the correspondence, all go to shew that it was an implied term of the contracts that the defendant would pay whatever claims the plaintiff would be compelled to pay, and would accept the findings of the Wheat Export Co. and the Canadian Wheat Board, as they would have had to do had they sold direct.

Mr. Flavelle was called as a witness and gave *viva voce* evidence before the trial Judge.

Flavelle was, during the war and afterwards, flour inspector for the Wheat Board, the Wheat Export Co. and originally for the Canadian Government acting for the British Government. He was superintendent of the Flour Inspection Department. He so acted from early in 1919 to June, 1920. He has had 30 years' experience in the flour mill business, handling flour and milling it. He explained at length the method adopted by the authorities under which he was employed. His evidence is too extensive to set out or even to epitomise. The trial Judge refused to permit Flavelle to refresh his memory by the inspection reports or to accept the reports as evidence of the truth of their contents, although the witness was prepared to say that from his knowledge of the system under which the reports came into existence—and his knowledge was complete—the reports were correct.

It was admitted by counsel for the defendant company that Flavelle if he had been allowed "to refresh his memory" by reference to the reports, etc., would have answered in accordance with the information they contain.

In my opinion there are in this case three separate and distinct grounds upon which the trial Judge ought to have received the inspection reports, etc.

(1) Because, taking all the surrounding circumstances it was quite plain to the defendant company from the very commencement of the business that the flour was being sold to the Government and had to come up to the Government standard and there was the necessary implication that the decision of the recognised Government officials acting in the regular course of their duties should *prima facie* be binding as between the parties; such inference arising of necessity out of the circumstances, because it would not be practicable to check the inspection of particular shipments out of so vast a number of shipments requiring the various experiments involved in the work of testing in respect of quantity, and especially quality. Even if it had even occurred to the parties to provide for some method of checking, the project

would, I should judge, in all probability have been abandoned as impracticable or at least too inconvenient and expensive, assuming, about which there perhaps is room for doubt, the Government authorities would have permitted the intervention of inspectors for the many manufacturers of flour, with whom the Government had no direct contracts.

(2) Because, the various processes of testing the flour, the records of these processes and the reports compiled as the result of these processes, and the copies of the various entries of data and of the reports were all respectively made under the direct supervision of the witness Flavelle in such a way and under such circumstances as to give the same moral certainty as if these several things were done by Flavelle personally, and consequently that the case is one in which Flavelle was in a position to "refresh his memory" by reference to any of the entries and reports, according to the rules of evidence under that topic. A witness "refreshes his memory" although the document placed in his hands does not revive his memory in fact, but merely enables him to assert his belief that its contents are true.

(3) Because, there was proved to have been in existence and operation a carefully devised and a carefully conducted system established for the express purpose of ascertaining and determining the quantity and quality of all flour purchased by the Government and requiring in its operation a large body of officials, among whom divers particular duties were distributed and it was a part of the system that the particular results and a synopsis of the accumulation of these results should be regularly recorded. All this leads to a high probability of the correctness of the ultimate results, especially in a public or quasi-public office, as was the case here, and such a general system having been proved by Flavelle, under whose supervision the whole system was carried on and the records made, and he having verified the copies or duplicates of the reports issued in pursuance of the system, the contents of the reports were proved and the contents are prima facie correct.

See Phipson on Evidence, 5th ed., p. 105, and the cases there cited and *Rex* v. *C.P.R. Co.* (1912), 5 D.L.R. 176, 14 C.R.C. 270, 5 Alta. L.R. 9, a decision of this Court.

Personally I think any one of these three principles covers the question of weights as well as all other questions of quantity or quality but on the question of weights acquiescence on the part of the defendant company can well be inferred from the mass of correspondence especially the letter of August 8, 1919, and November 19, 1919.

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There is no other question involved in the case, than the quantity and quality of the flour in question. The plaintiff is entitled to judgment for the amount he claims.

I would therefore allow the appeal with costs, and direct that judgment be entered for the plaintiff for the amount claimed with costs.

CLARKE, J.A., concurs with BECK, J.A.

Appeal allowed.

MOORE v. BROWN.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Rogers, JJ. May 4, 1922.

COTENANCY (§III—18)—OUSTER—LIABILITY—ACCOUNTING—DAMAGES.

Where a cotenant ousts the other from possession of the common property and transfers the property to a corporation of which he is the controlling stockholder, he is liable in damages to the other party and bound to account on a most rigorous basis, for the exclusive use and occupation.

ACCOUNTING (§I—1)—COTENANCY—"NET EARNINGS"—CAPITAL.

"Net earnings" does not lose its character as such, because it was to "remain invested in the capital account of the business," for the purpose of purchasing the business. Income tax paid on the profits of the business is a business charge deductible from the gross profits, but not interest paid for capital borrowed by a cotenant, nor commissions on purchases earned by him, for the purpose of determining net profits in an accounting between cotenants.

COTENANCY (§III—10)—COMPENSATION FOR IMPROVEMENTS—ON PARTITION.

A cotenant who erects structures upon the joint holding, or spends money in improvements, cannot recover his outlay either at law or in equity, except in an action for partition.

APPEAL by defendant from the judgment of Mellish, J., confirming the referee's report. Varied.

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

L. A. Lovett, K.C., for respondent.

HARRIS, C.J.:—The plaintiff on October 2, 1916, got a lease of a pulp mill and certain lands in Lunenburg County from the Nova Scotia Wood Pulp and Paper Co., for the period of 3 years at a rental of $2,000 per year. This lease authorised the lessee among other things "to erect, renew and improve any necessary dams or other structures in and upon the said properties for the purpose of carrying on the generation of electric power or the operation of the said mill for any purpose contemplated by the lease."

The lease gave the plaintiff an option of purchasing the property at any time during the 3 years for the sum of $30,000

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and provided that if the option was exercised all monies paid for rental should be credited on the purchase price.

The plaintiff on the same day assigned his lease and option to the defendant and by the terms of the assignment he was to be employed as resident manager of the business which the defendant proposed to carry on, on the premises, under the name of the Medway Pulp and Paper Co. The agreement provided that the plaintiff was to receive: "25% of the net earnings of the said business, as remuneration for his services which said 25% of the net earnings is to remain invested in the capital account of the said business for the purpose of purchasing the property referred to in the said lease."

The defendant was to pay plaintiff $200 per month on account of the profits which was to be deducted from the plaintiff's "share of profits."

The agreement further provided that if defendant purchased the property the plaintiff had the right to take over 25% thereof "at the same valuation as the defendant will pay to the Nova Scotia Wood Pulp and Paper Co. for the purchase of the said property, namely $30,000."

The defendant carried on the business for the 3 years and exercised the option of purchase by taking a transfer of the capital stock of the Nova Scotia Wood Pulp and Paper Co., instead of a transfer of the property.

About this time he dismissed the plaintiff who, thereupon, tendered defendant with $7,500, being one-quarter of the $30,000, and demanded a transfer of one-quarter of the property, which the defendant refused to convey and an action was, thereupon, brought by plaintiff to enforce his rights under the agreement with defendant.

The action was tried before Mellish, J., who ordered a transfer of one-quarter of the property to plaintiff and that the accounts of the profits for the 3 years should be taken by a referee, Harvey E. Crowell. These accounts were taken and the referee's report was on motion confirmed by Mellish, J., who also assessed the plaintiff's damages for the year when plaintiff was kept out of possession, and there is an appeal from his decision.

The referee found that the total net profits during the 3 year period were $40,669.18, one-quarter of which belonged to plaintiff under the agreement.

On the appeal, it was objected on behalf of the defendant that the profits should be reduced by deducting the sum of $18,120.45, the amount of certain expenditures made on the mill, flume, dam and property, which it is claimed were expended by mutual agreement and which improved the value of the property. It

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was argued that plaintiff was getting the benefit of these expenditures in the increased value of the property and could not get it also in cash as profits.

The work of the referee was done in a most commendable way and he made an excellent report, but it is, I think, evident that he proceeded upon the assumption that he was to arrive at the net profits on the basis that the business was to come to an end at the expiration of the 3 years or at least upon the theory that plaintiff was not to be interested in it after that time. He ignored the agreement for the purchase of the property and the evidence that both parties were active during the 3 years upon the understanding that the purchase should be consummated. The agreement for profits, and for purchase of the property are tied up together and the rights of the parties must be worked out in view of that fact.

In the decision of the Judge upon the trial of the action he found that: "there was a permanent intention from the outset to purchase the property either for the purpose of operating the same or for a resale."

That finding is amply supported by the evidence. The plaintiff says he and defendant discussed the subject on many occasions and defendant had repeatedly told him that he intended to exercise the option.

It is also clear from plaintiff's own evidence that the fact that the option was to be exercised had an important bearing on the question as to the expenditure of the money upon the improvements.

The evidence shews that plaintiff assented to the expenditure and considered it the proper thing to do in the interest of both himself and the defendant if they exercised their option. I quote only a few passages from plaintiff's evidence on the trial on the point:

"Q. All the things that were done were done under your supervision? A. Yes. Q. And under your advice? A. Under Brown's advice. We would talk the thing over and agree upon what was to be done. We both agreed upon having these things done. Q. You considered that you would gain in the output? A. Yes, in the end. Q. So you considered that it was good business to do it? A. Yes. Q. You said you agreed that it would be good business in the end to make permanent improvements; is that applicable to the 3 year term or as to the future of the company? A. *I meant that if we exercised the option we would get the* benefit of the improvements and repairs. Q. Had there been any intimation to you about the option? A. Yes, Brown had every intention of exercising the option. Q. Was there any-

thing definite about it; that he was going to do it? When you talked about the improvements put in in stone and concrete that would be permanent, did you discuss taking over the property? A. We discussed taking it over so many times that I never questioned it. Also the policy laid out by Brown tended to that."

Again, before the referee he said: "The penstock we could have replaced but we built a concrete wall and finally decided to build an entirely new penstock and flume. Q. You agreed with Mr. Brown on this expenditure? A. Yes, *the Medway company, which was Brown and Moore.* Q. Did you protest against making these repairs? A. No. Q. *Did you think it good business to make them?* A. *Yes, so long as we bought the property. I made it very clear that if we intended to purchase the property he should do it in a permanent way,* and if not let me repair it."

The evidence shows that when plaintiff got the lease the property was very much run down and Rex Davison says after these repairs and improvements were made the property was worth $30,000 more than it was before, i.e., $60,000 as against $30,000.

The plaintiff having agreed to these expenditures and getting the benefit of them in the increased value of the property cannot get them as net profits, and this $18,120.45 must be deducted from the $40,669.18 to arrive at the real profits.

There is also an item of $108.93 sundry accounts on fish hole, gateway and log roll as to which the referee says: "The expenditure in connection with above accounts appear in the books of the company at the end of the third year of operations and any benefit to be derived from same would accrue only to whoever carried on business with the same property.

In view of the fact that the option to purchase was exercised at about this date, I consider the total amount of $108.93 a capital expenditure."

The reasons given by the referee for refusing to deduct this sum from the net profits shew that it is in the same category as the expenditure already referred to and it must also be deducted.

The item of $208.90 is in the same class and there is no reason why it should all be paid by the defendant. It must also be deducted. If the amount is recovered from the Government the plaintiff will get his share of the amount.

The next item objected to was income tax paid by defendant on the profits of the business. It was said that the defendant had to pay income tax on the monies expended on capital account as well as on the net income of the business; and the correspondence between the inspector of taxation and the defendant

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has been produced and it appears that the defendant paid income tax on the profits of the Medway Pulp and Power Co., and on a portion of the expenditure on capital account. This tax, while in a sense personal, had to be paid out of the profits and on the profits. To the extent of 25% of the profits the defendant was a trustee for the plaintiff and had to pay the tax on plaintiff's share as well as his own. This item, amounting to $2,998.27 must be deducted from the profits. Another question raised was whether the sum of $1,906.44 paid out by defendant to the bank for interest upon money borrowed to carry on the business should be deducted from the gross profits, in arriving at the net profits. The referee disallowed the item.

I cannot understand any principle upon which it should be disallowed. There is nothing in the agreement which required the defendant to furnish borrowed capital at his own expense to carry on the business, and I cannot see why this item is not a part of the expense of the business which has to be paid out of the gross profits. I am of opinion that this amount must be deducted.

There was a dispute as to whether a sum of $2,395.41 should be deducted. The referee reached the conclusion that 10% of certain purchases made by the Medway company through the Union Supply Co., and the Nova Scotia Motor Sales Co., in both of which defendant was largely interested, could have been saved if the Medway company had purchased the goods directly from wholesalers. It was contended that defendant made no profit out of these purchases as he turned over his interest in the two companies to the Davison Lumber Co., a third corporation in which it appears he was also largely interested. The facts are not very clear as to defendant's interest in the various companies but the findings of the referee do not depend upon the working out the problem involved in that question.

For the reasons stated by the referee I agree with his conclusion as to this item.

We were urged by counsel for the plaintiff in case we found that the expenditure on property had to be deducted from the profits to restore as part of the profits the $6,000 deducted by the referee as paid out for rent of the property.

The matter was not very fully discussed at the argument and the impression left on my mind at the close of the case was that it should be restored as part of the profits. It is inartificial to deal with it in that way but the plaintiff should get the benefit of his proportion of the $6,000 of rent paid which was credited on the purchase price and the trial Judge has directed the plaintiff to pay one quarter of the whole $30,000, i.e., $7,500 as a

condition of getting a transfer, whereas he should, I think, have reduced the $7,500 by the plaintiff's quarter of the $6,000 of rent and thus have made the amount payable by plaintiff $6,000 instead of $7,500. The proper way would be to change that part of the decree by reducing the $7,500 to $6,000, but there was no appeal from that and plaintiff's counsel asked to have it adjusted in the computation of profits. I see no objection to that course if plaintiff is satisfied to accept it, and I think the sum of $6,000 should be added to the profits in respect to this item and plaintiff will thus get the benefit of one-quarter of the $6,000 which he is entitled to on the purchase price. I have not overlooked the wording of the clause under which plaintiff gets the right to take over "not to exceed 25% of the said property at the same valuation as the said Frank K. Brown will pay to the said Nova Scotia Wood Pulp and Paper Co. for the purchase of the said property, namely $30,000."

It is true that in this clause nothing is said as to the rent being deducted and the purchase price is spoken of as $30,000, but the plaintiff is to take it "at the same valuation as the said Frank K. Brown will pay." We must construe the whole clause in the light of all the circumstances of the case and so construing it I think it was the obvious intention that plaintiff should get the benefit of any rent which went to reduce the purchase price. I would therefore add the $6,000 to the profits which will compensate plaintiff if he has to pay the whole $7,500 as a condition of his conveyance.

The result is that there will be first added to the $40,669.18 of net profits allowed by the referee and the trial Judge the sum of $6,000 last referred to, making that item $46,669.18, and there will be deducted the following sums in respect to the matters referred to herein, viz.:—Expenditure on flume, etc., $18,120.45; expenditure on fish hole, etc., $108.93; government share fishway, $208.90; bank interest, $1,906.44; income tax, $2,998.27; total, $23,342.99; leaving a balance of $23,326.19 to the credit of net profits in which plaintiff is entitled to a one-quarter interest.

Another item from which there was an appeal was the sum of $15,000 allowed by the trial Judge for damages for the year during which plaintiff was kept out of possession after the property was taken over by the defendant. I think that the amount assessed by the trial Judge should not be disturbed. I do not think it is too much, whatever may be said from the other standpoint, which I do not have to consider as there is no appeal by the plaintiff.

The order below will be varied accordingly.

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I think the defendant should have the costs of the appeal.

RUSSELL, J., agrees with ROGERS, J.

RITCHIE, E.J.:—At the hearing of this appeal it was clear to me that the allowance of $15,000 for the exclusive use and occupation of the property should not be disturbed; further consideration has confirmed me in this opinion.

As to the other points urged on behalf of the defendant, I was in doubt; but my doubt has been removed by the opinion of Rogers, J., which I have had the privilege of considering. I agree with the opinion referred to both as to the conclusion arrived at and the reasoning upon which that conclusion is based.

CHISHOLM, J., agrees with ROGERS, J.

ROGERS, J.:—This is an appeal from an order of Mellish, J., dated January 5, 1922, confirming the report of a referee to whom was submitted the enquiries directed under an order for judgment dated November 20, 1920, and decreeing the rights of the parties on the basis of the report. It is to be assumed that the delay has been occasioned by appeals from this order asserted first to this Court ((1921), 59 D.L.R. 642, 54 N.S.R. 459), and thence to the Supreme Court of Canada ((1921), 62 D.L.R. 483, 62 Can. S.C.R. 487). The judgment of the Justice in plaintiff's favour was upheld in both Courts.

Moore had obtained a lease from the Nova Scotia Wood Pulp and Paper Co. for 3 years with an option for the purchase of the property for $30,000. This he turned over to Brown under an agreement dated October 2, 1916, which after reciting the lease and its assignment and Brown's intention to carry on the manufacture of wood pulp, electric power on the property and any other business he thought fit to engage in, under the name of the Medway Pulp and Power Co., and his agreement to employ Moore, reads as follows:

"1. The said Phil H. Moore is to have 25% of the net earnings of the said business as remuneration for his services, which said 25% of the net earnings is to remain invested in the capital account of the said business for the purpose of purchasing the property referred to in the said lease.

2. On account of the said profits to be so appropriated to the said Phil H. Moore, the said Frank K. Brown is to advance to the said Phil H. Moore the sum of $200 in each and every month for a term of 3 years from the date hereof, or until the purchase of the said property or until the discontinuance of the said business proposed to be carried on as aforesaid, which said monthly payments are to be deducted from the said share of profits to be so appropriated to the said Phil. H. Moore.

3. An accounting of the said profits of the said business shall be made between the parties hereto at the end of each and every month hereafter and for the purpose of said accounting all books, papers and accounts in any way connected with the said business shall be at any time open to the inspection of either of the parties hereto at the head office of the said Medway Pulp and Power Co., or at the operating office at Charleston.

4. If at any time the said Frank K. Brown purchases the said premises described in the said lease out of the aggregate net earnings as set forth above in this agreement, then and immediately thereafter the said Phil H. Moore is to become the owner of 25% thereof and the said Frank K. Brown is to assign and transfer to the said Phil H. Moore 25% or one-quarter interest therein by good and sufficient deeds thereof always conveying only such title as he may have acquired from the said Nova Scotia Wood Pulp and Paper Co.

5. In the event of the said Frank K. Brown being desirous to purchase the said property before the said aggregate net earnings as hereinbefore referred to are sufficient to complete the amount of the said purchase price, the said Phil H. Moore shall have the option of drawing from the said capital account of the said company his proportion of the profits to that date or of purchasing with his said proportion of profits and any other money which he may desire to invest in the said property an interest in the same not to exceed 25% of the said property at the same valuation as the said Frank K. Brown will pay to the said Nova Scotia Wood Pulp and Paper Co. for the purchase of the said property, namely $30,000."

The agreement is fully quoted, for confusion has been caused by failure to keep in mind its exact terms. It is a contract between two co-adventurers (not partners), whereby one of them, Moore, the plaintiff, who has no control of the expenditures and who is in no sense bound to contribute towards them, is to receive payment for his services as operating manager by means of a percentage of the net earnings arising from the operations for a limited period, and these earnings (subject to a very small living allowance only) are charged at the instance of the defendant, the financier, with the plaintiff's relative share of the purchase money, if the events which may happen he elects to become a purchaser.

The trial Judge upon giving judgment in favour of the plaintiff, asserting his right to a conveyance of one-fourth of the lands, directed the following accounts and enquiries: (a) An inquiry as to all the businesses which defendant engaged in under the name of the Medway Pulp and Power Co. in connection with

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the premises described in the lease set out in para. 1 of the statement of claim and referred to in the agreement set out in para. 2 of the statement of claim covering the period from October 1, 1916, to October 1, 1919. (b) An account of the net earnings of any and all business so carried on by defendant under the name of the Medway Pulp and Power Co. in connection with said premises. (c) An inquiry as to what use has been made of said premises since October 1, 1918, to date of report of referee. (d) An account of the net earnings of any or all businesses carried on in connection with said premises, covering the period from October 1, 1919, to date of report of referee. (e) An account of defendant's dealings with the Zinc lot, so-called; and the order, after reciting a tender by plaintiff of $7,500, one-quarter of the purchase price, declared as follows:—

"And that plaintiff is entitled to have defendant assign and transfer or cause to be assigned and transferred to plaintiff a one-quarter interest in said premises by good and sufficient deeds thereof, to be dated the 1st day of October, A.D. 1919, conveying all title thereto which was vested in the Nova Scotia Wood, Pulp and Paper Company, Limited, on the 2nd day of October, 1916, free from any and all encumbrances since said 2nd day of October, 1916; upon plaintiff tendering to defendant the difference between the sum of $7,500, and one-quarter of the net earnings (if said net earnings do not exceed an amount which, after deducting $7,390.93, will aggregate the sum of $7,500) of the Medway Pulp and Power Company, covering the period from October 1st, 1916, to October 1st, 1919, when finally ascertained and determined by the Court."

The order under appeal clearly does not and could not affect this declaration nor the disposition of the net earnings thereby provided for with respect to the three year period mentioned. The only question open therefore is as to whether the trial Judge has properly interpreted and applied the referee's report. There does not appear to have been any motion to vary the report, but inasmuch as it is before us on an appeal from its confirmation the rights of the parties as dependent on the report can be determined provided we do not interfere with the affirmed judgment of November 20, 1920.

With respect to the enquiries referred to the referee, we are now concerned only with the accounts taken under clauses (a) (b) and (c) and (d). For the 3 year period the referee found that the net earnings or profits (the words are used interchangeably in the agreement, although the word earnings is for the purpose the more accurate) amounted to $40,669.18 and as to the period of 1 year immediately following he found that defend-

ant made by the use of the property and the business he carried on thereon an amount of $90,397.86. During the longer period the co-adventurers were operating as such under the lease, but during the shorter period the defendant had possession to the exclusion of his co-owner and the ascertainment of the earnings or profits for that year would not determine plaintiff's right as against his co-owner, although there was an ouster. The Judge in confirming the report directs judgment for plaintiff for $10,167.29, one-quarter the determined profits and for $15,000. in connection with the use and occupation of the plaintiff's interest in the premises from October 1, 1919, to September 30, 1920. From these sums the order directs a deduction of $7,390.93, the amount theretofore received by plaintiff from defendant on account of the net earnings and it further provides that in the event of the deed of the one-quarter interest in the property being delivered within a time stated the sum of $7,500, plaintiff's share of the purchase money, is also to be deducted, otherwise the plaintiff is to pay into Court that amount to be dealt with as the Court may order. It will be noted that these directions follow precisely the order upon the trial confirmed on appeal, except that the requirement of the tender and the fixing of the differential sum now proves unnecessary because plaintiff has ample balances in defendant's hands to provide the purchase money for his share.

The defendant in his notice of appeal and in the argument attacks the Judge's adoption of the referee's decision fixing the profits at the sum named, $40,669.18, and the use and occupation damages at $15,000; and we have to determine what if any error has been made by the referee and the trial Judge in the method of determining the correct amount of the first item and whether the Judge was justified on the referee's report in allowing the second sum. For convenience the first item will be referred to as the earnings and the second as the damages.

The ascertainment of the earnings depends on the soundness of the referee's report with respect to a number of items of expenditure the largest of which is the sum of $18,120.45 for "mill, flume, dam and property repairs." Two other items of $108.93 and $208.90 may be regarded as in the same class; and these three sums aggregating $18,438.28 are those which appellant especially urges upon our consideration, his contention being that these amounts should be regarded as in the nature of ordinary annual repairs or casual improvements and in the account put forward by him he so treats them. I have read with care the evidence in the case and that before the referee and I thoroughly agree with his reasoning and with his findings as to

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the charges under consideration. The report is an admirable one in every way and with the exception of one matter of minor importance referred to later, I can well understand that the Judge found it unnecessary either to deal with the rather voluminous evidence or to comment on the referee's reasoning. Ample provision had been made for current expenses and all ordinary requirements of a business of the kind for the period of the option, and the allowance of the items in question would have swollen the outgoings on any proper accounting basis to a sum beyond all reason. It was suggested by counsel for defendant that if these sums expended in permanent improvements are to be regarded as such in ascertaining the earnings of the venture, the plaintiff will be receiving his remuneration twice, once on this accounting and again in the shape of an improved property when the time comes (if it ever does) when defendant hands over the deed of the one-fourth interest. This contention which is, in my opinion, founded upon an entire misunderstanding of the agreement will be considered later in this opinion. At present, I desire only to add that, in my opinion, the question as to the manner in which the earnings of the parties were disposed whether in capital outlay or in bonds or put to one side in cash makes not the slightest difference. The only question is, what the earnings were on the correct method of ascertaining them. If the defendant put the moneys of the business in buildings or repairs he had the right to do so and plaintiff had no power to prevent him from so doing nor would he have any desire to do so because his position under the contract would not be adversely affected, rather the contrary. Had the plaintiff seen fit to withdraw from the business, before the earnings were sufficient to complete the purchase as it is provided, he could, defendant would have had to find the money to pay plaintiff, notwithstanding that the agreement allowed the defendant to put them (other than $200 per month provided for plaintiff as a living allowance) into improvements. In such a case the earnings would have been precisely the same as the referee found them to be. The profits of the venture were its net earnings and the fact that these net earnings were for the purpose of purchasing the business "to remain invested in the capital account of the business" does not make them any the less earnings and whether plaintiff desired to withdraw on the one hand or the defendant by ousting him from the co-owned property on the other hand forced him to withdraw, the process of accounting is the same and so also the earnings are the same. The order for judgment directs the accounts to be taken as they have been taken, and it has, as well, determined how they shall be disposed

of as between the parties, and all literally in compliance with the very clear terms of the agreement. The point already referred to as the possibility of double payment will be dealt with after the consideration of other items in dispute. They are three in number:—

1. Income tax. $2,998.27. The referee dealt with this item properly but on his assumption that it was defendant's personal income tax. It turns out that the sum represents the business income tax on the profits as made up by the defendant for that purpose. The amount is, therefore, a proper business charge of which one-fourth should be borne by the plaintiff.

2. Bank interest. $1,906.44. I agree with the referee and the Judge below that if defendant thinks it is to his advantage to borrow money or use his own money in a venture he has no right to pay interest out of the business in the one case or charge the business with interest in the other. The rights of the parties are determined by a contract and we cannot read into it a liability which is not either expressly or by necessary implication within its four corners. The matter would be different if the parties were partners and had either expressly or by necessary implication agreed to borrowings in the general interest on joint account. See remarks of Sir Page Wood in *Rishton* v. *Grissell* (1868), L.R. 5 Eq. 326 at p. 329.

3. Commission on purchases. $2,395.41. The referee's conclusions are sound and tend to support good business morals. The defendant had no right to make profits for himself at the expense of his co-adventurer.

In the result the referee's finding of the profits at, $40,669.18, is to be reduced by the business taxes, $2,998.27 = $37,670.91, and of this sum plaintiff's one-quarter is $9,417.73.

There is another matter to which attention should at this point be called—an error which apparently has passed unnoticed throughout the whole litigation and which was referred to by counsel for plaintiff on the argument. The lease and option agreement provided that the moneys paid as rental $2,000 per year for the 3 year period should, in the event of the option being exercised, "be credited on the purchase price." The referee quite properly has considered these rentals as an expense of the business so that the plaintiff has, through the medium of the accounts, paid one-fourth of the total or $1,500. The real amount payable upon the purchase becomes by offsetting these rentals $24,000 in all, in place of $30,000, so that the figures $7,500 in the orders both of 1920 and 1922 should be struck out and $6,000 be substituted therefor. The mistake is an obvious one and the Court should not hesitate to correct it. That it has

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the power to do so where no matter of principle affecting the judgment is involved is undoubted, and, in any case, further consideration has been reserved. The same result may be reached by adding the $6,000 to the aggregate net earnings.

The question as to the sum allowed by way of damages $15,000 in respect of the exclusive use and occupation of the joint property by the defendant lies within a very narrow compass. The finding of the referee, that the defendant earned profits by his operations during the year October 1, 1919, to September 30, 1920, to an amount in excess of $90,000 is not attacked. The trial Judge, however, has not accepted this finding as imposing a liability on defendant to account to plaintiff for one quarter of this sum. He allows by way of damages or compensation the sum of $15,000, and, in my opinion, if he has erred at all he has done so on the side of leniency. The defendant's counsel contented himself with suggesting that the common law relationship of co-ownership permitted his client to occupy in ordinary course and that plaintiff could do the same and there could only be an accounting in case one took more than his share, and he denied that there had been an ouster of the plaintiff. The letter of September 18, 1919, to plaintiff, which is responsible for the commencement of the litigation is the all-sufficient answer to these arguments. The language of the following extract can hardly be misunderstood:

"The three year contract I made with you will be terminated on this date, and it is my desire that this notice shall terminate any further business relations between ourselves in this respect.

I have made arrangements to dispose of the business and will proceed at once to wind up the affairs of the Medway Pulp and Power Co., and I wish to advise you that future business of this operation will be carried on by the Nova Scotia Wood Pulp and Paper Co., who are now the owners of this property.

You will, therefore, accept this notice as advising you that on and after the above date your further services as manager for me, for my business at Charleston, will not be required."

The plaintiff was not only dismissed as manager but driven off the property and out of the house upon it, and it afterwards transpired that the defendant thought he was successfully accomplishing his purposes by purchasing himself, without conference with his associate, the shares in the company in whose name the title was vested. If authority were required to support the Judge's position, those cited on behalf of the defendant are all that are required. The defendant has clearly brought himself within the scope of Bacon, V.C.'s remarks in *Job* v. *Potton* (1875), L.R. 20 Eq. 84 at p. 97, 44 L.J. (Ch.) 262, 23 W.R. 588:

"If a wrong doer does an act which if it were the case of a chattel and capable of sustaining an indictment for larceny, then the most rigorous mode of taking the accounts is that which is adopted against him," and he goes on to say that the tenant in common in the case he was considering (coal-mining) had "done nothing tortious, neither larcenous nor negligent"; but he had accounted to his co-tenants for the value of the coal taken after deducting the costs of bringing it to the surface. In this case, the defendant has tortiously, as to both real and personal property, and larcenously as to the latter (unless indeed his slender claim of right would save him) converted to his own use by means of the control he had of both the title and possession the common property held as to one-fourth in trust for plaintiff and he cannot be heard to say that he is not bound to account and on "the most rigorous" basis. The trial Judge has certainly not been too rigorous.

And then, too, it is to be borne in mind that the defendant has brought himself clearly within the Statute of Anne (1702), for it is not he who is in possession but rather the Nova Scotia Pulp Co. from whom he as shareholder holding practically all the shares received his profits and for receipts from third parties an action for accounting lies at the instance of the co-owner.

The variation in the order under appeal and strictly adhering to the directions of the order for judgment of 1920 should be the substitution of $9,417.73 for $10,167.29 and the sum of $6,000 for $7,500 wherever these respective figures occur.

As it is now known what the earnings were and this could not be known when the original decree was made, the plaintiff on September 30, 1919, had earnings to his credit of $9,417.73, against which he has drawn out $7,390.93; $2,026.80; and inasmuch as that in order to entitle him to his deed he must be in funds to the extent of $6,000 (in lieu of $7,500 the error as to the rentals being corrected); $3,973.20: the difference between the sum of $6,000 and the balance to his credit, $3,973.20, was the correct sum to tender.

Accordingly, were it then possible, the judgment would simply have directed defendant to convey on payment of this ascertained balance of $3,973.20; and this result should now be embodied in the order under appeal as the only variations directed.

I have now to deal with a contention put forward on behalf of the defendant and already adverted to, to the effect that by the adjustment of the accounts as in all substantial particulars they have been by the referee and by the confirming judgment, the plaintiff when his deed is delivered to him and he gets possession, will in effect be receiving his "net earnings" twice over, once

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in cash and again as part of his one-fourth interest in the real estate. This is an entire fallacy. For the purpose of clarifying the situation and simplifying the figures which while they do not lie may confuse, let us suppose that the earnings or profits of the joint 3 year adventure were precisely $30,000 and they had been ascertained on September 30, 1919, accordingly. It may also be assumed that plaintiff had drawn a small sum by way of living allowance or salary on account. Under these circumstances, by virtue of para. 5 of the agreement, and assuming plaintiff desires to purchase, the plaintiff would have "the option of drawing from the capital account his proportion of the profits" and if he exercised this right he would have received his quarter in cash and that would have ended the transaction. The defendant if he desired still to go on would necessarily have to provide the whole purchase money. On the other hand, the plaintiff would have the further alternative of making up the assumed small shortage of capital to his credit by the use of "any other money which he may desire to invest in the said property" and thereby purchase "an interest in the same not to exceed 25% of the property" and on the basis of the fixed price of $30,000, and of course as it then stood with all improvements. This second option was exercised but not by the use of the earnings. They had not been made up monthly as the agreement provided except for a short period but on September 10, 1919, a statement was demanded and the answer was the "ousting" letter of September 18 from defendant already quoted. Moore then formally demanded recognition of his rights and tendered in "other money" his share of the whole purchase money $7,500. And this money in the orders under review is treated as paid as it should have been out of the earnings against the delivery of the conveyance ordered and is directed to be paid into Court on failure of the delivery within a stated period. The fact that the earnings went into improvements is quite beside the question. They may have; we don't know and no such futile enquiry was directed, nor do we know what Brown himself put into the property in the way of improvements; a great deal of money may have been expended by Brown himself quite apart from the earnings. We know he claims to have advanced large sums as to which he seeks only re-imbursement as to the interest thereon. No accountings were ordered as against Brown in these respects because this would have been equally futile. If he had expended $50,000 in the absence of any obligation on Moore's part to contribute and every dollar of that sum had been expended in, for example, re-building the mill, it could not have affected Moore's position, for by contributing his one-fourth of the purchase price whether

in undrawn earnings or in cash he was bound to have, by virtue of his contract, a conveyance of one-fourth of the property as it stood when the option was exercised. On the assumed facts, it would be quite impossible to say that Moore was thus getting his profits several times over; he would, doubtless, be coming out of the whole venture ultimately with success, but he would only be receiving in property what was due him under the contract in consideration of his services and for the risks he was incurring. But, if we replace the assumed facts by those in proof, the parties evidently understood in advance pretty well what the probable outcome of the operations would be, for the earnings proved to be about sufficient for the completion of the purchase. The plaintiff's rights under the contract are not to be confused with the value of the acquisition, whether that value was incidentally increased by his contributions or by Brown's contributions, and whether these contributions were made by the way of the earnings or profits of the one or of the other or of both and in what proportions is equally immaterial. His remuneration by the "net earnings" is one thing, his ultimate profits on the whole venture is quite another. The suggestion that the property has been increased in value by reason of the improvements is, as has been said, at this stage quite beside the question, that is another enquiry which is not in issue, and it could not be in issue in the nature of things; and the statement of a witness that the property became doubled in value by reason of the improvements is immaterial even if the value had been tested by an actual sale. If the property had been sold for $100,000 in November, 1918, as was proposed by Moore and agreed to by Brown, the former would have received his one-quarter net, for Brown writes that any such sale is to be "carried out subject to a certain former agreement made between us in which you are to receive 25% of the property after all debts of whatsoever kind are paid." He refers here, of course, to the agreement of October 2, 1916. Is there then any room for the suggestion that if that proposed sale had been consummated, Brown would not have had to account to Moore for the then accrued 25% of earnings on operating account as well as one-fourth of the net selling price after the payment of authorised indebtedness, or could it be suggested that Moore was receiving profits not only twice but many times over? These suggestions disclose lack of consideration for the important, in this case vital, difference between co-ownership as such or rather a joint adventure based on that relationship and a co-partnership undertaking, where there are, generally speaking, provisions for the sharing of profits based on capital contributions and for the advance of moneys by way of loan to be repaid

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as a prior charge out of the assets or out of the profits, and the rights of the parties adjusted accordingly. Here Moore—in the popular sense of the word a silent partner—is really one of two joint adventurers and his rewards and his obligations are dependent solely on the terms of the instrument which establish them. Moore under the agreement is a creditor, a preferred creditor for his remuneration, as against the adventure and against Brown personally if the latter has its funds or other assets in hand. It is not for the Courts to make a new bargain for the parties. It is hardly necessary to go beyond the words of the contract itself to consider the real relationship of the parties, but, as it has been suggested that the assent of Moore, the engineer and technical adviser of the venture, to the capital expenditure is an element affecting that relationship, it is sufficient to say that I cannot find a line in the evidence to suggest that the making of any part of them was to have any effect whatever upon the contract or the relative rights at law of the parties as co-owners if and when they became such. Brown at the trial at the commencement of his evidence explains the consideration which led up to the agreement. He says "Suppose I undertake to exercise an option on a rental basis of $2,000 a year, with a view to buying it at the end of three years and would *finance it*, would he (Moore) engage in the proposition with me? He said he had no money. I said *how about your services?* Suppose I give you a quarter interest in the profits!" On this basis the agreement was concluded and says Brown: "From that time it was necessary for me to finance it," nor is there a word of evidence anywhere suggesting any obligation on Moore who had no money to raise money or to expend it in improvements or otherwise or implying any promises in that regard. Undoubtedly, both parties looked forward to the purchase of the property and, for that reason, the relative large expenditures for improvement were made. If there was ultimately no purchase, both have lost the benefit of them by failing to buy and the loss thus incurred would be borne by both but not necessarily rateably. Brown was the sole director. As Moore puts it there was no disagreement. "He (Brown) told me each time we had any great expenditure to make, how he wanted it done and I did it the way he said. It was not a question of asking me if I agreed: he said he wanted certain things done and I would do them as he said," and he further says that the alternative "as between temporary inexpensive repairs for a short period and permanent or more costly work for the longer period were always suggested." In my opinion, it is manifestly clear in the evidence that the parties proceeded with the venture according to the terms of the agreement, and that this agreement

has not been varied in any respect either expressly or by any implications.

The opinion of Sir Page Wood, V.C., in *Rishton* v. *Grissell* L.R. 5 Eq. 326, already cited, may again be usefully referred to. The circumstances were very similar except there was a lease only, not a lease with an option, nor any future prospect based upon a prospective purchase. In consequence, a manager who was to be paid by a percentage of the profits could not object if, on the accounting, all moneys expended in improvements were charged in one side of the profit and loss account provided "the depreciation arising from the running out of the lease and the deterioration of the plant and machinery, were charged on the other side. The adventure had no relation to the future, while in the case in hand it is practically common ground, and the referee finds that permanent and lasting improvements were made and to an extent that would, if allowed, practically prevent the plaintiff from receiving anything for his 3 years services. This principle was applied again by Chitty, J., in *Frames* v. *Bullfontein Mining Co.* in [1891] 1 Ch. 140, 60 L.J. (Ch.) 99, 39 W.R. 134.

The position of co-owners *inter se* is of course an anomalous one in many particulars, but the law is well settled and lies within narrow limits. The diction of Cotton, L.J. in *Leigh* v. *Dickeson* deals with the situation (1884), 15 Q.B.D. 60 at p. 67, 54 L.J. (Q.B.) 18, 33 W.R. 538, as to expenditures for improvements and repairs as follows:—

"No remedy exists for money expended in repairs by one tenant in common so long as the property is enjoyed in common; but in a suit for a partition it is usual to have an enquiry as to those expenses of which nothing could be recovered, so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things it is then necessary to consider what has been expended in improvements or repairs; the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court one party cannot take the increase in value without making an allowance for what has been expended in order to obtain that increased value. . . . . There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered but the procedure is confined to suits for partition. Tenancy in common is an inconvenient kind of tenure but if tenants in common disagree there is always a remedy by a suit for a partition and in this case it is the only remedy."

The claim there as appears from the judgment of Pollock B.,

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in the same case when before him in (1883), 12 Q.B.D. 194, was in respect of "substantial and other proper repairs and improvements." It is clear then that at law one co-tenant who erects structures upon the joint holding or spends money in improvements cannot recover his outlay at either law or in equity, but that in an action for partition under the statute, the Court will assume jurisdiction in equity if a proper case be made out. If, ultimately, legal co-ownership at law is established between the parties now before us, and an action for partition be brought and a sale ordered, it might, in justice, be necessary to make allowance to one or the other as the case would require after the enquiry and adjudication, but the words of North, J., in *Re Jones*, [1893] 2 Ch. 461 at p. 478, should be borne in mind. The co-tenant was not to be allowed to have the equitable assistance of the Court to get any part of his expenditures (and he is speaking of substantial repairs and lasting improvements), "unless he was willing to be charged with what he could not by the rules of law as distinguished from equity be made liable for." The question might then well arise as to whether the defendant in this case should not be charged in the accounting in respect of his occupation on a much more rigorous basis than he has been. But this is an aspect of the case which is not at the moment before us, though reference to it is essential in order to an understanding of the real position of the parties.

There is another distinct reason which forbids the acceptance of the argument of the defendant's counsel. The land by reasons of his client's conduct is vested in the Nova Scotia Co. as against the plaintiff, the defendant having as before intimated by reason of his control of the title converted the joint property into shares in that company without consultation with the plaintiff or agreement with him, is to be regarded as having the earnings in his own hands. He must, therefore, account for them in precisely the same manner as if he had sold the property to a purchaser for cash. The plaintiff has disaffirmed the attempted sale and demands his conveyance of the realty and is pursuing his remedy in that regard, but this is quite consistent with his demand for his "remuneration for his services." And it also is to be borne in mind that defendant still is in default under the decree of the Court. The lands have not only not been conveyed but the Nova Scotia Co. alleges that it cannot be compelled to execute a deed as it would be an act *ultra vires* the company and it, as well, alleges that the company or the shareholders who now control it are in the position of *bonâ fide* purchasers. It is not for the Court to express any opinion as to the validity of these defences, especially the last one, until the issues reach us in due

course, but, in my opinion, if we now deprive the plaintiff of what, in my judgment, is his undoubted right, he may never receive his profits, his earnings, his remuneration once, much less twice. He may well be driven as has been so well suggested by Anglin, J., to an action for damages or some other species of relief, the nature of which, in the events which may possibly happen, it would be difficult in advance to determine.

In my opinion the appeal should be dismissed with costs, subject only to variations particularly dealt with in the early pages of this opinion.

Judgment varied.

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*GUARDIAN REALTY Co. of CANADA, Ltd. v. JOHN STARK & Co.

Ontario Supreme Court, Rose, J. November 17, 1921.

LANDLORD AND TENANT (§IIC—24)—LEASE—OPTION TO RENEW—RIGHT OF EXERCISING AFTER EXPIRATION OF TERM.

A simple option to take a renewal of a lease, cannot be exercised after the expiration of the term, when there is nothing other than the mere overholding by the lessee upon which to base the contention that the right to exercise it still exists.

[*Brewer* v. *Conger* (1900), 27 A.R. (Ont.) 10, distinguished; *Lewis* v. *Stephenson* (1898), 78 L.T.R. 165, referred to.]

ACTION to recover possession of premises let by the plaintiffs to the defendants.

K. F. MacKenzie, for the plaintiffs.

R. J. McLaughlin, K.C., for the defendants.

ROSE, J.:—While the transactions between the landlord and the tenants concerning the partitions were such as to indicate that, at the time when they took place, it was probably the intention of the tenants to exercise their option to take a renewal of the lease, there was no formal exercise of the option, and there was nothing to bind the tenants to take the premises for a further term, if, at the expiration of the term of the lease, they did not desire to do so; and the question is, whether they were in time in demanding a renewal when they did, viz., during the month following the expiry of the term. In my opinion, they were not.

Where, as here, the lease is silent as to the time when application for a renewal should be made, it has been said by Bruce, J., in *Lewis* v. *Stephenson* (1898), 78 L.T.R. 165, 67 L.J.Q.B. 296, that the application for a renewal must be made within a reasonable time before the expiration of the original lease. But this statement by Bruce, J., was *obiter*, and it seems to be clear that there are circumstances in which the application may ef-

*[This judgment was reversed by the First Divisional Court of the Appellate Division on January 30, 1922; this judgment was affirmed by the Supreme Court of Canada, June 17, 1922.]

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fectively be made at a later time. Mr. McLaughlin suggests that the right to elect continues as long as the tenant remains in possession; and, except for the question as to the applicability of the decision in *Brewer* v. *Conger* (1900), 27 A.R. 10, presently to be discussed, I think that the inquiry narrows itself down to the question, whether he is right as to this, or whether there must be something more than a mere continuance in possession.

Foa, Landlord and Tenant, 5th ed., p. 307, suggests that the right to a renewal will not be lost if the tenant continue in possession after the end of the term, with the sanction of the landlord; and Foa's language is adopted by one of the Judges in *Allen* v. *Murphy*, [1917] 1 I.R. 484, at p. 490.

Masten, J., in a case in which what was under consideration was an option to purchase, expressed the view that the reasonable time within which the option was to be exercised was the term of the lease and the time thereafter during which the relationship of landlord and tenant *on the terms of the lease* should continue: *Bennett* v. *Stodgell* (1916), 28 D.L.R. 639, 36 O.L.R. 45, 61.

Several cases were cited to me by counsel in which the right had been held to be exercisable after the expiry of the term, by a tenant who continued in possession. It is not necessary to consider whether in each of them the possession was on the terms of the lease, so as to bring the case exactly within the rule stated by Masten, J.; for every one of them was at least within the rule as stated by Foa—the possession was with the sanction of the landlord—and none of them, in my opinion, supports the broad proposition suggested by Mr. McLaughlin. Even in *Hersey* v. *Giblett* (1854), 18 Beav. 174, the last of the successive years for which the tenant had been given possession was still current when, in February, 1853, the tenant gave notice of his desire for a new lease (see pp. 178 and 179): the statement, in the statement of case, that the application was in April, differs from the statement in the judgment of Sir John Romilly; and, even if the statement in the statement of case is accepted, it does not appear that the application was not made before the 19th April, on which day the term came to an end.

For these reasons, I think that, unless the contrary is decided in *Brewer* v. *Conger*, 27 A.R. (Ont.) 10, the plaintiffs are entitled to possession.

The decision in *Brewer* v. *Conger* seems to me to depend entirely upon the peculiar language of the covenant which the Court had there to construe, and to be quite inapplicable to the case in hand. It was a case, not of the simple option which

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we have here, but of a covenant to "grant . . another lease . . for a further period . . . provided the lessee . . . should desire to take a further lease . . . ;" and what the Court held was that, as the desire existed, the lessee could enforce performance of the covenant, although no demand for another lease had been made until some months after the expiration of the term; and it is to be noted, although, perhaps, the Court did not treat this as an essential, that the desire was known to the lessor's solicitor during the term: see p. 14.

This decision, in my opinion, has no bearing upon the question whether a simple option, such as the one in the case in hand, can be exercised after the expiration of the term, when there is nothing, other than the mere overholding by the lessee, upon which to base the contention that the right to exercise it still exists. There must be some limit to the time within which such an option can be exercised; *primâ facie* that time is, I think, the time of the continuance of the relationship created by the lease; and there seems to be nothing in the cases cited to justify a holding that the tenant can create an extension of it by holding over without the consent of the landlord.

The landlord must be awarded posssession, and declared entitled to retain, as occupation rent, the rent, at the increased rate, which has been paid, and, by arrangement betweeen the parties, has been accepted without prejudice to the landlord's claim to possession. But the landlord is not entitled to the double value which is claimed; that double value is not recoverable where, as here, the retention of possession has been under a *bonâ fide* claim of right: *Wright* v. *Smith* (1805), 5 Esp. 203.

The defendants must pay the costs.

ST. JULIEN v. CHEVRETTE.

Montreal Police Magistrates' Court, Hon. H. Lanctot, P.M.
November 25, 1921.

SUMMARY CONVICTION (§III—30)—ADJOURNMENT OF HEARING OF ARGUMENT AFTER CLOSE OF TESTIMONY—DELAY EXCEEDING EIGHT DAYS—STATUTORY LIMITATION OF ADJOURNMENTS—WAIVER—CR. CODE SEC. 722.

The consent of the attorneys for both parties on the close of testimony in a summary convictions matter being tried under the procedure of Part XV. of the Criminal Code to postpone the hearing of the argument until the shorthand depositions had been transcribed is a waiver of the eight days' limitation provided by Cr. Code sec. 722.

ELECTIONS (§ID—75)—RETURNING OFFICER ILLEGALLY ACTING AS "AGENT" FOR A CANDIDATE—PUBLIC ESPOUSAL OF CAUSE OF ONE CANDIDATE—MUNICIPAL ELECTIONS—R.S. QUE. 1909, ART. 5455.

A returning officer at a municipal election in Quebec is liable to fine on summary conviction under R.S. Que. 1909, art. 5455 for

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acting as "agent" for any candidate in the management or conduct of the election. It is an offence under the Act for him to publicly espouse the cause of either of the contestants, as he thereby constituted himself the "agent" of the favoured candidate within the statute.

SUMMARY trial and conviction under art. 5455 R.S.Q. 1909 against a returning officer for acting as agent for one of the candidates in a municipal election.

Bastien & Bastien, for the prosecution.

Beaudry & Beaudry, for the defence.

LANCTOT, P.M.:—In this case the attorneys of both parties declared their enquête closed and asked that the argument be postponed until after the depositions had been transcribed. These depositions, they said, were very numerous and very long, and they wished to have time to study and analyse them. This request appeared to me to be quite reasonable and I granted it.

Now, who is responsible for the unusual delay in connection with the present case? In the first place, the stenographers are responsible, for they were slow in bringing me the depositions and the last, who seems to beat all records, did not give me his depositions until March 10, 1921. Out of curiosity, I noted this fact on the last page of the depositions taken by him. Again, the parties' attorneys are responsible for, if I am correctly informed, they have not yet taken communication of the depositions which have always remained in my possession. As for me, I have always been ready, as I am still to-day, to hear them.

To-day the accused says: "The case was not adjourned every eight days and the justice who presided at the trial has lost jurisdiction."

Could the accused renounce the benefit created in his favour by Art. 722, Crim. Code? I answer: "Yes," because it is a question of procedure and his consent to renounce to the delay prescribed by the Code was legal and valid. The length of time elapsed which he invokes as the basis of his objection, is of no importance because, in proposing and accepting the above mentioned understanding, he accepted all its consequences in advance. See the case of *Proctor* v. *Parker* (1899), 3 Can. Crim. Cas. 374, 12 Man. L.R. 528: "A conviction is not bad although more than three months elapsed from the commencement to the end of the proceedings."

To support my view point I have only to cite some decisions rendered in analogous cases: *Regina* v. *Hefferman* (1887), 13 Ont. R. 616: "The provision of Sec. 857 (now Art. 722 C.C.), that no adjournment shall be for more than eight days, is matter of procedure and may be waived and a defendant who con-

sents to an adjournment for more than eight days cannot afterwards complain in that respect." In this case the judges go still further by saying: "It seems that the provisions that no adjournment shall be for more than one week are directory merely."

Re Burns' Bail (1906), 17 Can. Cr. Cas. 292: "The consent of the accused to the longer adjournment was a waiver of the irregularity and the bail having been expressly given for longer than eight days the surety could not complain."

Bedard v. *The King* (1916), 30 D.L.R. 326, 26 Can. Cr. Cas. 99, 22 Rev. Leg. 302: "In the absence of prejudice to the accused a summary conviction before a justice is valid, although there has been an adjournment without any date fixed for rendering judgment, if the magistrate before hand has given notice to the solicitor of the accused."

Rex v. *Dominion Drug Stores, Ltd.* (1919), 31 Can. Cr. Cas. 86, 14 Alta. L.R. 384: "The refusal of an adjournment to the accused even after the taking of evidence for the prosecution will be a ground for quashing a summary conviction if it was a manifest denial of justice and prevented the accused from making his full answer and defence."

Regina v. *Hazen* (1893), 20 A.R. (Ont.) 633: "The provisions of sec. 857 (now 722) that no adjournment shall be for more than eight days, is matter of procedure and may be waived and the defendant who consents to an adjornment for more than eight days cannot afterwards complain in that respect."

For these reasons, therefore, I have not lost jurisdiction over the case in view of the mutual consent of the parties sanctioned by the Court.

Consequently the objection raised by the defence is dismissed.

Art. 5455, R.S.Q. (1909), reads as follows:—

Art. 5455: *Who may not act as agents* "Every returning-officer or deputy returning-officer of a municipality, and every partner or clerk of either of them, who acts as agent for any candidate in the management or conduct of his election for such municipality is guilty of an offence which may be summarily tried and is liable to a fine of two hundred dollars."

In this case which is of public interest, I am once more convinced that the first duty of the judge is to see that the law is respected. Everyone must comply with the law; as is expressed concisely and forcibly in the English maxim "Law must be obeyed."

The defendant in this case, a Notary Public, secretary treasurer of the municipality of the Village of Rigaud and *ex-officio* returning officer at the election of a councillor should be strict-

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ly impartial and should not side with one candidate more than another. He should not on any pretext identify himself with the election of either of the two adversaries. He should not take part in the choice of candidates, address public meetings, intrigue or perform any act of partizanship. Yet Mayor Montpetit, a friend of the defendant, said in his deposition "Chevrette worked to defeat St. Julien in order to avenge himself." If his conduct was questioned, as has been done, it was without doubt because he publicly and illegally espoused the cause of Charlebois and the candidate St. Julien hit upon the appropriate phrase one day when he said "stay at home and no one will say anything to you." As that is what he should have done, it would have been much more worthy, and in so doing he would have shewn himself respectful of the law and infinitely superior to those who might have the laxity to attack him in his absence especially as his position forbade him to enter the arena.

If his conduct was criticised, as it has been, if he was slandered, he had only to take the means provided by law for any citizen to defend himself and vindicate his honour; but in taking the steps which the proof shews him to have taken, he constituted himself the agent of one of the candidates. That is what the law forbids absolutely.

The returning officer must remain absolutely neutral. He is, by the nature of the functions assigned to him by law, the president of the election. He is the impartial arbitrator between the candidates and the electors and between the individual candidates themselves; his duty is to see that the law is observed and that peace and good order are maintained.

The circumstances urged in justification and extenuation may tend to mitigate the penalty but cannot exculpate the defendant.

The proof established by a great number of witnesses who corroborate each other leaves no doubt as to the truth of the charges brought against the defendant and his illegal partizanship on behalf of one of the candidates. What is perhaps most damaging to the defendant's case is that he interfered either seriously and even with violent expressions, or in the form of banter, in favour of Charlebois to the detriment of St. Julien. Ridicule sometimes kills more surely than serious accusations. Finally the defence itself admits this state of affairs, but adds

in justification: "If I acted as I did it was in self-defence."

Did the defendant not greatly exceed his duty, for example, when he exclaimed angrily to Procul Lefebvre in public: "You were against St. Julien and now you are for him. You spit upon a man and then lick his hand." A certain number of witnesses swear that they saw the returning-officer several times at Charlebois' committee rooms. He also spoke at the meetings.

Far from being the moderator appointed by law, the defendant was more like Charlebois' election agent (the election Lord of Charlebois) and that fact was so notorious that the case of beer that was destined to celebrate the latter's triumph was left by the grocer at the returning-officer's door. He was quick to realize the possible results of this incident, since he said hastily, "Take that away it is not a good thing."

I am convinced that the defendant did more to bring about Charlebois' election than that candidate did himself. On reviewing the evidence made in this case I asked myself what the defendant could have done more than he did in the direction and organization of the election of Charlebois. If the defendant wished to do as he did and take an active part in the electoral struggle, he had only to resign his position as returning-officer.

I must not lose sight of the fact that the defendant is more or less the victim of a system which is, in my mind, defective. The returning-officer in a municipal election shauld not be the secretary of the municipality. He then plays two roles and in his double capacity is sometimes tempted to do certain things which the returning-officer cannot and must not do.

Now, as to the penalty, I think it is only fair for me to take account of the heavy costs that have been incurred and the provocations which the defendant has had to put up with, at the same time taking care not to forget that this case must serve as an example to all those who are called upon to discharge the functions of returning-officer.

For these reasons I shall only condemn the defendant to pay a nominal fine of $5.00 and the costs of suit, and in default to pay the above mentioned fine and costs, to one month's imprisonment.

Defendant convicted.

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McEWAN v. BUMSTEAD.

Saskatchewan King's Bench, Maclean, J. January 17, 1922.

VENDOR AND PURCHASER (§IE—28)—AGREEMENT FOR SALE AND PURCHASE OF LAND—AGREEMENT FOR EXTENSION OF TIME IF FAILURE OF CROP—"DURING CURRENCY OF THIS AGREEMENT" — MEANING OF—RIGHTS OF PARTIES.

An agreement for the sale of land contained a clause that if there was a total failure of crop "during the currency of this agreement" the vendor was to give an extension of time to the purchaser. The Court held that as the word "currency" was clearly used in a prior part of the agreement as applying to the time which the agreement was in force until the date fixed for final payment, the same meaning must be given to the word as used later on in the agreement, and that the purchaser was not entitled to an extension of time on account of a failure of crop after the date originally fixed for payment, an extension having been once made on account of such failure.

[See *McEwan* v. *Bumstead* (1922), 65 D.L.R. 607.]

APPEAL from the Local Master at Moose Jaw dismissing an application for an order to cancel a certain agreement for the sale and purchase of land, to forfeit moneys paid under the agreement and to vest the title to the land in the plaintiff. Reversed.

L. McTaggart, for plaintiff; *L. Johnson*, for defendant.

MACLEAN, J.:—The facts are not in dispute, and a statement of facts has been filed. The statement sets out the amount of money that remained unpaid under the agreement when action was brought on January 29, 1921. The agreement provides for payment of the purchase-price by four instalments of $500 each, on December 1, in the years 1915, 1916, 1917 and 1918, and the balance, $2300, on December 1, 1919, together with interest at the rate of 7% *per annum* from the date of the agreement. The agreement also contains the following clause:—

"It is further covenanted and agreed that in the event of a total failure of crop in any year to the currency of this contract that the purchaser shall be required to pay me interest only due under this contract, and the vendor agrees to give an extension of time for one year for the payment of the principal."

There was a crop failure in the year 1919, and the defendant asked for and received an extension for one year for the payment of the principal, that is until December 1, 1920. There was another crop failure in 1920. The defendant asked for and contends that he is entitled to a further extension of one year for the payment of the principal, until December 1, 1921. The

defendant's contention is that as long as any money remains unpaid under the agreement a total crop failure entitles him to an extension of one year on the payment of principal, whether that crop failure occurs before or after December 1, 1919. The plaintiff's contention is that the defendant is only entitled to an extension for crop failure occurring prior to December 1, 1919. If the defendant's contention is right the action was brought prematurely. The question turns on the meaning of the phrase "in any year to the currency of this contract," that is, practically, on the meaning of the word "currency" as applied to the contract.

Counsel on both sides admitted that they were unable to find any judicial definition of the word "currency" as applied to an agreement for sale of land. The word "currency" is a usual term in its application to so-called commercial paper and in that respect has a definite meaning.

The word "currency" is twice used in the agreement under consideration. In an earlier part of the agreement, that is, earlier than the above quoted clause providing for extensions, it is provided that the purchaser shall have "the privilege of paying off the whole or any part of the purchase-price at any time during the currency of this agreement."

It seems to me clear and not open to argument that the parties in providing that the purchaser should have the privilege of paying off the whole or any portion of the purchase-price during the "currency" of the agreement meant, at any time during the period ending December 1, 1919, the date fixed for final payment. It is a well-known rule of construction that where one term is used twice in the same document the parties will be presumed to use the term in the same sense in both instances. If that be so in this case, and in my opinion it is, there is no difference in meaning between the phrase "at any time during the currency of this agreement," and the phrase "in any year to the currency of this contract."

The condition therefore on which an extension is granted is a total failure of crop at any time up to but not after the first of December, 1919.

It seems to me that the defendant would not be in a stronger position if, instead of using the words "in any year to the currency of this contract" there had been used the words "until such principal money had been fully paid and satisfied." That phrase was used in a mortgage which came before the Supreme Court of Canada in *The Peoples Loan & Deposit Co.* v. *Grant* (1890), 18 Can. S.C.R. 262, and it was there held that

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the parties had in contemplation the time originally specified for completion of payment. It is true in that case the Court concluded that the parties were not considering a breach of the contract, and that the parties in using the phrase "until fully paid and satisfied" could only have in mind the time which they had fixed or were fixing for completion of payments, while in the agreement under consideration the parties had in mind the possibility of non-compliance in a certain event with the original terms. It is obvious, however, that if the parties were contemplating an indefinite number of extensions because of a possible series of successive crop failures, they would not use to designate an indefinite period a term already used to designate a definite period.

In my opinion the action has not been brought prematurely and the amount unpaid when the action was brought was also due at that time. The appeal will be allowed. The plaintiff is entitled to the amount shewn in the statement of facts filed together with interest thereon according to the terms of the contract.

The plaintiff's application for cancellation of the agreement and forfeiture of previous payments is granted, but the defendant will have until February 15, 1922, for the payment of all moneys due under the contract and costs.

In default of payment of the whole amount due and costs by that time the agreement shall without further order be deemed to be cancelled, the land vested in the plaintiff, and all moneys paid under the agreement forfeited to the plaintiff.

Appeal allowed.

GARON v. DANJOU.

Quebec King's Bench, Martin, Greenshields, Dorion and Allard, JJ. February 26, 1921.

JUDICIAL SALE (§IIA—18)—ACTION AGAINST LESSEE—SALE BY SHERIFF—LESSOR NOT PARTY TO OR BOUND BY PROCEEDINGS—VALIDITY—INTEREST OF PURCHASER—SALE FROM HUSBAND TO WIFE THROUGH SON—VALIDITY—QUEBEC LAW.

A sheriff's sale of an immovable, in an action against a lessee under a simple *bail à loyer*, the lessee never having had any proprietory interest in the property except that of tenant, and the lessor not being a party to or bound by the pretended sale, is illegal and void in so far as it purports to give the purchaser any title in fee to the said immovable. A subsequent sale from the purchaser to his son, and a sale from the son to his mother cannot be invoked to perfect the illegal title, such a transaction being null and prohibited by Quebec law as being a sale from a husband to his wife through a person interposed.

PETITORY action.

The facts of the case are set out in the judgment of Martin, J.

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Garon & Jessop, for appellant; *Angers*, K.C., for respondent.

MARTIN, J.:—Respondent invokes a donation to him by Lord Mount Stephen of a property in the Township of Causapscal, lying between the public road and the Matamajaw Club. The deed of donation was made on September 6, 1890. It was registered on October 1, 1890. It did not contain the cadastral number which is alleged in the declaration to have been part of lots 3d and 4b of the official cadastre of the range of Old Road Kempt in said township.

He alleges a lease (*bail à loyer*) of September 1, 1909, for 10 years from May 1, 1909, to one Samuel Thibault, that the lease has expired and that the appellant is illegally in possession of the property without right and refuses to give the same up to respondent although required so to do. The respondent, declaring that he consented to the buildings erected on said property being removed as provided in the lease, concluded that the appellant be condemned to give up possession of said property.

The appellant by his plea avers that on December 12, 1910, he purchased at sheriff's sale the property in question which was brought to sale in a suit of one Henri Garon against the said Samuel Thibault (the latter being respondent's lessee), that he subsequently sold the property to his son Joseph Garon and the latter sold the property to appellant's wife Marie Pineau. By the answer to plea respondent alleged that the pretended sheriff's sale, as well as the sale from appellant to his wife through the intervention of his son, were radically null and that the deeds from appellant to the son and from the latter to the wife were not registered.

The Superior Court maintained respondent's action and the defendant's appeals.

In so far as the appellant's contention of right to retain possession of the property by virtue of the sheriff's sale to him, I have no difficulty in holding that this contention cannot prevail. The lease to Thibault was not an emphyteutic lease. It was a simple *bail à loyer* and so styled by the parties. Thibault never had any proprietory interests in the land. He was a simple tenant and the so-called sheriff's sale was no sale. It was a nullity and I think respondent could invoke this nullity by his answer to plea. The pretended sheriff's sale was invoked against him by the appellant's plea.

Respondent was not in any way a party to or bound by such pretended sheriff's sale and he clearly had the right when it

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was invoked and pleaded against him, to aver and urge that as to him it was a nullity.

In my opinion, the objection that the action should have been directed against the wife of appellant also fails. Her pretended title deed was not registered. There was nothing to indicate to respondent that she claimed title and possession to the property. The appellant could not invoke or plead her rights, and moreover she had no rights. The deeds from appellant to his son and from the latter to appellant's wife have all the ear-marks of a sale from husband to wife through a person interposed. Such a transaction is null and prohibited by law *Carter* v. *McCaffrey*, 1 Que. K.B. 102.

Finally, the appellant fell back on the contention that he was entitled to retain possession of the property as lessee by tacit re-conduction and renewal of the Thibault lease. This ground was not urged in the written pleadings. The lease contained an express prohibition against sub-letting and the right to renew the lease at the expiration of the stipulated term was a personal right granted to the lessee Thibault. Thibault could sell the buildings and the purchaser could take them away. Respondent declares his willingness to have this done.

I do not think appellant could or did acquire any other rights under the lease in question though respondent left appellants in possession of the property for the balance of the term of the Thibault lease. He never consented to a removal of that lease in favour of appellant and the latter was not in a position to exact a renewal.

The appellant in his *réplique* admits that he had no more rights than the tenant Thibault had, and he had one less right, that is to say, the personal right accorded Thibault to renew the lease. The appellant admittedly, has no rights as proprietor of the property.

The judgment of the Superior Court granted in part respondent's motion to amend the cadastral description as part of 3a of the official cadastre of the range Vieux Chemin Kempt. The property is described by metes and bounds and no prejudice results from correcting the cadastral number.

I would confirm the judgment of the Superior Court for the reason therein stated, and dismiss the present appeal with costs.

DORION, J.:—A petitory action which was maintained by the Superior Court. The defendant appeals from this judgment.

The defendant Garon states in his plea that he is not the

true possessor and that the property which he bought at a sheriff's sale was resold to his son and by the latter to defendant's wife.

Instead of asking to be put out of Court, the appellant contests the respondent's title and asks that the action be dismissed.

Now the respondent has proved his right of ownership. The action must, therefore, be maintained against the appellant.

If Mrs. Garon has any rights, she can enforce them when she is a party to the action, if she sees fit to intervene. But a transfer of property from husband to wife through a person interposed is null. The appellant pretends that his wife is possessor under a lease (*bail à rente*) and that the sheriff's sale was made subject to the charge of the rent which he continued to pay to the respondent until May 1, 1919.

But it appears by the exhibits in the record that the lease in question is not a *bail à rente* and that the only right that the appellant bought from the sheriff is the right of the lessee Thibault against whom the sale was made.

As a last resource, the appellant invokes in appeal the ordinary lease (*bail à loyer*) which was for a term of 10 years expiring May 1, 1918, and renewable every 10 years at the option of the lessee. But he should have taken that position in his plea, asking for renewal of the lease and tendering the rent.

The Court is only obliged to pronounce upon the contestation joined. Besides, the appellant could not take exception to his wife's right for he repudiated all personal interest in the contestation. He might have pleaded tacit renewal through his prolonged occupation more than 8 days after the expiration of the term, as entitling him to continue his enjoyment if not to resist the petitory action.

It is true that the fact appears by the written plea and the evidence; but the appellant does not pretend to have occupied the premises as lessee with the knowledge and consent of the proprietor. He does not ask for possession as lessee. He does not offer to pay the rent. He asks that the action be dismissed purely and simply. He must therefore fail. Judgment confirmed with costs of both Courts.

ALLARD, J.:—To decide the present case we must answer the following questions: 1. Is the plaintiff owner of the revendicated immovable? 2. Have the defendant's wife and his son Joseph ever had rights in the said immovable, and has the defendant's said wife still such right? 3. Is the present action properly brought against the defendant? 5. Supposing that

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the sheriff of Rimouski, on a writ *de terris* issued in a case of *Garon* v. *Thibault*, did sell and adjudicate to the defendant the revendicated immovable, was that sale legal and had it the effect of transferring the property in the said immovable to the plaintiff? 6. Can the defendant admit in his plea that he acquired Thibault's rights from the sheriff and at the same time contest the plaintiff's petitory action?

The first question seems to me to be easy of solution. The plaintiff-respondent acquired the revendicated immovable by the said deed of gift of September 6, 1890, duly registered. His title is perfect and gives him complete ownership of the property in question. The only restriction placed on the plaintiff's right of property by the said deed is that he cannot sell or hypothecate the land.

But, says the defendant-appellant, the land no longer belongs to the plaintiff-respondent. I bought it from the sheriff at a judicial sale and sold it to my son Joseph who in turn sold it to his mother, my wife. My wife is owner and is in actual possession. The only charge imposed upon her by the sheriff's deed of sale is to pay the annual rent of $15, and this has been paid every year.

In the first place, it is difficult to discover, from the evidence and the titles produced, if the land sold by the sheriff is the identical land revendicated by the respondent. The description of the land sold by the sheriff is not the same as that of the property leased to Thibault. Furthermore, I am of opinion that the deeds from the appellant to his son Joseph and from the latter to his mother are not genuine. The appellant never transferred the property in the land he bought from the sheriff to his son Joseph. The appellant was in financial difficulties at the time by reason of obligations incurred on behalf of his other son Henri. He transferred the property to his son Joseph either for the purpose of keeping it free from the attentions of his creditors or in order that the latter might serve as an intermediary or person interposed between himself and his wife.

After selling to his son Joseph for $2,300, he received nothing but promissory notes in payment. None of these were ever paid and the appellant made them payable to his wife. Later on, in order to perpetuate the fraud and simulation, the son transferred the ownership and rights in the land, which he had acquired from his father, to his mother.

For my part, I am of opinion that these deeds are simulated and non-existent. I speak of the deeds from the appellant to

his son and from the latter to his mother. Besides, the evidence shews that the defendant-appellant, in spite of these simulated deeds, always remained in possession of the revendicated land. That was the conclusion reached by the Judge of the Court of first instance, who heard the evidence. I am absolutely of his opinion.

I may add that the testimony of the appellant and his son Joseph does not appear convincing to me. Given that the appellant has always been in possession of the revendicated property, it follows that the action against him is well taken.

The appellant can only have the rights of Thibault, who had leased the land in question for a period of 10 years ending May 1, 1919. Thibault was forbidden to sublet by the terms of his lease from the respondent. It is true that Thibault was permitted to renew his lease for another term of 10 years, but that right was personal to him; and if he could not sublet, it is evident that he could not transfer to a third party his right to renew his lease at the expiration of the 10 years.

By art. 699 C.C.P. an immovable can only be seized as against the person condemned who is or is reputed to be in possession *animo domini*. Thibault was only a simple lessee under a *bail à loyer*. His possession was precarious. It had none of the characteristics or qualities necessary for prescription. The sheriff's sale to Thibault is, therefore, absolutely null and its nullity can be invoked by the respondent.

The appellant contends that this sale is valid because Thibault was in possession of the property in question under a lease which gave him the rights of a proprietor. As I have already said, Thibault was only an ordinary lessee. The parties to the deed of September 1, 1909, express themselves clearly. The first clause of the lease is as follows:—

"Who has by these presents leased by *bail à loyer* for 10 years . . . "

But, says the appellant, the respondent had knowledge of the sheriff's sale and made no opposition.

Can the appellant pretend that the respondent had knowledge of the sale of his property by the sheriff? The evidence does not shew it. It is true, in this connection, that the plaintiff-respondent was asked the following question:—"Q.—Did you have knowledge of the sale of the property in the 'Moulin Thibault'?" and answered as follows:—"A.—I had some knowledge of it."

The question only referred to the sale of the mill. This mill belonged to Thibault. It was his by the terms of his lease and

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he was entitled to take possession of it, and there is no doubt that the respondent thought that the effects sold against Thibault by the sheriff belonged to the latter, that is, the buildings erected on the respondent's land.

The appellant was also of that opinion since, in para. 2 of his answer, he virtually admits that he only acquired Thibault's rights and states that his son Joseph and his wife, who derive their alleged title from the appellant himself, have not and did not acquire by their title any greater rights than the said Samuel Thibault may have had in the respondent's land.

This admission made by the appellant facilitates the solution of the present controversy. If the appellant only acquired such rights as Thibault possessed, he did not acquire any right in the revendicated land. He only bought the buildings which belonged to Thibault.

But the appellant argues in his factum that, having acquired Thibault's rights, he must be treated as a lessee in any event, and that the respondent should have given him notice to vacate the premises before taking action. The answer is that that is not the stand taken by the appellant in his plea.

He denies the respondent's right of property and pretends that the revendicated property belongs to him by reason of the title he derived from the sheriff. This pretension alone enabled the respondent to obtain from the Court a judgment declaring him to be the owner of the property, and this he could only do by means of a petitory action. But if he had pleaded that he was in possession of the said land as lessee, having acquired from the sheriff the rights which Thibault had under his lease from the respondent, the latter could have answered at once: The sheriff's deed does not give you the right to a renewal of Thibault's lease for a further period of 10 years. That right was personal to Thibault and you cannot exercise it yourself. The skill and resourcefulness of his attorneys would have suggested other serious grounds of defence.

In any event, we have only to pronounce upon the questions raised by the pleadings in the present case. And on the whole, for the above mentioned reasons, I would confirm the Superior Court judgment with costs of both Courts.

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Manitoba King's Bench, Dysart, J. April 20, 1922.

CONTRACTS (§IIB—185)—TO CUT AND DELIVER PULPWOOD—"EVERY POSSIBLE ASSISTANCE"—SEVERAL OR ENTIRE—PAYMENT FOR DELIVERIES.

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An agreement to cut and deliver a certain quantity of pulpwood, to be paid for monthly for deliveries made during the month, the other party agreeing to render "every possible assistance" to enable the carrying out of the terms of the agreement, is not a contract for the sale of goods, nor a building contract, but one for work and labour depending for its maximum performance on the concerted efforts of both parties; it is an instalment contract in respect for the payments for the monthly deliveries, which are recoverable, though the maximum deliveries were not reached because of the lack of assistance by the other party.

ACTION for the recovery of the balance due under a contract for cutting pulpwood. Judgment for plaintiffs.

W. Hollands, for plaintiffs.

W. Manahan, and *W. H. Hastings*, for defendants.

DYSART, J.:—Late in the year 1920 the defendants entered into an agreement with the Dryden Paper Mill Ltd., by which they agreed to "cut, haul and deliver on cars" from the timber concessions of the company in Western Ontario, a large number of cords of pulpwood, ranging at the defendants' option from 3,000 to 5,000 cords, at the price of $8 per cord. On December 13, 1920, the defendants entered into a similar contract with the plaintiffs, who agreed to cut, haul and deliver 4,000 cords of the pulpwood at $6 per cord.

The two contracts, except for the necessary differences in parties, quantities and price, are in exactly the same terms in all respects. Both provide that "deliveries will begin as soon as possible, and will terminate on the completion of the number of cords above mentioned," and also that:—"payments will be made on the 15th of each month for all pulpwood which is received before the first of the month. Ten per cent. of the value of the wood received will be retained . . . until this contract has been completed," that is, in this case, retained by the defendants.

Like the earlier contract, the contract between the parties hereto contains the further provision that:—"every possible assistance will be given to the parties of the second part in locating roads, procuring and removing cars, and otherwise to enable them to carry out the terms of this agreement."

The parties of the second part in the later contract are the plaintiffs.

Under their contract the plaintiffs went to work and in the months of January, February and March, 1921, they cut, hauled and delivered on cars 133.9 cords, 964.2 cords and 964.3 cords, respectively—in all 2,062.4 cords—for which they were paid on February 15, March 15 and April 15 the stipulated price of $6 per cord, less the 10% retention money. In the

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same way the defendants got the benefit of these deliveries and received from the paper company payments at the rate of $8 per cord, less 10%. There is no dispute over these facts.

But the April deliveries amounted to only 532 cords, bringing the total deliveries up to 2,594.4 cords, that is, 1,405.6 cords below the stipulated 4,000. Payment of the April deliveries was made by the company to the defendants subject to the usual 10% retention, but was refused by the defendants to the plaintiffs. The plaintiffs, therefore, have brought this action to recover payment for the April deliveries at the contract rate less 10% thereof, amounting to $2,782.80. In addition they claim a small item which is admitted, at $238—making their total claim $3,110.80.

In resisting payment the defendants set up breach of contract resulting in the loss of profits on the 1,405.6 cords at $2 per cord, and the loss of 20 cents per cord on 2,062.4 cords, being the adverse difference between the 10% money retained from them and that retained by them. In all their claim amounts to $3,330.28, and they ask for judgment for the balance in their favour.

In order that the plaintiffs might succeed in this action they must shew: (1) that they were not responsible for the failure to make full deliveries; or (2) that the contract is divisible and is payable by instalments. The defendants' claim, of course, rests upon the view that the contract is an entire one.

The plaintiffs plead impossibility of full performance and introduce some evidence which, while supporting, did not establish that plea. But the evidence did not shew to my satisfaction that the lumbering conditions under which the plaintiffs worked were unusually difficult; that the snow in the forest, while of sufficient depth, was soft and wet; that the workmen could not be induced to remain very long at their unpleasant tasks in wet snow; that continuous supplies of new and often inexperienced men were brought in to replace those who daily left the camp; that one of the plaintiffs devoted a large part of each day in Winnipeg to securing and transporting such new recruits as were available; that on several occasions the plaintiffs told the defendants of the need of more men and asked defendants' assistance and co-operation in procuring men; that the defendants knew in February that deliveries would have to be speeded up if the contract was to be carried out in full; that some of the defendants, with a view to assist, visited the camp over night and made some suggestions, which the plaintiffs regarded as impracticable; and that nothing more was done by the de-

fendants to enable the plaintiffs to carry out the contract. In the meantime plaintiffs continued under these adverse conditions, and with considerable zeal and earnestness, perhaps with occasional petulance, to work through to the end of the season, doing all they could to carry out the contract in full. In spite of their efforts, however, they fell short of their goal. I attribute their failure to adverse conditions, and lack of assistance from defendants.

Are the plaintiffs responsible for breach of contract? Are we to look to their contractual undertaking and overlook that of defendants? Are we to condemn the partial performance of the plaintiffs and condone that of the defendants? The defendants had a contractual duty to render "every possible assistance" to the plaintiffs "to enable them to carry out the contract." This duty was a real one. The language is not to be ignored. It imposes on the defendants a specific duty of doing everything that could possibly be done to aid in carrying out that contract. From the evidence I am satisfied that the defendants, apart from offering some advice, did nothing substantial in the way of rendering assistance, and that if they had exercised themselves as much in rendering assistance as they did in insisting on their supposed rights, the contract might possibly have been performed in full.

It ought to be noted that the provision calling for "every possible assistance" from the defendants can have no proper place in such a contract unless it be to arrange that a united effort be made by all the parties to the agreement to increase the output. If the responsibility for the full output rested entirely upon the plaintiffs, why were the defendants to render "every possible assistance"?

The assistance could not give them a greater profit per cord—it could only give them the fixed profit per cord on a greater number of cords. Thus the defendants had a substantial interest in increasing the output to the maximum. But that output was expected to be more or less indefinite. The contract between the paper company and defendants was originally placed at 3,000 cords, but by later negotiations the defendants secured the privilege of increasing it to any amount up to 5,000 cords. So also in the contract sued on here. Provision was made for accepting 3,000 cords instead of 4,000 in the event that sleighing ceased by March. It was also provided that:—"permission to continue the work on the same terms until the close of the logging season, or say the first of May, will be granted if conditions so warrant." From these provisions it

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must be evident that the parties contemplated getting out all the pulpwood possible—and in that task of getting out the maximum output, the defendants were to render "every possible assistance."

Besides the deliveries are to be paid for monthly. This provision partakes of the nature of a severable contract. The retention money is withheld as a leverage to induce full performance. Is not this retention money really the measure of plaintiffs' damage in case of default? That at least is the plaintiffs' view. They do not seek to recover it. They recognise that having failed to complete the deliveries up to the stipulated 4,000 cords they are not entitled to the moneys retained. The same construction has been put upon the contract between the defendants and the paper company and settlement has been made in full upon that basis. Why should settlement be denied the plaintiffs on the same basis? I can see no reason for such denial. Of course, it has been urged on the authority of several cases that the retention money is merely for safety, or merely to stimulate performance, and that it is not the measure or limit of damages resulting from failure to perform in full. But while that may be true of building contracts payable by instalments, I think the principle does not apply to the contract in question here. As I construe this contract, it is not what the defendants contend. It is neither a contract for the sale of goods, nor is it a building contract. It is rather a contract for work and labour to be performed on specified timber limits. The plaintiffs and defendants were both restricted to these limits. Neither could go into the open market and buy pulpwood to fill up the number of cords required. In one instance at least the plaintiffs did buy pulpwood to swell their deliveries, but the pulpwood was refused by the Dryden Company to whom all deliveries had to be made by plaintiffs. The contract was, therefore, one for cutting all possible pulpwood from certain lands, with a minimum fixed, but without a maximum—and containing a provision that defendants would render every possible assistance to enable plaintiffs to fulfil their contract.

It is argued by defendants that this is not an instalment contract. But in one sense it is, and in another it is not. It is an instalment contract in that the deliveries of each month were payable on the 15th of the following month. On the maturity of each of these instalments plaintiffs could maintain an action for it. And this would continue true till the time for final settlement, when, if there was damage suffered by them, the defendants might offset and counterclaim. In this latter

sense then, the contract is not an instalment contract—it is an entire contract—in the nature of a building contract.

The conclusions I reach are, that the contract is properly construed as one which depends for its maximum deliveries, on the concerted efforts of both parties to it; that the maximum was not reached because of the lack of assistance by defendants; that the deliveries made must be taken as full deliveries so far as the efforts of the plaintiffs could make them full; that the defendants' loss of profits for the shortages of deliveries must fall on defendants; that the defendants' counterclaim be dismissed with costs; that the plaintiffs are entitled to payment for the April deliveries in the same way as for the earlier deliveries, and that the plaintiffs, therefore, have judgment for $3,110.80 with costs.

Judgment for plaintiff.

O'LEARY v. O'LEARY.

Alberta Supreme Court, McCarthy, J. September 22, 1922.

HUSBAND AND WIFE (§III B—149a)—RESTITUTION OF CONJUGAL RIGHTS—IMPOSSIBILITY OF CREATING A HOME—ORDER IF MADE INEFFECTUAL.

The Court will not grant restitution of conjugal rights where the course of conduct of the plaintiff towards her husband would make it impossible for the parties to live together again under such circumstances as to constitute a home in which conjugal relations would be established, and a social atmosphere created which would be beneficial to the upbringing of the children and the order in the opinion of the Court would be ineffectual and unsafe.

HUSBAND AND WIFE (§III B—145)—ACTION BY WIFE—RESTITUTION OF CONJUGAL RIGHTS—DEFENCE—DISMISSAL OF ACTION FOR ALIMONY—SAME MATTERS IN ISSUE—ACTION MERE CLOAK TO OBTAIN POSSESSION OF CHILDREN.

The dismissal of an action for alimony brought by a wife against her husband, in which the husband is charged with the same matrimonial offence, is an effectual bar to a subsequent action for restitution of conjugal rights, the real purpose of which is to procure the custody of the children.

ACTION by a wife for restitution of conjugal rights. Action dismissed.

George Ross, K.C., for plaintiff.

H. A. Chadwick, for defendant.

MCCARTHY, J.:—The defendant sets up by way of defence that he has lived separate and apart from the plaintiff by reason of the plaintiff's conduct towards him.

This action was commenced by statement of claim issued out of this Court on April 15, 1922. Prior to the commencement

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of this action, the plaintiff brought an action against the defendant for alimony. The statement of claim in the last mentioned action was issued out of this Court on August 10, 1920, and alleges various acts of cruelty and that the defendant failed to provide the plaintiff and the children with sufficient clothing and necessaries, and that the defendant forbade the plaintiff receiving her relatives including her mother, brother and sisters, at the home of the parties to this action and refused the plaintiff the right to visit her people, and charges that the defendant was not a fit and proper person to take care of the infant children, and if they were not under the care of the plaintiff they would not be properly brought up or clothed or otherwise taken care of. The plaintiff also claimed alimony and an injunction restraining the defendant from selling, transferring or otherwise disposing of his farm implements, moneys deposited in the bank or other assets. The action proceeded to trial before Scott, J., and on March 16, 1921, was dismissed and the custody of the infant children was given to the defendant.

The oral judgment of the trial Judge, after dismissing the plaintiff's claim for alimony, concludes as follows:—"I am prepared now to hold that the defendant is entitled to the custody of all the children. If you make any other satisfactory arrangement between the parties I will make an order to that effect. You can speak to me about it afterwards."

At the trial of this action, I endeavoured to have the parties arrive at some settlement of the matters in dispute between them and the case was adjourned for that purpose and I have deferred giving my judgment until this late date in the hope that the parties to the action would still arrive at some agreement but evidently they have been unable to do so.

It was stated by counsel at the trial of this action that the reference to a satisfactory arrangement made by the trial Judge arose by reason of the fact that the defendant at the conclusion of the trial offered to allow the plaintiff to have the custody of one of the children, being the infant child, which she refused to accept, explaining in her evidence at the trial of this action that her health was then in such condition that she did not feel that she was strong enough to look after the child, who was then an infant of the age of three or four months or thereabouts. No appeal was taken from the judgment of Scott, J.

The course of the plaintiff's conduct that the defendant complains of may be briefly summarized in part as follows:—That on June 19, 1920, the plaintiff left the defendant's home, taking with her the three infant children, (the infant previously refer-

red to being born subsequent to June 19, 1920); that the defendant subsequently ascertained that she had left them in a home for neglected children in the City of Calgary, and upon hearing of this that he arranged to have them placed elsewhere with their mother; that on August 10, 1920, she commenced the action for alimony and the custody of the children, previously referred to, and in the course of the conduct of the action she filed an affidavit, sworn to on August 9, 1920, wherein she charges the defendant with endeavouring to have her commit a criminal offence in that he endeavoured to induce her to commit an abortion; that the plaintiff caused the defendant to be brought before a magistrate on a charge of assault, that the defendant was convicted, but he says no opportunity was given him of producing evidence before the magistrate; and that on March 16, 1921, action for alimony above referred to was dismissed, and that the trial Judge directed that he, the defendant, be given the custody of the four infant children; and that, notwithstanding the judgment of the trial Judge directing that the defendant should have the custody of the children, the plaintiff circulated in the neighbourhood where they lived, amongst his neighbours and acquaintances residing at Cluny and in the vicinity, a petition by which they placed themselves on record, as the petition states, of being heartily in favour of granting the custody of the children to the plaintiff; and that on January 22, 1922, the plaintiff launched an application for the custody of two of the children, which application she subsequently dropped; that also, the plaintiff endeavoured to interest the Department of the Provincial Government which has the supervision of neglected children, in the matter, representing to them that the children were not being properly cared for and causing enquiries to be made by them from the defendant; that on March 17, 1922, the plaintiff, apparently having changed her solicitors, caused a letter to be written to the defendant by them, laying the foundation for the present action, and on April 15, 1922, the present action was commenced. In short, that the whole course of conduct of the plaintiff towards the defendant has been such that it would be impossible for them to live together as man and wife.

The evidence as to what transpired since the termination of the former action is contradictory. The defendant, since the separation, apparently has had his sister keeping house with him on the farm and looking after the children. The plaintiff alleges cruel treatment by him, which is contradicted by the defendant and his sister but the defendant does admit upon one

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occasion of having turned her out of the house. There is no doubt, in my mind, but the conduct of the defendant, the husband, towards his wife was not what it should have been, but the situation appears to me to be that the plaintiff has so annoyed the defendant by the publicity given to their domestic troubles and by compelling him to pay costs of the former action, which was done, and putting him to the expense in connection with her actions, that the defendant is retaliating by making it as difficult as possible for the plaintiff to see her children.

The questions therefore arise:—1. Does the course of conduct of the plaintiff disentitle her to succeed in an action for restitution of conjugal rights; and 2. Is the dismissal of her action for alimony under the circumstances a bar to the present action? 3. Is this a *bonâ fide* action for the restitution of conjugal rights, or is the real purpose to procure the custody of the children?

Counsel for the defendant relies on the case of *Russell* v. *Russell*, [1897] A.C. 395, where the wife had accused the husband of sodomy of which he was found not guilty, she subsequently commenced proceedings for restitution, the husband counterclaimed for judicial separation, his counterclaim was dismissed, so was the wife's petition on account of her conduct.

Counsel for the plaintiff on the other hand takes the position that the only defences open to an action of this character are:—1. Adultery. 2. Cruelty by the petitioner. 3. Desertion, which became an additional ground in 1857, relying on Dixon's Divorce Law and Practice, 3rd ed., at p. 21. In other words, counsel for the plaintiff contends that we are in Alberta yet under the Law of England as it existed prior to 1870 and that the Act of 1884 (Imp.) ch. 68 which he contends, in effect, provides what is a reasonable cause for the refusal of a decree, is not applicable to Alberta, and that the many other defences which have been held tenable since the passing of the Act of 1884 do not apply to Alberta, and we are thrown back under the old law and limited to the three defences above enumerated. If that be not so, there are many other grounds for refusing the decree, *vide Dixon* at pp. 21 *et seq.*; e.g., a false charge against a husband of an unnatural offence; dangerous drunkenness, etc. See also *Marshall* v. *Marshall* (1879), 5 P.D. 19, 48 L.J. (P.) 49, where deed of separation containing a covenant not to sue was held to be a good defence; and the cases collected in Brown and Watts' Divorce and Matrimonial Causes,

8th ed., at pp. 89, 90, 91, 92; also where a plaintiff was addicted to drink and had become dangerous to herself and others, and where a separation deed executed by the husband and wife jointly is a bar to such a suit. *D'Arcy* v. *D'Arcy* (1887), 19 L.R. Ir. 369, where a violent temper and habitual intemperance were held to constitute a legal defence to a suit by the wife for restitution.

Rayden on Practice and Law in Divorce Divisions at pages 55, 78, 79, 121 and 343.

As to the contention of counsel for the plaintiff (a) That the Court should only consider three grounds of defence that is adultery and cruelty (desertion being added as a ground in 1857) in proceedings for restitution (b) and that material modifications were made in the law by the Acts of 1857 and 1884.

While some of the text books support this view, I think that after careful examination of the statutes and authorities some of the latter, it will be observed, decided prior to 1870, will not support this view. Section 17 of the Divorce and Matrimonial Causes Act. 1857, (Imp.) ch. 85, provides that either the husband or wife may institute proceedings for restitution of conjugal rights and that the Court upon being satisfied of the truth of the petitioner's allegations and that there is no legal ground why the same should not be granted may decree restitution accordingly and by sec. 22 of the same Act it is provided:—

"In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on *principles and rules* which in the opinion of the said Court shall be as nearly as may be conformable *to the principles and rules* on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the Rules and Orders under this Act."

It is to be observed that the Act of 1857 has not altered those principles. What would constitute a proper ground for refusing restitution before the Act constitute a proper ground subsequent to the passing of the Act. In other words, there has been no modification by the Act of 1857.

Since the date of the adoption of the English law, 1870 in this Province, the Act of 1884, (Imp.) ch. 68 has been passed in England but from an examination of that Act it was apparent that all the Act did was to do away with the power of attachment and affected the question of desertion in the case of disobedience to the order. But no new grounds of

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defence were created by the Act nor were there any created by the Act of 1857, (Imp.) ch. 85.

A careful examination of *Russell* v. *Russell*, [1897] A.C. 395, will disclose that the Court there sought to find out what were the principles and rules on which the Ecclesiastical Court acted and gave relief and that case indicates that the impossibility of the parties continuing to live together would be a proper ground for refusing to grant restitution of conjugal rights, and that too according to the Ecclesiastical principles and rules.

Numerous authorities discuss what defences are available in proceedings of this kind. For example, intemperance has been held not to be a good defence but habitual drunkenness has, see *Beer* v. *Beer*, (1906), 94 L.T. 704, 54 W.R. 564, 22 Times L.R. 367. A false charge of an unnatural offence was held to be a good ground for refusing to order restitution of conjugal rights; See *Russell* v. *Russell*, *supra*. The defence of impotency was discussed in *Ricketts* v. *Ricketts*, (1866), 35 L.J. (P.) 92, 13 L.T. 761. A separation deed is discussed in *Welch* v. *Welch*, (1916), 85 L.J. (P.) 188, 115 L.T. 1, and also in the recent case in Saskatchewan of *Korulak* v. *Korulak*, (1921), 57 D.L.R. 746, where MacDonald, J., refuses to order restitution of conjugal rights where a separation agreement was in existence, although not produced at the trial. Insanity as a general rule is not a good reason for refusing restitution of conjugal rights but if dangerous it may be otherwise; see *Green* v. *Green* (1869), 21 L.T. 401. Refusal of intercourse is discussed in *Davis* v. *Davis*, [1918] P. 85, 87 L.J. (P.) 53, 118 L.T. 649.

So that, although the defences may have been extended since the Act of 1884, no new grounds of defence were created by the Acts of 1857 or 1884 and there has been no modification of the principles or extensions thereof. The law relating to restitution which guided the Ecclesiastical Courts and the Divorce Courts are set out per Lopes, L.J., in *Russell* v. *Russell*, [1895] P. 315 at pp. 333-335, and *per* Rigby, L.J., at p. 339, (64 L.J. (P.) 105).

The Court in dealing with the effect of the conduct of one of the parties upon the home in the case of *Russell* v. *Russell*, [1897] A.C. at p. 408 says:—

"There is no doubt that where the home is not destroyed, the Court might say 'To keep the parties together is desirable.' But where the conduct is such that the home is at once absolutely destroyed ,and that according to the ordinary human laws and feelings it would be discreditable for the parties to live

together, the Court is justified in saying it would not force them to live together."

While it might be possible for the Court to order parties to live together under the same roof it seems to me in this case the course of conduct of the plaintiff towards her husband would make it humanly impossible for the parties to live together again under such circumstances as to constitute a home in the true sense of the word, a home in which conjugal relations would be established in fact and a social atmosphere created which would be beneficial to the upbringing of the children. I am satisfied from the evidence and the feeling which was shown between the parties at the trial of the action that any order directing restitution that I would make in the matter would be ineffectual and unsafe and I am not satisfied it would not result in a breach of the peace.

In *Torsell* v. *Torsell*, (1921), 58 D.L.R. 575, 16 Alta L.R. 200, Beck, J. said at p. 581:—

"But it will have been observed that the restrictive definition of 'cruelty' laid down in *Russell* v. *Russell* was held to apply to a case of judicial separation only because in cases of that sort the Court, that is the Court for Divorce and Matrimonial Causes, established by the Act of 1857, sec. 6, was, by reason of the restrictions placed by the Act upon the powers of that Court, hampered by the principles and rules of the Ecclesiastical Courts (sec. 22). Nor, as the case itself discloses, is it necessary as a defence to an action for restitution of conjugal rights, to establish cruelty of the special kind required to be shown by the plaintiff in a suit for judicial separation."

There is nothing in the reasons for judgment of the majority of the Court in *Torsell* v. *Torsell* which conflicts in any way with this statement of the law.

Lord Herschell in *Russell* v. *Russell*, [1897] A.C. at pp. 455-456, points out the distinction to which Beck, J., has referred as follows:

"One argument I ought to notice before I review the authorities. The Court, it was said, could only refuse restitution of conjugal rights on grounds which would justify a decree for divorce, [i.e., a divorce *a mensâ et thoro*] and it was further said that it would be monstrous to pronounce a decree for restitution and enforce it by imprisonment in such a case as this, and that, therefore, there must exist sufficient ground for a divorce. I find myself unable to accept this as a guide to the determination of the question whether cruelty entitling to a divorce has been established. I think the law of restitution of

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conjugal rights as administered in the Courts did sometimes lead to results which I can only call barbarous. I need seek no better illustration of this than the case of *Holmes* v. *Holmes* decided in (1755), 2 Lee 116, 161 E.R. 283 which is relied on for the proposition that the Courts can only refuse restitution on grounds which would justify a divorce. Conduct of a most revolting character on the part of the husband was held to afford no answer to his claim for a restitution of conjugal rights. Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it would still be to my mind unsatisfactory that a husband who, though stopping short of cruelty in that sense, had by insult and outrage driven his wife to leave him, should, without repentance for the past or any assurance of amendment for the future, be able to invoke the assistance of the Court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation. One would think that the Court might well refuse to afford its assistance to one who acted thus. And notwithstanding the decision to which I have referred, there are not wanting dicta of eminent judges, and notably of Lord Stowell, [See *Evans* v. *Evans* (1790), 1 Hag. Con. 35, 161 E.R. 466] that 'something short of legal cruelty' might bar a suit for restitution."

As to the second question, "Is the dismissal of her action for alimony under the circumstances a bar to the present action?" In view of the fact that an action for alimony has already been unsuccessfully brought by the plaintiff against the defendant at his expense, and bearing in mind the plaintiff's admission that this action is brought really to get the custody of the children, the custody of the children having already been granted to the defendant in the former action, I am of the opinion that the plaintiff is not entitled to succeed.

Finney v. *Finney* (1868), L.R. 1 P. & D. 483, at p. 484, 37 L.J. (Mat.) 43, 18 L.T. 489, says:—

"But the questions of fact raised in this case are precisely the same as those which were inquired into and determined in a previous suit in this very Court. In both suits, the husband is charged with the same matrimonial offence, that of cruelty. That issue having been tried, and found in the husband's favour in the former suit, the wife now seeks to have it tried over again, and it is argued that she is entitled to reiterate those identical charges, because she has tacked on to them a charge of adultery. I think that cannot be allowed. According to the practice of every Court, after a matter has once been

put in issue and tried, and there has been a finding or a verdict on that issue, and thereupon a judgment, such finding and judgment is conclusive between the same parties on that issue. In all Courts it would be treated as an estoppel. There is abundant reason why, in this Court especially, the same questions should not be tried over again. In most cases, the trials are at the cost of the husband, and the Court ought not to allow a wife to persecute a husband as she could do if she were allowed to repeat charges which have once been found against her. The allegations of cruelty must be struck out of the petition."

Rayden on Practice and Law in the Divorce Division, p. 78:—

"6. Charges, which have been unsuccessfully put forward and disposed of in one suit, cannot be repeated in a second between the same parties; for, not only does the common law doctrine of estoppel apply; but since, in matrimonal causes, a wife usually brings her suit at the expense of her husband, a repetition of charges would act as a peculiar hardship."

There can be no doubt as to the real purpose of this action as disclosed by the evidence of the plaintiff herself and the relief asked for. The following extract from the plaintiff's evidence may be referred to:—

"Q. The Court: Would you want to go back if you had won your lawsuit when you sued him for alimony, would you have gone back then? A. If I had the custody of the children? Q. If you had succeeded in your action for alimony would you have gone back to live with him then? A. Well, if I would have had to. Q. You know what you sued him for? A. Yes, I wanted support so I could keep the children with me, you see. Q. If you had succeeded in that action would you have gone back to live with him afterwards? A. I do not think so. Q. Why? A. Because we were not happy. Q. Because you couldn't get along, could you? A. Well I find it is harder to live apart from my children than it was to live with him with the children.

The Court: I can quite understand that. The thing which worries you most is being away from your children. I quite understand that. It is quite natural it should.

Q. The Court: Well, are you still afraid of him? A. Yes, but I am stronger and I think . . . Q. What you are asking me to do is to practically make an order for the two of you to live together, in the face of the evidence which we have heard and of the way you got along, what has changed the situation now, what makes your fear less now than it was at the time you brought your action for alimony? A. Well, for one thing the

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condition of my health is better. My nerves are better and I find. I just simply cannot be away from the children any longer. Q. I do not blame you for that, but if you got the custody of the children would that end the matter so far as you are concerned? A. If I had the children? Q. Yes? A. That is certainly my object, of course. Q. That is your main object? A. Yes, it is really the children, I just simply feel that I should be with them now."

Whilst there does not appear to be any great similarity in the statements of claim in the two different actions, it is quite apparent that Scott, J., dealt with and disposed of the question of the custody of the children in the first action.

With regard to the third question, "Is this a *bonâ fide* action for the restitution of conjugal rights, or is the real purpose to procure the custody of the children." The extract of the plaintiff's evidence set out above would throw some light upon this question. Counsel for the defendant argues that the action on the part of the plaintiff is not *bonâ fide*, relying upon the authority of *Russell* v. *Russell*, [1897] A.C. at p. 410 *per* Lord Watson:—

"I do not suppose that the law as laid down in *Mackenzie* v. *Mackenzie*, [1895] A.C. 384, is not a good decision. Where in Scotland a woman or a man sues for adherence—this is equivalent to restitution of conjugal rights in England—and a suing spouse does not want to go back and had no intention of doing so, but sues only for a particular purpose, I do not see why that want of *bonâ fides* on her part should not be a defence to an action for restitution of conjugal rights."

Upon the question of *bonâ fides*, Sir James Hannen in *Marshall* v. *Marshall*, 5 P.D. at p. 23 says:—

"For my own part, I must say that the opinion I have formed, after several years' experience in the administration of the law in this Court, is that it is in the highest degree desirable, for the preservation of the peace and reputation of families, that such agreements [referring to separation agreements] should be encouraged rather than that the parties should be forced to expose their matrimonial differences in a court of justice. And I must further observe that so far are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand."

In the case at Bar, it is not restitution the plaintiff wants but the custody of the children and this question was disposed of in the former action and the judgment not appealed from.

The plaintiff in her evidence admitted that her chief object was to be with the children, not the resumption of cohabitation.

I may add that from an investigation of the recent authorities it would appear latterly that actions for restitution of conjugal rights are very rarely resorted to in England, except as a step in the cause, an application for divorce, where an order for restitution if made and not acted upon, is then used to supply the necessary evidence of desertion which otherwise could not be obtained.

Of the three defences which counsel for the defendant admits are available, the placing on the records of the Courts by the wife of an accusation of a criminal offence against the husband would hardly constitute legal cruelty I think within the authorities referred to in *Russell* v. *Russell*.

There is no suggestion of adultery on the part of either party to the action.

On the question of desertion, there is evidence that the plaintiff left the defendant's home on June 19, 1920, taking with her the children. She brought her action for alimony charging cruelty, which was dismissed, and the defendant thereafter refused to take her back.

The question for decision, if my conclusion of the result of the authorities is correct, is simply whether the defendant had reasonable cause for refusing to take the plaintiff back, and whether it had become impossible for the spouses to live together.

I would answer both questions in favour of the defendant upon the evidence and as previously stated my view of the law being that the Acts of 1857 or 1884 give no new or additional grounds of defence but that the law and the principles applied in the Ecclesiastical Courts are the same as applied in *Russell* v. *Russel, supra.*

The result, therefore, is that the plaintiff's action will be dismissed.

The question of costs is not without difficulty and reference might be had to what was said as to costs in *Finney* v. *Finney, supra,* and as to a repetition of charges in Rayden on Practice and Law in the Divorce Division, p. 78, but as difficult questions of law have arisen in this action, and the solicitors for the plaintiff have acted *bonâ fide* in bringing it, which seems to be the test in this Province: *Lloyd* v. *Lloyd* (1914), 19 D.L.R. 502, 7

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Alta. L.R. 307; *Keizer* v. *Keizer* (1909), 2 Alta. L.R. 354. I am afraid that the defendant will again have to be muleted in costs. The plaintiff will, therefore, have her costs of the action. Should, however, the case go to appeal, I express the hope that this question be considered there.

Action dismissed.

GOULET v. IDA SERRE, dit ST. JEAN.

Exchequer Court of Canada, Audette, J. April 22, 1922.

TRADEMARK (§VI—30)—REGISTRATION—MISREPRESENTATION—RIGHTS OF OTHER PARTIES CONCEALED—EXPUNGING FROM RECORD—TRADE-MARK AND DESIGNS ACT.

Under the Trade Mark and Design Act only the proprietor of a trademark can register and if there are several owners this must be disclosed in the declaration and a declaration by the person registering that such trademark "was not in use to his knowledge by any other person than himself at the time of his adoption thereof," when to his knowledge others had rights and interests in the same, is lacking in good faith and honesty amounting to misrepresentation, and the Court will expunge such trademark from the records, where it would not have granted registration in the first place had the true facts been known.

[See Annotation 51 D.L.R. 436, 57 D.L.R. 220.]

PETITION to have trade marks "La Fortuna" and "Artiste" expunged from the register of Trade Mark and Design and have same registered in the name of petitioner and others named.

A. Duranleau, K.C. for petitioner.

C. Laurendeau, K.C., for Ida Serre dit St. Jean.

F. A. Bélique, for Hermine Goulet and other heirs of Ludger Goulet.

Oscar Dorais, K.C. and *J. P. Lanctot*, for Henri Goulet and heirs of Joseph Goulet.

AUDETTE, J.:—The petitioner, by the present proceedings, seeks to expunge from the Canadian Register of Trade Marks, three "specific" trade marks as applied to and in connection with the sale of cigars, and further that the same be registered in his favour and Ludger Goulet's estate jointly.

These three specific trademarks consist of:—1. The words "La Fortuna" registered, on November 16, 1920, under folio No. 27582. 2. The word "Artiste" with a colored label which is described in the certificate of registration by the following words, viz:—"avec étiquette de couleur, représentant un artiste assis sur un banc, peignant un rideau, à son côte un chien regardant le dit rideau, un paquet de tabac, (en feuilles) une boite de cigares et un pot de fleurs, tel qu'il appert par la

demande et le patron ci-contre," and registered on the 4th November, 1920, under folio No. 27510. 3. The same word "Artiste" with the above described label, registered on 17th December, 1883, under folio No. 2194.

The Exchequer Court of Canada is given jurisdiction over such matters both under sec. 23 of the Exchequer Court Act, R.S.C., 1906, ch. 140 and under sec. 42 of the Trade Mark and Design Act, R.S.C. 1906, ch. 71.

Freeing myself from all unnecessary considerations, and having regard only to the broad facts of the case, I find the important and controlling fact, (a fact disclosed by the evidence, and I think, conceded by all parties) that the petitioner had, in November, 1920, when Henri Goulet registered the trademarks Nos. 27582 and 27510, an undoubted clear, individual and undivided right to, and interest in, the said trade marks and has ever since had it; and moreover that when the said Henri Goulet registered the same, no formal embodiment in writing was ever made by him of such known right and interest in him (the petitioner), either in his application or in the declaration for trademarks.

As I have already had occasion to say in *Billings & Spencer Co.* v. *Canadian Billings & Spencer Ltd., et al* (1921), 57 D.L.R. 216 (Annotated), 20 Can. Ex. 405, the Canadian Trade Mark Act does not contain a definition of trademarks capable of registration; but it provides by sec. 11 that the registration of trademark may be refused if the so-called trademark does not contain the essentials necessary to constitute a trademark properly speaking. *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.*, [1911] A.C. 78, 80 L.J. (P.C.) 87, 27 R.P.C. 789, 27 Times L.R. 63; *Partlo* v. *Todd* (1888), 17 Can. S.C.R. 196. This sec. 11 further provides that the *applicant should be undoubtedly* entitled to the exclusive use of the trademark. *Re Roger's Trade Mark* (1895), 12 R.P.C. 149; *The J. P. Bush Mfg. Co.* v. *Hanson* (1888), 2 Can. Ex. 557.

If by virtue of such registration, Henri Goulet, or those he registers for are allowed to retain the exclusive use of the trademark, the petitioner will be forever barred and excluded from using the same or in other words will have all rights, title and interest in the same wiped out by such registration. The applicant for registration must use or intend to use the trademark, therefore, Henri Goulet,—or the estate in whose favour he registered, could not so use the trademark without leave of the petitioner or without using something in which the peti-

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tioner has a right and interest. Kerly's Law of Trade-Marks and Trade Name 4th ed. pp. 114, 120, 140.

Then it is, by sec. 13, provided that the applicant may have his trade-mark registered upon forwarding a declaration that it "*was not in use to his knowledge by any* other person than himself at the time of his adoption thereof."

Section 42 of the Trade Mark and Design Act, R.S.C. 1906, ch. 71, provides, among other things, for expunging, at the suit of an aggrieved person, the entry of any trademark, made on the register, *without sufficient cause*. The petitioner, whose rights have been frustrated by such registration is a person aggrieved within the purview of the Act. *Baker* v. *Rawson* (1890), 8 R.P.C. 89, 60 L.J. (Ch.) 49, 45 Ch. D. 519, 63 L.T. 306; *The Autosales Gum and Chocolate Co.* v. *Faultless Chemical Co.* (1913), 14 D.L.R. 917, 14 Can Ex. 302; and *Re Registered Trade Marks of John Batt & Co.*, [1898] 2 Ch. 432, 67 L.J. (Ch.) 576, 15 R.P.C. 534, 79 L.T. 206, 14 Times L.R. 538. The present registration of 1920 "without sufficient cause" which claims the mark, constitutes a cloud on the petitioner's title, and if he is the owner of or has an interest in the marks, he has a right to have that cloud removed.

The only conclusion one is forcibly led to upon the language of the declaration made by Henri Goulet when, *inter alia*, he says in registering "La Fortuna": "La dite marque de commerce spéciale n'a été employée à ma connaissance par aucune autre personne que par les dits Joseph Goulet et Ludger Goulet, faisant affaires à Montréal, sous les noms de Goulet & Frères, avant d'avoir été choisie et adoptée par ces derniers," is that, only part of the truth is therein disclosed, and amounts to more than an untruth, since he knew at the time he made his application to register, that the petitioner had rights and interests in the same, that he used the said trademark as a member of the partnership. Both the application and statutory declaration are silent upon this subject. Good faith, honesty and loyalty are expected in all transactions and a Court of Justice is invested with due authority, and is in duty bound to see that such principles are duly respected.

Now could a trademark be so registered in the name of two estates without disclosing the names of the persons forming part of such estates, is a very doubtful question which I find unnecessary to decide for the purposes hereof. However, following the decision of the *United States Steel Products Co.* v. *Pittsburg Perfect Fence Co.* (1917), 19 Can. Ex. 474, it must be held that the *proprietor* of the trademark alone can register.

If there are several owners, that must be disclosed. The latter case is authority for refusal to register, if it appears that the applicant is not the proprietor of the trademark; the Trade Mark and Design Act providing for the registration in the name of the proprietor only.

It is inconceivable that any one could know better than Henri Goulet, when he made his declarations for the registration, that the petitioner had some rights and interest in the ownership of the trademarks as a result of the petitioner's partnership owning the same and through which Henri Goulet claimed for the estates. By stating only part of the truth and repressing part of it—in not disclosing that the petitioner was part owner of the marks—he made statements amounting to misrepresentation and thereby obtained registration. Had he disclosed the whole truth and nothing but the truth, he would not have procured the registration. Part of the truth only is more treacherous and more difficult to meet than a glaring untruth.

Henri Goulet's conduct in obtaining registration under such circumstances and under such curtailed and guarded statement of facts was most reprehensible and all his claims cannot avail, because the help of the Court will not be extended to one who comes in Court with unclean hands.

All that has been said with respect to "La Fortuna" will equally apply to the other trademark "Artiste" with however this qualification.

The Trademark "Artiste" was duly registered as a specific trademark on December 17, 1883. Under sec. 17 of the Act, such specific registration endures for a term of 25 years, and can only be renewed before its expiry, and the registration of such renewal must be registered before the expiration of the current term of 25 years.

This specific trademark "Artiste" registered in 1883 expired in 1908, and cannot, under the provisions of sec. 17 above referred to, be again registered in 1920, as was done by Henri Goulet. It would seem that this trademark has expired.

However, whatever might have been the merits or the demerits of the applicant Henri Goulet, the Court in a matter of this kind, where the interests of trade, public order, and the purity of the register of trademarks are concerned, shall and must always exercise its statutory discretion in ordering the removal from the register of such entry made *without sufficient cause*. *Canada Foundry Co.* v. *Bucyrus Co.* (1912), 8 D.L.R. 929, 14 Can. Ex. 35; (1913), 10 D.L.R. 513, 47 Can. S.C.R. 484;

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Leather Cloth Co. v. *American Leather Cloth Co.* (1865), 11 H.L. Cas. 523, 11 E.R. 1435; *Baker* v. *Rawson, supra; Re The Appollinaris Co's Trade-mark*, [1907] 2 Ch. 178, 24 R.P.C. 436, 23 Times L.R. 515; Kerly's Law of Trade-Marks and Trade Name 4th ed. pp. 318, 320.

Coming now to the second branch of the case, whereby the petitioner seeks for an order directing the registration of these trademarks in both his favor and the said Ludger Goulet's estate jointly, it must be stated that it appears from both the evidence and the defendant's pleadings that the petitioner is apparently sole owner of these trademarks for having purchased them in June 1921, at a sale made of the same, under direction of the Superior Court of the District of Montreal, in an action of licitation for the partition of the assets of the above mentioned estates. The statement of claim has not been amended.

In consideration of this important fact and in the view the Court takes of the case, it becomes unnecessary to decide whether or not these trademarks formed part of the partnership assets and ever passed to the estate without being first disposed of with the good-will of the partnership. Can a trademark be sold in gross, that is without the good-will? The cases of *Re Vulcan Trade-Mark* (1915), 24 D.L.R. 621, 51 Can. S.C.R. 411, and *Gegg* v. *Bassett* (1902), 3 O.L.R. 263, are authorities for the negative. See Hopkins on Trade Mark, 3rd ed., pp. 28, 68, 161, 575. Could these trademarks ever pass to the defendant's estates, without first being sold with the good-will of the partnership? Would it not seem that these estates could acquire interest in the assets of the partnership, only upon the proceeds of the same having been realized from the sale of the good-will with the trademarks? *Eiseman* v. *Schiffer* (1907), 157 Fed. Rep. 473; *Independent Baking Powder Co.* v. *Boorman* (1910), 175 Fed. Rep. 448; *Bowden Wire Co.* v. *Bowden Brake Co.* (1913), 30 R.P.C. 580; affirmed (1914), 31 R.P.C. 385. These are interesting questions which it becomes unnecessary to decide in the view I have taken of the case, and the considerations of the same would indeed carry us very far afield.

There will be judgment ordering the expunging from the entry on the Canadian Trade Mark Register of the specific trademark "La Fortuna" registered on November 16, 1920, under No. 27582, and the further expunging of the specific trademark "Artiste" registered on November 4, 1920, under No. 27510—in accordance with the Trade Mark and Design Act.

While the necessity of expunging the specific trade mark

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"Artiste" registered on December 17, 1883, under folio No. 2194, and expiring in 1908, as provided by sec. 17 of the Trade Mark and Design Act, might not be, of strict necessity, yet with the object of obviating any difficulty that might arise in reference to the title to the trademarks registered in 1920, it is thought advisable, following the decision in *Re John Batt & Co's Trade-Mark, supra,* to order the expunging of the same. The continuance of such registration can answer no legitimate purpose, and its existence is purely baneful to trade, as said by the Master of the Rolls, in *Re John Batt & Co's Trade Mark, (supra).*

The petitioner is aggrieved by maintaining the entry of the trademark, it is certainly embarrassing to say the least, and in his interest, it should be expunged, as the registered owner is not the proprietor thereof. Smart on Trade-Marks, Trade-Names and Designs at pp. 62-64.

There will be no order directing the registration of these trademarks in favour of both the petitioner and the Ludger Goulet estate jointly, for the reason above mentioned that the petitioner would appear to be the sole owner of the same for having purchased them at a sale made under direction of the Superior Court of the District of Montreal; but without passing upon the rights of the said petitioner to register in his own personal name, he will now be at liberty to apply for the registration of the same, if he sees fit. The whole with costs against the contesting party Henri Goulet.

Judgment accordingly.

SALT v. SING LEE.

Moose Jaw (Sask.) District Court, Ouseley, D.C.J. March 14, 1922.

NARCOTIC DRUGS (§I—1)—ILLEGAL POSSESSION—ILLEGAL SMOKING OF OPIUM—DISTINCT OFFENCES—SUBSTITUTION OF ONE CHARGE FOR THE OTHER WITHOUT AMENDING INFORMATION—CR. CODE, SECS. 706, 707, 721—OPIUM AND NARCOTIC DRUGS ACT, 1911 CAN., CH. 17 AND AMENDMENTS.

Under the Opium and Narcotic Drugs Act, Can., having opium in possession and smoking opium are separate and distinct offences. It is not competent for justices in summary conviction proceedings for unlawful possession to substitute without the consent of the prosecution a charge for unlawfully smoking opium and to accept a plea of guilty for the latter offence as to which there was no information before them.

APPEAL (§IIIB—77)—IN SUMMARY CONVICTION MATTER—TRANSMISSION TO COURT HEARING APPEAL OF FINE PAID TO JUSTICES—CR. CODE SECS. 751, 754.

On an appeal in a summary conviction matter, any fine paid in to the justices under the conviction made should be remitted to the

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Clerk of the Court to which the appeal is taken to be dealt with under the order of the Court.

[*Cf.* as to transmitting the summary conviction or order and all papers therewith, Cr. Code, sec. 757.]

APPEAL by the prosecutor against the dismissal of an information for unlawful possession of opium and the substitution by the justices of a charge of illegally smoking opium.

W. G. Ross, for appellant.

W. E. Knowles, K.C., for defendant, respondent.

OUSELEY, D.C.J.:—On June 24, 1921 appellant laid an information against the respondent alleging that the respondent on June 24, 1921 at Moose Jaw, in the said Province was unlawfully in possession of opium contrary to the Opium and Narcotic Drugs Act.

On the hearing before the magistrates in the Court below, after the evidence of the prosecution had been taken, counsel for the respondent contended that there was insufficient evidence to convict on the charge as laid, and suggested amending the information to one of smoking opium to which counsel alleged his client, the respondent herein, would plead guilty. Under strong protest from the appellant and his solicitor the Justices proceeded and took the plea of guilty to the amended charge of smoking opium, and imposed a fine of $50.

The trial below was held on June 30, 1921. On the hearing of the appeal the original information was put in with objection. I may add here that counsel for the respondent did not appear on the hearing of the appeal other than to appear and take objection to the regularity of the appeal. Endorsed on the back of the information and signed by the Justices there is a memorandum of the proceedings taken in the Court below. This memorandum reads as follows:—

"Moose Jaw, 30th June, 1921. Court opened at 8 p.m. T. J. Clarke sworn as stenographer. Charlie Chow sworn as interpreter. Accused pleads 'Not guilty.' N. R. Craig for the prosecution. W. E. Knowles for defence. Case for prosecution closed. Accused pleads guilty to amended charge of smoking opium. Fined $50 and the costs of the prosecution $2.50, or in default one month in the common gaol at Regina.

Sgd. Henry Webber, J.P., R. F. Jackson, J.P."

On the hearing of the appeal counsel for the appellant stated in open Court that at the conclusion of the evidence for the prosecution in the Court below that the counsel for the accused contended that there was insufficient evidence to convict on the charges laid and suggested amending the information laid to

one of smoking opium. One of the Justices of the Peace, Mr. Webber said:—"We have come to the conclusion and are both perfectly agreed that it should be altered to one of smoking." Later on the other Justice of the Peace, Mr. Jackson, made the following statement:—"It would appear to me at any rate that it would be a travesty of justice to let this man go scott free. This man was doing something against the law. Because there is a charge of having opium in his possession and we do not see eye to eye with that charge." Here he was interrupted by Mr. Craig counsel in the Court below for the prosecution, who said:—"Then dismiss it." Mr. Jackson:—"I think it would be a travesty of justice."

These statements of counsel before me show that the Justices had come to the conclusion that there was insufficient evidence to charge him with the offence of having opium in his possession, and that therefore they would reduce it to a charge of smoking opium. The statements of the presiding Justices that they were both perfectly willing that the charge should be altered to one of smoking opium, and one of the Justices that "it would be a travesty of justice to dismiss the charge altogether," and the fact that the charge was altered and the respondent convicted of smoking opium, amounts in my opinion to an acquittal of the charge as laid.

But the appellant is not driven to that view, because the Justices had no power whatever to convict the respondent of smoking opium as they had no jurisdiction to try him on that charge. Under the Opium and Narcotic Drug Act the charges of having opium in possession of the respondent and the charge of smoking opium are separate and distinct charges. They could not be included in the one Information as the Information would then disclose two offences; nor can they give themselves jurisdiction to try the respondent on a charge on which there is no Information before them, and the fact that the respondent pleads guilty before them does not of itself confer jurisdiction on the justices.

Subsection 3 of s. 710 [Criminal Code] dealing with Informations and Complaints reads as follows: — "Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences." The curative clausee of the Code dealing with sec. 710 is s. 725 which reads:—

"No information, summons, conviction order or other proceeding shall be held to charge two offences, or shall be held to

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be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively, for example, in charging an offence under section 533 it may be alleged that 'the defendant unlawfully did cut, break, root up and otherwise destroy or damage a tree, sapling or shrub'; and it shall not be necessary to define more particularly the nature of the act done, or to state whether such act was done in respect of a tree, or a sapling, or a shrub."

It is clear that this curative clause does not apply to the information before me, because the charges of having opium in the possession of the respondent as laid in the information, and the charge that the accused was found smoking opium are, under the Opium and Narcotic Drug Act, two separate and distinct offences. It is clear also that the justices can only give themselves jurisdiction under the Act by having an information before them. The only information the Justices had was one for that the accused did unlawfully have opium in his possession. There was no information before the Justices at any time, laid by the informant or any other person, that the accused was found smoking opium, and without an information charging the offence that the accused was found smoking opium the Justices cannot against the express wish of the informant alter the charge from one of having opium in his possession to one of being found smoking opium. As to this see *The Queen* v. *Deny* (1851), 20 L.J. (M.C.) 189. The head note of this case reads:—

"An information made before a Magistrate stated, that the informant having been assaulted and beaten by another person prayed that he might be bound over to keep the peace towards him. On the Magistrates, before whom the case was heard, proceeding to deal with the merits of the question of the assault, the informant protested against their adjudicating upon it.

Held, that the Justices had no jurisdiction to convict summarily the offending party of the assault against the will of the informant."

In his judgment at p. 190, Erle, J. says:—

"This rule must be made absolute. It is clear law that a party assaulted has several remedies. He may proceed by indictment or by action, or he may apply for a summary conviction before two magistrates under the statute. If he applies to the magistrates he is barred from other remedies. But the magistrates have no jurisdiction to convict summarily and impose a fine for assault, when it is an established fact that the

complainant before them does not intend to give the magistrates jurisdiction to deal with the assault."

This judgment applies to the facts before me and I follow it. When the informant Salt, the appellant before me, protested against the charge being altered, the Justices could not give themselves jurisdiction by arbitrarily saying that the charge would be altered.

Section 726 of the Code reads:—

"The justice, having heard what each party has to say, and the witnesses and evidence adduced, shall consider the whole matter, and unless otherwise provided, determine the same and convict or make an order against the defendant or dismiss the information or complaint, as the case may be."

This section limits the jurisdiction of the Justices to the subject matter of the complaint before them. See *The King* v. *Soper and Camfield* (1825), 3 B. & C. 857, 107 E.R. 951. In that case, by statute it was enacted that if any member of a society should think himself aggrieved by anything done by said society, two Justices may, on complaint upon oath of such member, summon the presidents or stewards of the society, and the Justices are to hear and determine the matter of such complaint, and to make such orders therein as to them shall seem just: Held, "that the jurisdiction of the magistrates was confined strictly to the subject matter of the complaint, and therefore, where it appeared that a party had complained to the Justices that he had been deprived of relief to which he was entitled, and the Justices awarded not only that the steward should give him such relief, but also that the party should be continued a member of the society, it was held that the latter part of the order was illegal, inasmuch as the expulsion of the party was no part of the complaint."

Bayley, J. in his judgment at p. 860 says:—

"I am of opinion that the rule for a new trial ought to be made absolute . . . The indictment states that Margetts, had been expelled the society, and had been deprived of certain relief to which he was entitled, and that, thinking himself, and being aggrieved thereby, he made complaint thereof, to two Justices, and took his oath before them, and deposed to the truth of the said complaint. The indictment therefore, alleges a complaint to have been made involving two propositions, viz. first, that Margetts, had been expelled from the society; and, secondly that he had been deprived of relief. The proof was, that the complaint made was confined to one of those propositions, viz. that Margetts had been deprived of relief; and the indictment

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does not charge any disobedience of the order of the Justices in that respect. It then proceeds to state that the stewards were summoned, and that they personally appeared and answered to and showed cause against the complaint and matters required of them in the said summons, and that the Justices afterwards made their order that Margetts should be continued a member of the society. Now that allegation imports that the stewards were summoned to answer and did answer the complaint, consisting of two branches, mentioned in the former part of the indictment. It appears, however, by the proof contained in the recital of the order, that they were summoned to answer one ground of complaint only.

I, therefore think that these allegations were not made but in proof, and that the defendants were entitled to an acquittal on that ground. The indictment then states that the Justices proceeded to order that Margetts, should be continued a member of the society. A question therefore arises whether the order was a valid order, because if it was not, the defendants were not bound to obey it, and consequently are not indictable for disobeying it. The statute . . . enacts, that if any member of the society shall think himself aggrieved by anything done by any such society or person acting under them, two Justices, upon complaint upon oath of such person, may summon the presidents or stewards of the society, or any of them, if the complaint be made against the society collectively, and the Justices are to hear and determine in a summary way the matter of such complaint, and to make such order therein, as to them shall seem just. The statute therefore confines the jurisdiction of the magistrates to the subject matter of the complaint before them.

They cannot, therefore, adjudicate upon any matter not comprehended in the complaint made on oath before them. Now, in this case the only matter of complaint before the Justices was, that Margetts, had been deprived of the relief to which he was entitled. The Justices have not only determined that matter of complaint, but they have further adjudicated that Margetts should be continued a member of the society, and that was not a matter brought before them upon oath. Upon the ground therefore, first, that the allegations in the indictment were not supported by the proof, and, secondly, that that part of the order which directs that Margetts should be continued a member of the society was illegal. I think that the defendants were entitled to an acquittal, and that the rule for a new trial must, therefore be made absolute."

Holroyd, J. at p. 861, says:—

"I also think that the rule for a new trial ought to be made absolute . . . . I also think that the Justices had power only to adjudicate upon the subject matter of complaint brought before them. If the complaint had embraced the two propositions which the indictment supposes it to have embraced, the Justices would have been guilty of no excess of jurisdiction; but here the expulsion of Margetts was no part of the complaint before the magistrates, and the defendants were not summoned to answer for having expelled him. I therefore think that the magistrates acted unlawfully when they ordered that Margetts should be continued a member of the society, and that the defendants were not bound to obey that part of the order."

From these two authorities I think it clear that the Justices cannot assume jurisdiction, even though the accused is ready and willing to plead guilty of an offence which is not named in the information, if the informant refuses to give the magistrate jurisdiction by allowing the second offence to be added to the original offence contained in the information, and that the Justices are limited to the charge laid in the information and have only jurisdiction to deal with the matter of complaint sworn to by the informant; and that where there is a charge laid in the information the Justices cannot add another charge separate and distinct from the charge contained in the original information, without the consent of the informant.

Under sec. 754 of the Code I have power to "hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or make such other conviction or order as the court thinks just, and may by such order exercise any power which the Justice whose decision is appealed from might have exercised. . . ."

It was held by the Nova Scotia Court *en banc* in *Johnston* v. *Robertson*, (1908), 13 Can. Cr. Cas. 452, 42 N.S.R. 84, that the plaintiff could be legally sentenced to imprisonment absolute in his absence by the County Court Judge on the appeal. In giving his judgment, Drysdale, J. at p. 473 says:—

"In my opinion the presence of the accused before the County Court Judge was not essential or necessary to enable the point raised in his favor to be determined, and by reason of his absence I do not think that the Judge lost jurisdiction. At common law, in a case of misdemeanor, it was not necessary that the accused be present to enable sentence to be imposed. Archbold's Crim. Law 227, and if not necessary at common

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law, in cases of misdemeanor, I think it can hardly be urged that on appeal under the Summary Conviction Act it is necessary."

Russell, J. in his judgment at p. 471 says:—

"The ground on which it (the conviction) has been attacked in this action, namely, that the County Court Judge could not sentence the prisoner in his absence is, I agree, untenable."

I will therefore convict the respondent of unlawfully having opium in his possession contrary to sub-sec. (*e*) of sec. 5 A. of the Opium and Narcotic Drug Act. Upon conviction the respondent becomes liable "to a fine not exceeding $1,000 and costs and not less than $200 and costs, or to imprisonment for a term not exceeding one year, or to both fine and imprisonment." As this is a first offence so far as the prosecution have disclosed I will impose a fine of $300 upon the respondent. I do not think that under the circumstances I should subject him to imprisonment, but I order and direct that in default of payment of the fine and costs of the appeal and of the Court below, that the respondent be imprisoned in the common gaol at Regina for a term of 4 months.

It does not appear from the record sent up from the Court below that the fine was remitted. I might point out that in all cases where there is an appeal all monies paid in to the Justices under the conviction made by the Justices should be remitted to the clerk of the district Court to be dealt with under the order of the Court. I will give leave to either counsel to speak to the question as to the monies paid in under the conviction which I have quashed, and as to what disposition is to be made of such monies when same are paid into Court.

Prosecutor's appeal allowed; defendant convicted.

BELANGER v. PICHER.

Quebec Court of King's Bench, Guerin, Bernier and Rivard, JJ. May 2, 1921.

OFFICERS (§I—11)—MUNICIPAL COUNCILLOR—ELIGIBILITY—RESIDENCE—SUFFICIENCY OF—QUEBEC MUNICIPAL CODE SECS. 227 AND 237—CONSTRUCTION.

Under the Quebec Municipal Code secs. 227 and 237, a person who owns property in a village on the Island of Orleans, and lives there with his family during the months when navigation is open, is eligible for the office of councillor of the village, although during the season when navigation is closed he occupies rented premises in Quebec with his family.

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BELANGER v. PICHER.

Bernier, J.

APPEAL from the judgment of the Quebec Superior Court (1920) 59 Que. S.C. 302, dismissing a writ of *quo warranto* and declaring the election of the defendant to the office of councillor of the village of Beaulieu in the Island of Orleans to be valid. Affirmed.

E. Belleau, K.C., for appellant.

Galipeault, St. Laurent, & Co., for respondent.

GUERIN, J. agreed with BERNIER, J.

BERNIER, J.:—The respondent was elected a councillor of the village of Beaulieu in the island of Orleans in the month of January 1920. In the month of August following, the appellant took out a writ of *quo warranto* against him and asked in his petition that the respondent be declared to have usurped illegally the functions of councillor. He alleges that the respondent is incapable of holding this municipal office because neither his residence nor his principal place of business is within the municipality.

The Superior Court (59 Que. S. C. 302) dismissed the writ of *quo warranto* and the appellant's petition, holding that the respondent had a sufficient residence in the Village of Beaulieu to render him eligible for the position of councillor. Belanger appeals from this judgment.

The new Municipal Code, in force since November 1916, introduced a change in the qualifications for office in municipal councils. The present action is the outcome of this amendment. Article 204 of the old Mun. Code said: "Whosoever has no domicile or place of business in a municipality is incapable of exercising any municipal office of such municipality, except those of secretary-treasurer, auditor, valuator or special superintendent."

The new art. 227 Mun. Code, which replaces the old one, says:—"227. The following persons cannot be put in nomination for nor elected to the office of mayor or councillor, nor can they be appointed to any other municipal office. . . .

10. Whoever has no residence or place of business in the municipality; such person, however, may be appointed secretary-treasurer, municipal inspector, auditor, assessor or special superintendent."

Article 337 of the old Mun. Code said: "337. The office of councillor becomes vacant . . . (3) when the councillor's domicile and place of business are no longer within the limits of the local municipality."

The new art. 237, para. 3, says: "The office of mayor or councillor becomes vacant when the mayor or councillor no longer

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has his residence or place of business within the local municipality."

In the present case it is not a question of the respondent's principal place of business, which seems well established in Quebec. We need only consider residence as a basis of qualification for a municipal office.

It is evident that the legislator has changed the existing law on this point. For municipal offices, domicile, as defined by our Civil Code, is no longer the determining condition of eligibility. Residence, whether it exists in fact at the domicile or elsewhere, is now a sufficient qualification.

The word residence is not defined in the new Municipal Code. It is, therefore, necessary to give it a special meaning for the purpose of determining eligibility to municipal office.

From the point of view of the Civil Code and judicial procedure, the word domicile has a very different meaning from the word residence. A person's domicile is his juridical residence: the place where the law presumes him to be. He may leave it to live elsewhere but he is presumed to reside there constantly. It consists of two elements: the intention to make one's principal establishment there, and the actual or legally presumed fact of residence.

It is not sufficient to have recourse to ordinary language or to consult the dictionary in order to find the elements of residence. The mere fact of staying in the country, at a watering place or amusement centre or at an hotel would not be a sufficient qualification. That would be simply an accidental residence, a mere physical presence which must not be confused with the meaning or idea implied by the word residence from the point of view of municipal qualification.

I am of opinion that in the municipal sense of the word, residence must be taken to mean the fact of inhabiting any municipality in a permanent, though not absolutely continuous manner, so that the resident may have an interest as a ratepayer, proprietor, lessee or occupant in the good administration of municipal affairs, may be subjected to the obligations and entitled to the rights of a ratepayer, that he pay taxes and that he be entitled to vote.

Those are the qualities which I consider necessary for residence. There may be others resulting from circumstances.

An examination of the proof in the present case will show whether the respondent is or is not qualified to be a municipal councillor of the village of Beaulieu.

It is, however, important to point out in the beginning that

since the new Municipal Code does not use the word "principal residence," the Courts should not arbitrarily vest the single word "residence" with the meaning of the words "principal residence." It would have been easy for the legislator to say, if he had so desired, that the word "residence" was to be taken as meaning "principal residence."

It is also to be noted that English and American jurisprudence in municipal matters has recently tended in a general way to give the word "residence" the meaning which our law attaches to the word "domicile."

Now must we conclude that our Legislature merely wished to copy into our new municipal law this interpretation established by foreign jurisprudence? I do not think so.

Up to November 1916, the Legislature expressly wished that municipal qualification should depend on domicile as understood and defined in our civil law; and the elements of domicile are derived from French laws.

Any change in this respect must, therefore, be interpreted according to our own laws and the rules of interpretation laid down in respect thereof.

English and American jurisprudence may well serve as a guide in this respect, but should not be taken as authorities.

At the time when the writ was served, the respondent was living in the Village of Beaulieu on the Island of Orleans; but at the hearing of December 14, 1919, when the respondent was living at Quebec, his attorney asked him if he lived at No. 473 St. John St. Quebec, and he answered, "Yes." He was then asked how long he had been living there and replied, "I have lived there for the last 12 years or so."

In another part of his testimony, the respondent states that his principal residence is in the Village of Beaulieu in the Island of Orleans; and he explains the matter by saying that in the month of April of each year he leaves Quebec, where he is merely a lessee, and goes with his whole family to the Village of Beaulieu where he owns immovable property of an area of 250,000 ft., with a fine house worth several thousand dollars, outbuildings for animals, and where he keeps, amongst other things, a horse which he only uses in that village.

He has owned property on the island for more than 14 years.

When the ice on the river prevents communication by water between the two banks, he returns to Quebec where he has his place of business as accountant with Laroux & Trudelle, but he only brings from the island his linen and wearing apparel and that of his family.

The whole of the evidence shews that he spends as much of

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his time at his residence in the Village of Beaulieu as he does in rented premises in Quebec.

The respondent describes himself as being of Quebec when he has legal actions to take in that city. That is not surprising since the law requires that the domicile of a party be stated in judicial proceedings and the respondent considered that he was domiciled in Quebec. The case is the same in respect of the declaration which he had made in 1915, when he went into partnership with Laroux & Trudelle. These two circumstances cannot, therefore, prejudice the respondent's rights.

It has also been proved that in 1917, the respondent made a declaration electing to have his name inscribed on the parliamentary lists as an elector of the Village of Beaulieu. This option was made by virtue of the Quebec Election Act, 1912 (Que.) ch. 10, art. 9 (amended 1915 (Que.) ch. 17, sec. 10) and would constitute a declaration to the effect that he is domiciled in the Village of Beaulieu. About four-fifths or three-quarters of the population of the Village of Beaulieu, including even persons born there, spend the winter in Quebec and return to the Island of Orleans in the spring when navigation opens. They are, therefore, residents of the island of Orleans during the summer and residents of Quebec during the winter.

An attempt has been made to draw an argument from the fact that the respondent was in the habit of spending Easter in Quebec, but it must be remembered that Easter day generally comes in the month of March or at the beginning of April, when navigation is not yet open between Quebec and the Island of Orleans.

The secretary-treasurer of the Village of Beaulieu tells us that he is himself a native of that village, that he lives there as long as the respondent and spends all his winters in Quebec. He adds that the municipal council of the Village of Beaulieu only meets in January and March during the winter. For these two occasions, the respondent returns to the island to sit as councillor and the secretary-treasurer does likewise. During the winter there are barely 32 families in the Village of Beaulieu. All the rest of the population spends the winter in Quebec, returning when navigation opens.

In these circumstances, I reach the conclusion that at the beginning of January 1919, when respondent was elected, he had a residence in the Village of Beaulieu sufficient in the eyes of the new law to quality him to be a municipal councillor and that he has had such residence at all times since that date.

According to the interpretation which seems to be given to the

new law and the spirit of our municipal legislation, he was qualified. I would therefore maintain the judgment of first instance and dismiss the appeal with costs.

RIVARD, J. dissented.

Appeal dismissed.

PATTERSON v. SCOTT.

Manitoba King's Bench, Galt, J. May 9, 1922.

SPECIFIC PERFORMANCE (§IA—3)—SALE OF LAND—INDEFINITE AGREEMENT

A memorandum purporting to be an agreement for the sale of land, which does not contain all the terms, is not a concluded agreement as will be enforceable by an action for specific performance.

CONTRACTS (§IE—105)—STATUTE OF FRAUDS—SALE OF LAND—SUFFICIENCY OF WRITING.

A parol agreement added subsequently to such memorandum of sale will constitute a new contract within the Statute of Frauds and unenforceable unless the whole of the terms are shewn in writing.

ACTION for specific performance of an agreement for sale of lands, or, in the alternative, for damages for breach of contract. Dismissed.

H. J. Symington, K.C., for plaintiff.

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

GALT, J.:—The plaintiff in this action claims specific performance of a certain agreement for sale of lands, or in the alternative damages for breach of contract amounting to $29,250.

The defendant denies the contract and pleads the Statute of Frauds, and in the alternative he pleads that he was induced to sign the writing relied upon by the plaintiff by the fraud of the plaintiff's agent, who made several representations (set out in the defence) which were untrue.

It appears that the plaintiff had purchased the land in question, consisting of 450 acres of farm land, from one Sidney Gowler in or about the month of March, 1921. Plaintiff then leased the farm to a man named Allan for the term of two years with a stipulation that either party should be at liberty to terminate the lease in any year by giving to the other one week's notice but that such notice should only be given in any year prior to March 1 or subsequent to November 1. The plaintiff shortly afterwards determined to sell the farm if he could, and instructed the Northwest Trust Company to find a purchaser. The manager of the real estate department of the company was

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one Charles Bannerman. Bannerman says:—

"The first week in June I saw Scott at Stonewall by appointment to show him farms to purchase. I mentioned that Patterson had bought a farm from Gowler, of Mill Creek. I suggested to him to inspect this farm because I knew that Patterson wished to sell it."

Charles Bannerman had a brother named Hugh, who was a real estate agent, so Charles employed his brother Hugh to effect a sale if possible, on the terms that any commission earned should be divided equally between them.

Dealing with the first interview between Scott and Patterson, I now refer to their evidence on the subject. Patterson says:—

"Met Scott first week in June when Hugh Bannerman drove him and Mrs. Scott out. Scott asked me my very lowest terms. I said if he could tell me how much money he could pay down I would tell him. He asked me if I would accept certain agreements of sale. He said he had about $800 in Victory Bonds and that his wife had some money. He spoke to his wife and then said they could put up about $3,000. *I said I would take $65 an acre clear to me, and that they would have to pay Bannerman's commission, namely, about* $1,460. *I was to get one-third of the crop for that year.* I told him of Allan's lease and the proviso as to one week's notice. I told him I had assigned the lease to Gowler to apply on my fall payment. *He said he would not buy that day, but would think it over.*"

Scott says, in answer to question 26 of his examination for discovery:—

"Well, on the first trip we came into the yard, we met him and Mr. Bannerman told him that we had come to buy the farm and wanted his best terms on it, I can scarcely remember what all was said but after we had talked a little while and discussed things, he said he wanted $65 an acre. He wanted to know what I could pay down on it and I tried to tell him what money I had, so he said $65 an acre would be the price."

The next thing that happened was a meeting of the two Bannermans and Mr. and Mrs. Scott at the latter's home in Gunton. Charles Bannerman says that the deal was discussed from about mid-day until 5.30 p.m. At this interview apparently Scott explained all about the agreements of sale or other security which he might be able to furnish if they were accepted by Patterson. Charles Bannerman hastily drew up a memorandum of the proposed sale and Scott signed it. The memorandum is as follows:—

"Mr. Scott agrees to buy the Patterson farm at Mill Creek

as follows:—'Turning over mortage on farm at Balmoral, Man., for $4,800, also agreement of sale for $3,000, deposit in cash $100, to cash out Patterson's equity in farm, assume mortgage of Sidney Gowler for approximately nineteen thousand dollars. Price of farm $65 per acre, for 450 acres.' ''

This is the document upon which the plaintiff relies as a memorandum in writing of the agreement between the parties and signed by the defendant, who paid $100 deposit. Before attempting to pronounce upon its sufficiency it is necessary to pursue the subsequent proceedings of the parties. Charles Bannerman says that Scott came into Winnipeg a few days after and gave to the manager of the trust company an order to get certain documents from his solicitor, Mr. Arundel, and that he obtained the documents accordingly. It next appears that on or about June 14, the two Bannermans had an interview with Patterson at Portage la Prairie. Charles Bannerman says:—

"I had the agreement in my pocket but told Patterson I thought I could put it through. He did not ask whether Scott had bought or not. I got him to approve the sale although I did not tell him it was sold. I got this paper [exhibit 8] signed by Patterson on June 14th."

This paper purports to be an agreement by Patterson with Hugh and Charles Bannerman to accept $65 an acre and pay commission of $1,000 in cash for selling his farm to A. W. Scott, for which he agreed to accept various securities mentioned in the memorandum signed by Scott. Furthermore, it reads:—

"I further agree to turn my share of the one-third of the crop on the said farm over at the said price, and further agree to accept the Victory Bonds on the understanding that they can be turned into cash or accepted by McMillan Brothers from whom I bought the Newton farm."

The tenant Allan had agreed to deliver one-third of his crop each year to Patterson by way of rent. The lease had been assigned to Gowler as security. Patterson estimated that this one-third share would amount to about $2,000, so it was quite a substantial item. It was also an important item to Scott whose main difficulty was to provide cash enough to carry through the deal. Hugh Bannerman says in reference to this interview at Portage la Prairie: "I decided that Scott should get one-third of the crop and Patterson agreed." Patterson says in reference to this interview at Portage la Prairie:—

"The Bannermans came and Hugh said they had come to make some money out of me. One of them said: 'We have sold your farm for you and have a written agreement from

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Scott and $100 in cash, at $65 an acre, and to get one-third of the crop.' This was different from my arrangement. I said I would accept that if Bannerman would cut down his commission to $1,000 and Scott would have to pay the taxes. I said some of you will have to pay for the drawing up of the papers, and he agreed."

The memorandum signed by Scott was never shown or read to Patterson until his examination for discovery in the action. He there says:—

"114. Q. One-third of the crop? A. Yes; for the $65 an acre I will have to pay the commission, Bannerman's commission.

115. Q. Did he say what that would be? A. Yes.

116. Q. How much? A. $1.000.

117. Q. He said something about it being large to you? A. The amount was really $1,460.

118. Q. But he was letting you off with $1,000? A. *I told him if he would cut the commission down to $1,000 we would let the deal go through and seeing Scott was getting the crop Scott would have to pay all the expenses of the transfer and pay the insurance and the taxes for this year, and Bannerman said he understood that.*

119. Q. Scott was to pay the insurance and the taxes, and the expense of drawing conveyances of the property, including the transfers, mortgages, and that sort of thing? A. Yes."

A good deal of the difficulty which has arisen in this case was caused by disputes over the agent's commission. It will be remembered that Patterson had originally stipulated that Scott should pay the whole commission amounting to $1,460, and that Patterson was to have one-third of the crop of that year, but when the Bannermans interviewed Patterson at Portage la Prairie they had already led Scott to believe that perhaps they could get him the one-third crop. Upon hearing this Patterson told the agents that they must reduce their commission to $1,000 and they agreed to do so, as far as he was concerned, but in order to secure their full commission Charles Bannerman 'phoned to Scott on or about June 17 that he thought he could get him an assignment of the crop if he would pay the balance of the commission, amounting to $460.

The next and final meeting occurred on or about June 19, at Scott's house in Gunton. Charles Bannerman says:—

"I got a 'phone call from Mr. McArthur. As a result Patterson and Mr. McArthur and I went to Scott's house. Patterson complained that he was not getting enough cash and asked Scott to pay him more. Scott refused."

On cross-examination Charles Bannerman said the taxes were

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to be adjusted to the date of the agreement, *but when it came to the final closing of the deal Patterson stipulated that Scott should pay all the taxes, and insurance on the buildings for the year 1921.* Bannerman opposed allowing Scott to have one-third of the crop, because, as he said, he hadn't got his full commission. Patterson says in reference to this last meeting:—

"McArthur asked Scott if he could possibly pay $1,500 more in cash and reduce the $3,000 security to $1,500. He said he did not think he could. Then I wanted him to buy my horses but that fell through. McArthur said, 'we will go into the house and close up the deal.' Mrs. Scott said, 'you are getting the big end.' I said, 'No.' She said, 'we have to pay the agent's commission.' Mrs. Scott said something to Bannerman that sounded like the word crook. Bannerman jumped up and spoke angrily to Mrs. Scott. Scott then offered to pay extra commission to get the crop. Scott said he would not sign papers without seeing his lawyer."

In the argument of counsel based upon the above facts, Mr. Symington, for the plaintiff, relied upon ex. 2, that is the memorandum in writing set forth by the defendant in the second paragraph of his defence. He argues that this memorandum constitutes a complete agreement with regard to the main contract between the parties. But there were other matters requiring consent by both parties, viz., questions as to payment of taxes and insurance and the agent's commission, and as to which party should be entitled to one third of the crop off the land for the year 1921, which was payable to the plaintiff by Allan, the tenant, under the lease which the plaintiff assigned to Gowler. Mr. Symington says that these matters were only collateral to the main contract and formed the subject of a verbal agreement arrived at between the parties after ex. 2 had been signed. Agreements almost invariably consist of an offer by one party accepted by the other. It does not follow that because a writing is expressed in the form of an agreement it is actually one. In *Larkin* v. *Gardiner* (1895), 27 O.R. 125, a parcel of land having been placed by the plaintiff in a land agent's hands for sale, a form of agreement for sale was taken by the agent to the plaintiff and was signed by him, but before the defendant was notified thereof he gave notice to the agent withdrawing his offer. The Court held that the instrument, though in form an agreement, was in substance a mere offer and as the defendant had withdrawn before he was notified of its acceptance, there was no completed agreement. Unless therefore, ex. 2 operated as an acceptance of a previous offer

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by the plaintiff, it cannot operate as anything more than an offer.

Looking now at the evidence given by the parties it is quite manifest that ex. 2 does not express the offer theretofore made by the plaintiff.

The law which I have to apply is stated in 7 Hals. p. 354, para. 732:—

"It follows from what has been stated above under the heading of offer and acceptance, that it is an essential of a valid contract that the parties should assent to the same thing in the same sense—they must have the same intention, and this intention must be declared. If there is no evidence as to the intention of the parties there can be no contract, and similarily, if it appears that they were negotiating or contracting with regard to different things or in contemplation of diverse terms, there is an absence of the essential mutuality and consequently no contract."

The plaintiff says, speaking of the only interview he had with the defendant prior to ex. 2:—

"I said I would take $65 an acre clear to me and that they would have to pay Bannerman's commission, viz., about $1,460. I was to get one-third of the crop for that year . . . . He said he would not buy that day but would think it over."

It is not pretended that these terms offered or specified by the plaintiff were accepted by ex. 2.

Treating ex. 2, therefore, as a mere offer, the next question is—Was is ever accepted? The document itself is expressed in most condensed phraseology. It occupies only ten lines in the statement of defence, yet in order to express it in intelligible English the plaintiff spreads it over more than a page and a half of foolscap. I shall assume in accordance with Mr. Symington's ingenious argument, that the document, when read with other documents in evidence, sufficiently indicates the names of the parties, the subject-matter with which it deals, and the price.

The first question which I have to decide is whether there was at any time a concluded agreement between the parties. For the purposes of this question I omit any reference to the Statute of Frauds and treat all the parol evidence as being properly admissible. Ex. 2 (defendant's offer, as I term it) was never shewn or read to the plaintiff until after the commencement of this action. His agents, the Bannermans, communicated to him the principal terms of it. At the same time they told him that they had promised the defendant, contrary to the plaintiff's original stipulation, that the defendant should have

one-third of the crop for that year. The plaintiff appears to have been in need of money and only sought to protect himself in every way from any cash payments. He appears to have adhered throughout to this as his guiding principle. Accordingly, when the Bannermans communicated to him at Portage la Prairie, the purport of defendant's offer, plaintiff said (Q. 119, Discovery):—

"Scott was to pay the insurance and taxes and the expense of drawing conveyances, including the transfers, mortgages and that sort of thing? A. Yes."

The next and final meeting of the parties occurred about June 19 at the defendant's house, when the terms insisted upon by the plaintiff at Portage la Prairie were carefully discussed. The plaintiff insisted on payment by the defendant of the taxes and insurance, not only from the date of the defendant's offer (which would have been quite usual) but for the whole year 1921. Then a dispute arose over the agent's commission and finally the meeting terminated by the defendant stating that he would not sign any papers without seeing his lawyer.

A somewhat similar set of circumstances was dealt with in *Williston* v. *Lawson* (1891), 19 Can. S.C.R. 673. There L. signed a document by which he agreed to sell certain property to W. for $42,500 and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased subject to the encumbrances thereon. With this exception the papers were in substance the same and each contained at the end this clause "terms and deeds, etc., to be arranged before the 1st of May next." In delivering judgment Strong, J., at pp. 679-680, points out the difficulties and liabilities which would attach to the defendant, and proceeds:—

"I only refer to them to show that there were, on the proper construction of the contract as a purchase of the equity of redemption, future questions sure to arise which it was reasonable and proper should be determined by some fixed and settled arrangement in the preliminary contract. . . . The materialty of what I have endeavoured to point out is with reference to the question of there being a completed and concluded agreement in view of the reference to the arrangement of further terms contained in both the articles, as well that signed by the plaintiff as that signed by the defendant. It appears to me, when we find these questions, I have adverted to left outstanding and unprovided for, to be impossible to say that the added terms which were appended by the defendant to the memorandum he signed dispose of all that could be meant to be referred to by the proviso "Terms, deeds, &c., &c.,

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to be arranged by 1st May next. . . . I am of opinion that there never was a concluded agreement between the parties."

In *Stratford* v. *Bosworth* (1813), 2 Ves. & B. 341, 35 E.R. 349, Plumer, V.C., deals specially with one point I have to consider, viz., the provision insisted upon by the plaintiff that the defendant should pay the expense of drawing conveyances of the property, including the transfers, mortgages and that sort of thing. The plaintiff prayed for specific performance of an agreement to sell certain lands to the plaintiff. There, as here, the questions raised were whether there was an agreement, and as to the Statute of Frauds. The defendant had written a letter to the plaintiff concluding, "I am not inclined to part with the land at a less price than £100 per acre clear of all expenses." In delivering judgment the Vice-Chancellor said, 2 Ves. & B. at pp. 346-348, 35 E.R. at pp. 350-351:—

"'The Court is not to decree Performance unless it can collect upon a fair Interpretation of the Letters, that they import a concluded Agreement; if it rests reasonably doubtful, whether what passed was only Treaty, let the Progress towards the Confines of Agreement be more or less, the Court ought rather to leave the Parties to Law than specifically to perform what is doubtful, as a Contract.'

Examining these Letters with reference to that Principle, we cannot expect to find the Terms stated with the Formality and Precision of a legal Instrument. The Price appears clear; but the Vendor annexes a Condition, that he shall have £100 *per* Acre clear of all Expenses; and one Question is, whether, that means the Expense of making out the Title; which clearly would without express Stipulation fall upon him, and might be considerable; as Fines and Recoveries, and even an Act of Parliament, might be required to make out a Title to the Satisfaction of the Purchaser; from the Liability to which Expense, it is said, he meant to be exonerated. If that is not the Meaning of these Words, they have no Effect; as the Expense of the Conveyance is by the Law thrown upon the Purchaser.

. . . Whether aware, or ignorant, of the particular Distribution of Expense between Vendor and Vendee, contemplating, that some Expense must arise from the Sale, he means to provide, that no Part of it shall be borne by him. He might, supposing him, apprised of the Rule upon this Subject, have expressed that Intention with more Precision; but meaning to say, generally, that he would bear no Expense, attending this Transfer of Property, as to the Title, or Conveyance, or on any other Account, not entering into Particulars, what Language could he use more general? He must, therefore, be understood

as saying, that he will be at no Expense; receiving the Price of £100 *per* Acre clear; and all the Charges shall be borne by the Purchaser. The Result is, that this Correspondence, taken altogether, has not reached beyond Treaty; and these Papers cannot be blended into one concluded Agreement. The Consequence is, that the Bill must be dismissed."

In the present case I am of opinion that it is more difficult to find a concluded agreement between the parties than it was in the cases I have cited. It may be, however, that I am wrong in this conclusion, so I proceed to deal with the defence of the Statute of Frauds. Mr. Symington relies upon ex. 2 as a complete agreement for sale and purchase of the farm and argues that the other stipulations as to one-third of the crop, insurance, taxes and expense formed the subject of a parol agreement, collateral to the main contract.

The circumstances under which parol agreements have been admitted, notwithstanding a distinct written agreement, are dealt with in *Byers* v. *McMillan* (1887), 15 Can. S.C.R. 194, Strong, J., says at p. 202:—

"There remains, therefore, as the only point in the case the question as to the admissibility of the evidence, and upon this I confess I see little room to doubt the correctness of the ruling of Mr. Justice Dubuc.

The cases between landlord and tenant in which parol evidence of stipulations as to repairs and other incidental matters, and as to keeping down and dealing with the game on the demised premises, has been held admissible, although there was a written lease, *Erskine* v. *Adearne* (1873), 8 Ch. App. 756, at p. 764, 42 L.J. (Ch.) 835; *Morgan* v. *Griffith* (1871), L.R. 6 Ex. 70, 40 L.J. (Ex.) 46; *Lindley* v. *Lacey* (1864), 17 C.B. (N.S.) 578, 34 L.J. (C.P.) 7, 144 E.R. 232, 13 W.R. 80, afford illustrations of the rule in question by the terms of which any agreement collateral or supplementary to the written agreement may be established by parol evidence, provided it is one which as an independent agreement could be made without writing, and that it is not in any way, inconsistent with or contradictory of the written agreement."

There is always danger in admitting parol agreements as collateral to a written agreement, because such admission affords to parties an easy way out of avoiding the rule that a written agreement cannot be added to or varied by parol. In two of the cases above cited the plaintiff had desired to insert in the written agreement the clause which he was seeking to enforce, but the defendant, while agreeing to the clause, objected to having it in the writing. In all of the cases, as I

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read them, the Court treated the defendant's conduct as fraudulent, and relieved the plaintiffs accordingly. In the present case the alleged parol agreement, in so far as it covers one-third of the crop on the land, appears to fall within the exception pointed out by Strong, J. in *Byers v. McMillan supra*, where he says that the parol agreement must be one which as an independent agreement could be made without writing. It was certainly "an interest in land" and as such would itself require to be in writing.

The same question, but in different form, came before the King's Bench Division in England in *Williams* v. *Moss' Empires, Ltd.*, [1915] 3 K.B. 242, 84 L.J. (K.B.) 1767. The headnote says that by a contract in writing which was not to be performed within a year from the making thereof the plaintiff was engaged by the defendants to perform at their theatres on certain terms including the payment of salary at a specified rate. During the currency of the contract and within less than a year of its termination the parties verbally agreed to a variation of the plaintiff's salary for the remainder of the engagement. Subsequently the plaintiff sued the defendants to recover salary earned since the verbal agreement, at the rate specified in the original contract. The Court held, that the verbal agreement, being one which was to be performed within a year, and, therefore, not within the Statute of Frauds, was admissible as evidence to prove that the parties had substituted for the original contract a new contract embodying the variation as to the salary and the unaltered terms of the original contract. I make the following extracts from the judgment of Shearman, J., [1915] 3 K.B. at p. 246:—

"The county court judge gave judgment for the plaintiff on the ground that, although the plaintiff had entered into this new verbal agreement, it could not be acted on, by reason of the principle which has been laid down in some of the cases that evidence is not admissible to prove a parol variation of the contract which is required to be in writing. No doubt there are dicta in some of the cases, and notably in the most recent case, *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634, which support the view of the county court judge that he was bound to disregard the parol contract and to treat the original contract as still subsisting; but in support of the appeal it is contended that the statement of the law in *Vezey* v. *Rashleigh* is inadequate rather than incorrect, and it is said that the real principle is that which was laid down in *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, 110 E.R. 713, and *Noble* v. *Ward* (1867), L.R. 2 Ex. 135, 36 L.J. (Ex.) 91, and other cases. In my judgment the principle

was more correctly and adequately stated in those cases than in *Vezey* v. *Rashleigh*, and it is this, that where the agreement, varying an agreement which would be invalid if it were not in writing, is itself of such a character that it is bound to be in writing, then unless it is in writing it cannot be relied on to vary or rescind the original contract and must be disregarded. The principle as laid down by Willes, J., . . . is where there is alleged to have been a variation of a written contract by a new parol contract, which incorporates some of the terms of the old contract, the new contract must be looked at in its entirety, and if the terms of the new contract when thus considered are such that by reason of the Statute of Frauds it cannot be given in evidence unless in writing, then being an unenforceable contract it cannot operate to effect a variation of the original contract . . . But if on the other hand there is nothing in the terms of the new contract which necessitates a written contract, then, although the original contract was one which was bound to be in writing, the new parol contract can be enforced because although it is not in writing it is nevertheless an effective contract. In the present case it was competent for the parties in August, 1914, to enter into a new verbal contract to vary the terms of the original contract which would expire in March, 1915, and which, therefore, in August, 1914, had less than a year to run. The new contract does not fall within any of the provisions of the Statute of Frauds and therefore need not be in writing. It is a binding and enforceable contract, and in my opinion, affords a defence to the plaintiff's claim in this action. The appeal must therefore be allowed."

Applying the decision arrived at in this case to the facts of the case before me, it is manifest that the original written contract (assuming it to be a contract) with the parol contract added to it, constitutes a new contract of such a nature that it falls within the Statute of Frauds and therefore cannot be enforced unless the whole of its terms are shown in writing.

Finally I refer to *Thirkell* v. *Cambi*, [1919] 2 K.B. 590, 89 L.J. (K.B.) 1. That was a decision of the Court of Appeal in England and the question arose whether the contract for the sale of goods of the value of £10 and upwards had been established by the evidence. Bailhache, J., had held that there was no sufficient memorandum in writing to satisfy sec. 4 of the Sale of Goods Act, 1893 (Imp.) ch. 71, and gave judgment for the defendant. I make the following extract from the judgment of Scrutton, L.J., [1919] 2 K.B. at p. 598:—

"But when all these documents are examined, which, it is said, contain the terms of the contract and prove that there was no other contract, it is found that one term, the mode

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of delivery of the goods against payment, is not mentioned in the written statements of the contract. Mr. Bevan said it was agreed orally, and he sought to supply written evidence of it from a subsequent letter of November 29 which states terms of a contract not that on which the appellant was suing but an original contract which was afterwards modified. The appellant then finds himself in this difficulty, that one of the terms on which he relies is not in writing and has to be inferred from his statement of what the contract originally was. This is the point on which he fails. It is sufficient to dispose of this appeal."

The appeal was accordingly dismissed.

For the above reasons, I am of opinion that the defendant is entitled to succeed on both of the grounds of defence pleaded by him, and that this action must be dismissed. The defendant failed to establish any of the misrepresentations complained of.

The defendant is entitled to his general costs of defence; but the plaintiff is entitled to his costs of the issues relating to misrepresentation on which the defendant has failed.

Action dismissed.

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REX v. FARRELL.

Halifax Police Court, O'Hearn, K.C., Police Magistrate. April 24, 1922.

SHIPPING (§IV—20)—STOWAWAY—UNLAWFUL SECRETION ON BOARD CANADIAN VESSEL IN BRITISH PORT—MERCHANT SHIPPING ACT, 1894 IMP., CH. 60, SECS. 237, 684, 686, 711—CANADA SHIPPING ACT, R.S.C. 1906, CH. 113.

A stowaway who has unlawfully secreted himself on board a vessel of Canadian register in an English port and by reason thereof is brought to Canada on the ship may be convicted under the Merchant Shipping Act, 1894 Imp., ch. 60, sec. 237, by a magistrate at the Canadian port of destination. The charge in such case is properly brought under the Imperial Act and not under sec. 303 of the Canada Shipping Act, R.S.C. 1906, ch. 113.

SHIPPING (§I—1)—EXTRA-TERRITORIAL OFFENCES ON SHIP OF CANADIAN REGISTER—APPLICATION OF ENGLISH LAW.

When a vessel of Canadian register is outside of Canada she becomes a British ship for certain purposes, and, in regard to criminal offences committed on board the common and statute law of England applies.

PROSECUTIONS of accused for unlawfully secreting themselves on board a ship of Canadian register while in port at Liverpool, England.

F. B. A. Chipman, for the prosecution.

H. L. Webber, for the accused.

O'HEARN, P.M.:—These defendants were charged before me with having violated sec. 303 of the Canada Shipping Act, ch.

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113, R.S.C., 1906, by unlawfully secreting themselves aboard the Canadian S. S. "Ranger", at Liverpool, England,—in other words, in common parlance, as stowaways. At the trial it was proved that the "Ranger" was a Canadian registered commercial vessel, and that the defendants in question had secreted themselves aboard this vessel at the place mentioned and were discovered by officers of the ship on the passage to Halifax. I dismissed the information, as I had done in a previous case, holding that the legislative effect of the Canadian Seamen's Act was co-terminous with the area or boundaries of the Dominion of Canada, and certainly could have no effect over the criminal actions of an accused person begun or completed in another country, British or otherwise. I think that this principle has been settled in the well known case of the *Attorney General of New South Wales* v. *Macleod*, [1891] A.C. 455.

The prosecution, however, laid a fresh information charging the accused with the commission of the same acts under the provisions of sec. 237 of the Imperial Act. The same evidence was adduced on the hearing of this information as on the previous one. The question now is whether the Imperial Shipping Act applies to acts committed aboard a Canadian registered vessel outside Canada. In my opinion when a Canadian registered vessel is on the High Seas, or at least outside of Canada, she becomes a British ship for certain purposes, and in regard to criminal offences committed aboard of her, the common and statute law of England applies. For instance, if a murder is committed aboard a Canadian ship on the High Seas, in my opinion the Canadian Criminal Code does not apply, nor do the Canadian Courts get jurisdiction over an offender by virtue of any domestic legislation. Jurisdiction is acquired by the principle of law, which England always has asserted, that persons committing offences aboard British ships on the High Seas are amenable to the domestic trial tribunals of England.

The Imperial Parliament has gone further and enacted an Imperial Shipping Act [Merchant Shipping Act 1894 Imp. ch. 60] which under secs. 684, 686 and 711 attaches jurisdiction in such a case as the present to a Magistrate who would have authority if the offence were committed in Halifax Harbor.

In my opinion this information is sustainable under the provisions of the Imperial Shipping Act, and as the evidence was not contradicted and supports the information, I find the accused persons guilty and sentence them to an hour's imprisonment in the Common Gaol at Halifax.

Defendants convicted.

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WHITE & Co. v. THE SHIP "IONIA".

Exchequer Court of Canada, Hodgins, L.J.A. January 26, 1921.

BANKRUPTCY (§I—11)—ASSIGNMENT UNDER BANKRUPTCY—RIGHTS OF HOLDER OF MORTGAGE ON VESSEL—NECESSITY OF VALUING SECURITY—EXCHEQUER COURT IN ADMIRALTY.

An assignment under the Bankruptcy Act 1919 (Can.) ch. 36, does not interfere with or lessen the rights of a secured creditor to enforce or retain his security, and so does not prevent the holder of a mortgage on a vessel from enforcing his security before the Exchequer Court in Admiralty. It is a question however whether he is not bound by sec. 46 to file an affidavit valuing the security at the risk of losing the right to participate in any dividend (sec. 46, sub-sec. 10).

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

MOTION in Chambers to set aside the service of the writ of summons and warrant of arrest issued by a mortgagee to condemn a ship in the amount of their mortgage thereon and interest.

A. D. McKenzie, for the authorised assignee under the Bankruptcy Act.

G. M. Willoughby, for plaintiffs.

HODGINS, L.J.A.:—Motion by assignee to set aside the service of the writ and warrant of arrest and to stay proceedings in this action, brought by mortgagees to enforce their mortgage by sale of the ship.

The assignment was made on November 11, 1920, the writ herein was sued out on December 23, 1920, and served on the ship and on the assignee on December 28, 1920, and January 5, 1921, respectively. The ship was arrested on December 28, 1920, by warrant issued in this action and is now in the custody of the marshal of the Exchequer Court.

The plaintiffs filed with the assignee on November 23, 1920, an affidavit of claim which stated the security held but did not value it pursuant to sec. 46 of the Bankruptcy Act 1919 (Can.) ch. 36, and no proceeding to enable or compel the assignee to elect to take or refuse the security has been had. The affidavit is not in compliance with the Act and does not effect any change in the positions of the plaintiffs or of the assignee. It is simply a careless and useless proceeding.

The provisions of the Bankruptcy Act respecting secured creditors are definite and precise. By making an authorised assignment, the assignor commits an act of bankruptcy, enabling his creditors to seek a receiving order but the assignment in itself does not appear to make the assignor a bankrupt under the Act. Under sec. 2 (*g*.) he is "an insolvent assignor whose debts provable under this Act exceed $500." See also sub-sec. (*t*). By sec. 4, sub-sec. (6), the Court can refuse to make a receiving order and may allow the estate to be administered under the assignment. The bankruptcy of a debtor commences only on

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the service of a petition on which a receiving order is made, sec. 4, (10).

Under sec. 6 (1), when a receiving order is made, the trustee is constituted receiver of the bankrupt's property but it is expressly provided that "this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

Under sec. 10, the effect of an authorised assignment is stated to be "subject to the rights of secured creditors" and by sec. 11 such an assignment takes precedence over attachments or debts and the attachments, executions or other process against the property. But as the assignment itself only vests the property subject to the rights of secured creditors it can only affect what the debtor owned, namely, the equity of redemption in the property. (See sec. 46 (6) and the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 45.)

The combined effect of secs. 6 and 10 is to declare that the bankruptcy proceedings do not interfere with, or lessen the rights of a secured creditor (defined in sec. 2 (*gg*) as a person holding a mortgage hypothec, pledge, charge, lien or privilege on or against the property of the debtor) to enforce or retain his security unaffected by bankruptcy proceedings. It is a question, however, whether he is not bound by sec. 46 to file an affidavit valuing that security, at the risk of losing the right to participate in any dividend (sub-sec. 10).

The assignee has, in my judgment, at the present time, no right to interfere in this action, otherwise than by defending it, if he so desires. I extend the time for his appearance to the writ for one week, and dismiss his motion with costs to be taxed, and added to the mortgage debt.

Judgment accordingly.

REX v. BELL & BARRON, LIMITED.

Alberta Supreme Court, Edmonton Judicial District, Tweedie, J. May 29, 1922.

SUMMARY CONVICTIONS (§VIII—90)—INVALIDITY ON ITS FACE—CORPORATION WITH INDIVIDUAL NAMES FOLLOWED BY WORD "LIMITED"—INDIVIDUALS ALSO TRADING AS PARTNERS AT SAME ADDRESS—CHARGE OF LIQUOR OFFENCE AGAINST CORPORATION — SUMMARY CONVICTION FINDING CORPORATION GUILTY AND ADJUDGING PENALTY AGAINST PERSONS WHOSE NAMES ARE INCLUDED IN THE CORPORATION NAME—QUASHING.

Where business premises were occupied jointly by an incorporated company called "Bell and Barron, Ltd." and also by persons named Bell and Barron as partners dealing under another trade name, while also interested in the company named after them, a summary conviction which purports to convict "Bell and Barron Ltd." but adjudges the penalty only against Bell and

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Barron is void on its face and will be quashed on certiorari. The court will decline to amend if not satisfied that an offence has been committed.

CERTIORARI (§IA—9)—POWER TO AMEND, SUMMARY CONVICTION—NECESSITY OF LEGAL EVIDENCE BEFORE MAGISTRATE TO SUSTAIN AN AMENDED OR SUBSTITUTED CONVICTION—LIQUOR ACT, 1916, (ALTA.) CH. 4, SECS. 62, 63 (CR. CODE SEC. 1124).

In applying the statutory power under secs. 62 and 63 of the Liquor Act, 1916, (Alta.) ch. 4, to amend an invalid summary conviction or to record a substituted conviction under that Act, the Court must be satisfied by a perusal of the depositions that there is evidence to support that course. In considering the evidence for that purpose, the Court is not bound to take the entire evidence which is submitted in the depositions but should accept only that which is legal evidence and reject all that which by the rules of evidence is inadmissible and which would be improperly before the Court below if it had been objected to, whether formal objection to its admission had been taken or not, and sustain a conviction in an amended or substituted form only if satisfied by the legal evidence adduced before the magistrate that an offence had been committed.

CERTIORARI (§II—24)—RECORD OF CONVICTION—EXTRANEOUS QUESTIONS AS TO THE DEPOSITIONS—STATUTORY FORM OF SUMMARY CONVICTION NOT RECITING THE EVIDENCE.

In dealing with an application to quash on certiorari, the Superior Court is bound by the record of the conviction in question. Where this record consists of a summary conviction in an authorised statutory form which does not state the evidence, the information and depositions, although required by practice rules to be returned with it, are not a part of the record and grounds of the insufficiency of evidence upon a material point or of wrongful admission of evidence, which could only be determined by a perusal of the depositions cannot be entered upon.

[*R.* v. *Nat Bell Liquors, Ltd.* (1922), 65 D.L.R. 1, 37 Can. Cr. Cas. 129, [1922] 2 A.C. 128, applied.]

APPLICATION to quash a summary conviction made by the Police Magistrate in the City of Edmonton, of Bell & Barron Limited, dated April 4, 1922, for unlawfully keeping for sale intoxicating liquor.

N. D. Maclean, K.C. for defendants.

A. M. Knight, for Attorney General's Department.

TWEEDIE, J.:—The notice of motion sets forth 12 different grounds upon which the application is based. None of these with the exception of one which alleges "that the conviction on its face is bad and void by reason of the fact that 'Bell and Barron Ltd.' is purported to be, convicted but that 'Bell and Barron' are adjudged to pay $500 and costs, and that the evidence does not disclose whether it was Bell and Barron personally, or Bell & Barron Ltd. which the magistrate intended to convict," are open to the consideration of the Court.

The first of the objections set out in the notice is:—"The information discloses no offence and is bad on its face and

void." But the court is unable to look at the information at least apart from questions of jurisdiction.

In *R.* v. *Nat Bell Liquors Ltd.* (1922), 65 D.L.R. 1, at p. 22, Lord Sumner says: " . . . . . but there is no suggestion that apart from questions of jurisdiction, a party may state further matters to the Court either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior Court along with its record, for example, the information, have been excluded by the superior Court from its consideration. That the superior Court should be bound by the record is inherent in the nature of the case."

The record consists of the conviction in statutory form. As to this Lord Sumner says at p. 29:—

"Since the statute expressly provides that the record of the conviction may be sufficiently recorded in the statutory form, a mere general rule of practice is not to be read as altering that provision or requiring that the record of it shall include a separate document sent along with it, that is to say, virtually, as declaring that the general form of conviction shall not be in itself a sufficient record, the statute notwithstanding."

The other objections with the exception of the one set out at length herein deal with the lack of any evidence, the insufficiency of evidence and the wrongful admission of evidence cannot be considered as grounds for quashing the conviction. Questions relating to evidence can only be determined by a perusal of the depositions, which is not permissible for this purpose. If the record is regular on its face they cannot be read as they form no part of the record.

Lord Sumner says [*R.* v. *Nat Bell Liquors Ltd. supra* at p. 30]:—"Their Lordships are of opinion that the evidence, thus forming no part of the record, is not available material on which the superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established . . . . . "

There are however purposes for which the depositions may be read as provided for by secs. 62 and 63 of the Liquor Act ch. 4, (Alta.) 1916, namely to uphold the conviction if it is irregular on its face by amending the conviction or to reverse it if the Court is satisfied in the words of sec. 62 "by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed."

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As to the former; Lord Sumner proceeds [*R. v. Nat. Bell Liquors Ltd.*, p. 29]:—

"The depositions are not made part of the record. They are used as independent materials upon which the Judge must uphold a conviction which upon its face he might otherwise be bound to quash for irregularity, informality or insufficiency provided that he is satisfied within the terms of the section."

And as the latter at p. 30:—

"The condition of power to reverse in the sense of a power to let the guilty person off cannot be a conclusion from evidence that the Act has been violated and it is to be noted that the word is 'reverse' and not 'quash.' What evidently is meant is that on drawing the above conclusion from the evidence, the Court may if it thinks fit to exercise the power of making some other conviction reverse for that purpose the conviction actually made below which otherwise would stand in the way and direct the conviction which in its opinion the justices should have pronounced."

This case clearly comes within the objection which was set forth in the notice of motion and which is set forth at length. The conviction is irregular on its face. It purports to convict Bell & Barron Ltd., adjudicates Bell and Barron to pay and forfeit $500 and to pay the informant's costs and in default of payment orders distress to be brought against the goods and chattels of Bell and Barron Limited and orders and adjudges the liquor seized (4 pint bottles) to be forfeited to His Majesty.

Section 62 of the Liquor Act provides "No conviction . . . . . shall upon any application by way of . . . . . be held insufficient or invalid for any irregularity . . . . . therein, if the court or judge hearing the application . . . . is satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed." For the purpose of upholding the conviction the Court or Judge must be satisfied from a perusal of the depositions that the accused has committed the particular offence against a provision of the Act for which he was convicted and, if so, he may amend the conviction under sec. 62, otherwise if he is satisfied that an offence other than the one charged has been committed he must direct to be recorded against the accused a new conviction for the offence against a provision of the Act which the depositions disclose.

It becomes necessary to examine the evidence to see whether

or not the conviction can be upheld or, if not, it should be reversed and a conviction for another offence against the accused directed. It will however not be necessary to consider the latter as I am satisfied that if an offence was committed it was the one as alleged in the conviction and if there is not evidence from which that can be reasonably concluded the conviction must be quashed by reason of the irregularity on the face of it.

Can the conviction for the offence alleged therein be upheld? I think not. In considering the evidence for this purpose the Court in my opinion is not bound to take the evidence which is submitted in the depositions but should accept only that which is legal evidence and reject all that which by the rules of evidence is inadmissible and which would be improperly before the Court below if it had been objected to, whether formal objection to its admission had been taken or not, and be satisfied therefrom after duly weighing and considering it that the offence has been committed.

The facts of this case are as follows:—The accused Bell and Barron Ltd. is a body corporate having been incorporated under the laws of Alberta, early in October, 1921, for the purpose of manufacturing and selling a proprietary medicine known as "Bell's Invalid Wine." For the purpose of its business it had procured the necessary licenses from the Dominion Government. It occupied premises at 10865—96th street in the City of Edmonton, where since incorporation it has been carrying on its business. Two men of the names of Bell and Barron were individual shareholders and one at least was an officer of the company. Prior to the incorporation of this company Bell and Barron were carrying on business in the same premises under the name of the "Montreal Distributing Company", engaged in the sale of an alleged non-alcoholic beverage, in bottles labelled Port Wine. The contents of the bottles were drawn from a common source and sold to an unsuspecting public at prices ranging from $13.50 to $18 per dozen, the price having no relation to the quality of the contents of the various bottles, but determined wholly by the label which they saw fit to affix thereto—such as "Sonada," "Operto," "Convido" and "Dewars", these being the alleged brands of Port Wine in which they dealt.

From October 7, 1921, to the date when the offence is alleged to have been committed Bell and Barron Ltd. and the Montreal Distributing Co. (Bell and Barron) occupied the premises jointly and there was stored therein the "Invalid Port" of Bell & Barron Ltd., and the alleged "Port" wine of the Montreal Dis-

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tributing Co.

Samples under a search warrant were taken from the stock of each, analyzed by the Provincial Analyst and his certificates pursuant to sec. 82 of the Liquor Act used as evidence against the accused. Circulars of the Montreal Distributing Company sent out for the purpose of advertising its goods and furthering sales was put in evidence as part of the case for the prosecution notwithstanding the fact that these circulars were distributed before Bell & Barron Ltd. came into existence, and was clearly inadmissible against the accused. The analysis of the Port wines made by the Provincial Analyst showed it to contain 4.64% alcohol in proof spirits, or 2.14% more than the percentage set forth in sec. 2 (C) of the Liquor Act defining intoxicating liquor. Section 82 of the Act in referring to the Analyst's certificate says: ". . . . . such certificate or report shall be conclusive evidence of the facts stated in such certificate or report."

In view of the fact that this certificate is conclusive evidence and that the accused has no opportunity of having the analyst examined on his behalf to detect error in the analysis and the further fact that the introduction of expert evidence to rebut the analyst's certificate would be of no avail, the certificate being conclusive, the certificate should be construed strictly and nothing should be read into it by implication, and the Court should not infer facts in connection with it for the purpose of establishing on behalf of the prosecution a case which it has failed otherwise to prove. This port wine was seized on February 23, delivered to the analyst on the 24th. On March 28 the Provincial Analyst issues his certificate in which he states, "I beg to advise you that I have analysed the sample of liquor delivered to me February 24, 1922, by Detective Sergeant Petheram," but there is nothing to indicate when he did analyse it. This becomes a very material fact. The prosecution if it intends to rely upon this certificate to establish that it was an intoxicating liquor must shew that it contained in excess of 2½% in proof spirits when it was taken into possession by the police from the premises of the accused. This was a fermented wine, the bottle was open and the constable who took it refused to seal the bottle before removing it from the premises. The evidence shews that under the conditions in which it was seized, opened and retained, further fermentation might take place. In the absence of anything in the certificate or other evidence to indicate when the analysis was made we must assume that it was made on the day of the

date of the certificate. We cannot assume that it was made on the day of its delivery to the analyst.

The certificate is conclusive that the liquor was intoxicating at the time of its analysis but not at the time of its seizure, and in the absence of any other evidence I cannot conclude that the liquor was intoxicating. Was there any other evidence to indicate that it was intoxicating?

The constables sampled the wine in the casks from which these bottles were filled by tasting it, but there is nothing to indicate that they, on February 23, considered it intoxicating. In fact they admitted that it was not so. If the Magistrate based his decision on the evidence as to the port wine of Bell & Barron (The Montreal Distributing Co.)—although he gave no reasons for his decision and there is nothing to indicate upon what he did base his decision—I am of opinion that he was not justified in arriving at the conclusion he did, as the evidence was not sufficient to prove that it was intoxicating.

Further evidence against Bell and Barron Ltd. is based wholly on possession of "Bell's Invalid Wine."

The facts in connection with that are briefly as follows:—Bell & Barron Limited received a certificate of incorporation on October 17, 1921. Bell and Sons Ltd., of Winnipeg, were proprietors of the formula for and the manufacturers at this time of Bell's Invalid Wine. The two companies entered into an agreement being dated October 14, 1921, and registered October 31, 1921, whereby the former was to give to the latter a certain number of shares of its capital stock in exchange for the right to manufacture and sell Bell's Invalid Wine which was registered in the name of the latter. On November 12, 1921, the former company procured from the Dominion Government a "Bonded Manufacturers License." The evidence shews that it had a Dominion license to sell.

The company then proceeded to manufacture and keep for sale pursuant to their licenses.

There is no doubt as to the quantity of alcohol in proof spirits in the preparation. A director of the accused admits that it was over 2½% and is therefore an intoxicating liquor within the meaning of the Liquor Act.

Section 51 of the Liquor Act places "the burden of proving the right to have or keep or sell or give liquor shall be on the person accused of improperly and unlawfully of having or keeping . . . such liquor." This burden the accused has discharged in my opinion.

The prosecution rely on the fact that while he may have had

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authority to manufacture and sell Bell's Invalid Wine that authority would extend to the preparation when made in strict conformity with the formula and was such a preparation of Beef, Iron and Wine as taking it within the terms of the "United States National Formulary," a formulary approved of by the Lieutenant-Governor-in-Council on May 6, 1918, approving of various formulas for the combination of alcohol with any other substance for sale. I do not consider that this latter requirement has any bearing on the case, the accused having its authority from the Parliament of Canada. Assuming, however, for the purpose of the prosecution that it has. What are the facts? Barron, a director of the accused company, says that it was made in strict accordance with the formula registered as No. 7863 and that it complied with the requirements of the "United States National Formulary" for proprietary medicines. When asked by counsel for the prosecution after referring to the registration number of the formula, "Do you know, Mr. McKechnie, if in this manufacture of Bell's Invalid Wine the condition is complied with—the Government registration as to ingredients?" McKechnie replied, "They have or they wouldn't have got the bond from the excise."

McKechnie was present, when the mixture of the various ingredients was made, as a representative of the Pure Food Department. At the time of mixing there was also present a Dominion Excise officer, who says that "Everything was straight and aboveboard."

On February 8, 1922, fifteen days before the samples were taken by the police, L. P. Turner, officer in charge of the Proprietory or Patent Medicines Branch, wrote Messrs. Bell & Sons Ltd., of Winnipeg, who were the proprietors of "Bell's Invalid Wine," therefore deemed the manufacturers under the Proprietory or Patent Medicines Act (sec. 2, ch. 6, 1919 Can.) a letter, which was forwarded to the accused, the actual manufacturers, in which he admits that "Bell's Invalid Wine," to which Registration No. 7832 was assigned under the Proprietory or Patent Medicine Act, is medicated in accordance with the terms on which this registration number was granted.

The evidence which shews that it was not prepared according to the formulary was that at a time previous to this alleged offence the accused had caused to be opened some bottles for the purpose of further medication. This may have been owing to the fact that the beef extract which was used in the preparation might have deteriorated as appears from the evidence of one of the witnesses. There is the further fact that it was seized. There

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is nothing, however, to shew why it was seized. In fact McKechnie, who had the supervision of the manufacture, says that he did not know why it was seized. He was just advised to that effect from Ottawa. The accused did not know. The seizure might have been wholly improper, and no inference should be drawn against the accused from that fact. Then we have the certificate of the Provincial Analyst. This certificate is open to practically the same objections as the one in regard to the Port Wine except that one of the bottles seems to have been sealed when taken on the accused's premises and remained so until delivered to the analyst. There is nothing to indicate what happened to samples from the time they were delivered until they were analysed, which in the absence of evidence to the contrary must be presumed to be the date of the certificate, March 28, 1922, some 34 days after seizure.

After stating that there was 23.27% alcohol in proof spirits in each sample, the certificate proceeds:—"In regard to Beef, Iron and Wine National Formulary I would state that the samples meet specification for iron, but are somewhat deficient in beef extract, being 20% lower than the requirements."

This certificate no doubt was introduced as conclusive evidence that Bell's Invalid Wine did not comply with the "United States National Formulary," as it was not necessary to produce it to establish the alcoholic contents thereof, as it was admitted by a director of the accused company at the time the sample was taken that it contained alcohol in proof spirits in excess of 2½%. Can the certificate be admitted for that purpose? I think not, and if admitted for any purpose within the section this latter statement is not evidence against the accused, conclusive or otherwise.

Section 82 of the Liquor Act provides in regard to the Provincial Analyst's certificate:—". . . . As to the analysis or ingredients of any liquor or other fluid or any compound or substance, such certificate or report shall be conclusive evidence of the facts stated in such certificate. . . . ." Under this section contents of the analyst's certificate is limited "as to the analysis or ingredients," and if he goes beyond that to state facts which are collateral thereto and which may be favourable or unfavourable to either party, the person producing such a certificate is not producing a certificate within the meaning of the section, and it should be excluded. Even if the certificate were admissible, and it was admitted in this case it could not be conclusive evidence that "Bell's Invalid Wine" did not conform to the "United States National Formulary." The certificate is

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conclusive proof of the facts stated therein only in so far as such facts directly relate to and are determined by the analyst's examination of the particular subject-matter which has been submitted to him for analysis or examination. For example, he might state whether the liquor is a malt or a fermented or an intoxicating liquor; and he may, as is generally the case, state the percentage of alcohol or he may state component parts of any compound and such other facts as are determined by his examination, but he cannot state facts which are purely collateral as he has done in this case. To hold otherwise would be to allow the analyst to make deductions which should be made by the Court.

The certificate is open to another objection which is fatal. It refers to the "National Formulary" but it does not say what "National Formulary." That approved of by the Lieutenant-Governor-in-Council is the "United States National Formulary" so that even if the certificate were admissible there is nothing in it to show that the preparation complained of was not prepared according to the approved formulary.

As to the Port wine which was seized, the prosecution have failed to establish that it was intoxicating at the time that it was seized and taken from the premises. As to the balance of the wine other than "Bell's Invalid Wine," which remained and was upon the premises at the time of the offence complained of, there is no evidence to show that it was intoxicating; in fact the evidence in regard to the larger portion of it which was in casks goes to show that it was non-intoxicating.

In regard to "Bell's Invalid Wine" the evidence goes to show that it was intoxicating within the meaning of the Liquor Act inasmuch as it contained an excess of 2½% alcohol in proof spirits.

That being the case sec. 57 of the Act places the burden upon the accused of proving the right to have, keep or sell the same. In my opinion it has discharged this burden by proving that it had a license from the Government of Canada to manufacture, and also a license from the same authority to sell throughout Canada a proprietory medicine, and that the manuactured product "Bell's Invalid Wine" was in conformity with the registered formula and it was therefore properly upon the premises of the accused for sale.

I am not satisfied from a perusal of the depositions that there is evidence on which the Justice might reasonably conclude that an offence against a provision of this Act has been committed and I am therefore unable to uphold the conviction.

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The conviction being irregular on its face should be quashed and I order accordingly but without costs to the applicant. The formal order will include the usual clause protecting all parties, who are entitled to such protection by an Order of the Court. While I do not quash the conviction because of other irregularities than that contained in the record, I wish to point out that the proceedings are bristling with irregularities from the initial step throughout and when such wide and absolute powers are placed in the hands of Justices and Magistrates they should at least endeavour to see that the proceedings are regular.

Conviction quashed.

Re LEMIEUX and COPPING MOTOR DISTRIBUTORS LIMITED.

Quebec Superior Court in Bankruptcy, Panneton, J. April 27, 1921.

BANKRUPTCY (§III—29)—CONDITIONAL SALE OF GOODS—COVENANT—DEFAULT OF PAYMENT—RE-POSSESSION OF GOODS—INSOLVENCY—SMALL AMOUNT DUE—RIGHT OF TRUSTEE TO PAY AND POSSESS GOODS.

Where goods are purchased under an agreement of purchase, the purchaser agreeing in case of default of payment to lose all the money paid, and all the payments are made except the last one, which became due after the purchaser had made an assignment under the Bankruptcy Act, and the trustee tenders the amount due on the last payment, but acceptance is refused by the creditor in the hope of recovering the goods back although three-fourths of the purchase price has been paid, and in this way recoup himself from loss of another debt owing from the bankrupt, the Court will order payment of the amount due and will not allow the vendor to recover possession of the goods.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PANNETON, J.:—Petition by W. A. Haymen and others doing business under the name of Office Equipment Co. of Canada to recover possession of certain office furniture delivered by them to the bankrupts under agreement by which the bankrupts agreed to pay $927.50 for them, said furniture to remain the property of petitioners until paid for entirely as follows: $327.50 on November 4, 1920, $200 on December 4, 1920, $200 on January 4, 1921, and $200 on February 4, 1921—the bankrupts agreeing in case of default of payment to lose all the money paid. The bankrupts further agreed not to remove the furniture from their premises without the consent of petitioners. The agreement contains this further provision: "After the above payments have been made, the goods will be the property of the second party [the bankrupt] on the payment of one dollar."

Four promissory notes were given to correspond with the payments. The first three notes were paid. The last one became

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due on February 7, last and was not paid as bankrupts made an assignment of their property to the trustee on February 3.

On February 16, the trustee offered $201, the one dollar being for interest that might have accrued on the note under reserve to contest any interest claims, the interest accrued being then 28 cents. The additional dollar to complete the title was not offered, but there was 72 cents offered more than the interest due.

In ordinary circumstances, the money would no doubt have been accepted, but the bankrupts were owing to petitioners in addition to the last note $158 for which they had no security, and seeing that the amount offered was short by a few cents less than the amount strictly due they made the present petition to obtain their furniture whereby, if they had a right to it, seeing that three-fourths of the price have been paid they would recoup themselves in that way from the loss on their ordinary claim.

This is a way of dealing between traders which cannot be commended. When the difference between the parties was so small (and there is no proof that the offer of $201 was refused because it was not sufficient) it is a favourable occasion to apply the just rule *de minimis lex non curat,* the law does not take cognizance of very small matters.

The $201 have, since the present contestation, been deposited with petitioners' attorneys to avail as a legal deposit of the amount.

The present petition was served on the bankrupts on April 6 to be presented on the 11th. Previously, on March 26, petitioners' attorneys wrote a letter to respondents' attorneys notifying them that they would apply to the Court to obtain possession of their furniture and forbidding the sale of the said furniture by the trustee.

Notwithstanding the said written notice and the service of the said petition, the trustee proceeded to sell the said furniture.

On April 8 instant, petitioners having then discovered that the furniture was being disposed of by the trustee obtained an order from the Court to stop the sale of said furniture, but it was too late, the rest of the furniture, five desks, had been sold and removed, the sale of the same having been made on the 7th, the day after the serving of the petition, and they were removed on the 8th.

This was a high handed proceeding on the part of the trus-

tee. As soon as the present petition was served, the trustee, an officer of this Court, ought to have stopped going on with the sale. The order served on him on the 8th, not to proceed further with the sale was served on him too late according to his pretension. However, the present petition had been served on the 6th, as stated before.

The trustee is condemned to pay the costs of the petition and order of April 8.

The trustee contends that with the petition served and presented, petitioner was bound to offer the last promissory note and that the petition cannot be granted without said offer. Petitioner deposited the note in Court at the *enquête*.

As petitioners have the money for the last promissory note due on the purchase of the furniture in question, and as both parties have not complied with the strict requirements of the law, the Court declares the money deposited by the trustee in the hands of petitioners' attorneys do avail as a deposit into Court, and declares that said money belongs to petitioners in full payment of the claim of petitioners for said furniture, and declares that said note deposited into Court is paid, and orders the Registrar to deliver the same to the trustee who pays the same with the money deposited as aforesaid in the hands of said petitioners' attorneys, and the petition is dismissed, each party paying its own costs.

Petition dismissed with costs; costs of restraining order against trustee.

Judgment accordingly.

CROSS v. PIGGOTT.

Manitoba King's Bench, Mathers, C.J.K.B. May 22, 1922.

LANDLORD AND TENANT (§IIID—96)—LEASE OF PREMISES—COVENANT BY LANDLORD TO HEAT AND REPAIR ROOF—BREACH OF COVENANT—REMOVAL OF TENANT—LIABILITY FOR RENT.

After a tenant has gone into possession his obligation to pay rent does not depend upon the performance by the lessor of any collateral obligations assumed by him, and nothing short of something done by the landlord which amounts to an eviction of the tenant will discharge the latter from his obligation to pay rent.

ACTION by landlord to recover a certain sum alleged to be due for rent.

R. D. Guy, for plaintiff; *F. C. Kennedy*, for defendant.

MATHERS, C.J.K.B.:—The defendant was tenant to the plaintiff of a suite of rooms in the Alcalde apartment block in this city, under a lease dated September 7, 1920, from October 1,

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1920 to September 30, 1921, at a rental of $1,500 payable at the rate of $125 per month. He was in possession at the time the lease was entered into and he continued to occupy the suite until April 8, 1921, on which date he removed from it. The premises remained vacant until the end of the term on September 30, and this action is brought on the covenant to pay rent contained in the lease for the rent from the end of April to that date—a period of 5 months—also for certain expense incurred by advertising in an attempt to find a new tenant.

The defence is put upon these grounds:—(1) That the term was surrendered on April 8; (2) That the plaintiff covenanted to adequately heat the suite from October 1 until May 1 and that he failed to do so, whereby the premises became uninhabitable and untenantable; (3) That the lease contained an implied covenant for quiet enjoyment but that the plaintiff allowed the roof to be and remain out of repair so that water leaked through into the said suite damaging defendant's goods and rendering the suite untenantable and uninhabitable. The defendant alleges that for these reasons he was entitled to terminate the lease and that the plaintiff is not entitled to recover the rent sued for.

As to the first ground of defence, the evidence in my opinion fails to prove a surrender either in fact or in law. The defendant's counsel recognised the weakness of his case in this respect and did not press the point.

The second and third grounds of defence may be treated together. The lease provides that:—"the lessor agrees to furnish steam for steamheating purposes in said building from the 1st day of October to the 1st day of May."

It was admitted by the plaintiff that the agreement called for such adequate heating as would make the premises comfortable as a place of residence. Indeed, any other contention would in my opinion be untenable: *Brymer* v. *Thompson* (1915), 23 D.L.R. 840, 34 O.L.R. 194; affirmed 25 D.L.R. 831, 34 O.L.R. 543.

I find as a fact that there were frequent periods from November, 1920, to April 8, 1921, when the suite was not either during the day or night adequately heated so that people could live in it in comfort. I find also that the roof leaked on several occasions through the winter and that the defendant suffered much inconvenience and considerable loss on account of this leaky condition.

The suite in question was on the top floor of the block. The roof remained in the possession of the plaintiff as lessor.

It is, of course, trite law that on the demise of land there is

no implied undertaking on the part of the landlord that it is fit for the purposes for which it was let: *Sutton* v. *Temple* (1843), 12 M. & W. 52, 152 E.R. 1108, 13 L.J. (Ex.) 17; or that an unfurnished house is in an habitable state: *Hart* v. *Windsor* (1843), 12 M. & W. 68, 152 E.R. 1114, 13 L.J. (Ex.) 129; *Tarrabain* v. *Ferring* (1917), 35 D.L.R. 632, 12 Alta. L.R. 47; (1918), 52 D.L.R. 687, 59 Can. S.C.R. 670; *Gordon* v. *Sime* (1917), 37 D.L.R. 386, 44 N.B.R. 535. It is equally well settled that breach by the landlord of his covenant to keep the demised premises in repair does not entitle the lessee to throw up the tenancy; *Surplice* v. *Farnsworth* (1844), 7 Man. & G. 576, 135 E.R. 232, 13 L.J. (C.P.) 215; *McIntosh* v. *Wilson* (1913), 14 D.L.R. 671, 23 Man. L.R. 653; and is no defence to an action for rent: *Denison* v. *Nation* (1862), 21 U.C.R. 57; even although the lack of repair rendered the premises useless for the purposes of the tenant: *Wilkes* v. *Steele* (1857), 14 U.C.R. 570; *Izon* v. *Gorton* (1839), 5 Bing. (N.C.) 501, 132 E.R. 1193, 8 L.J. (C.P.) 272.

In *Hart* v. *Rogers*, [1916] 1 K.B. 646, 85 L.J. (K.B.) 273, the plaintiff had let to the defendant an unfurnished suite in an apartment building on the top floor, retaining possession and control of the roof. The roof leaked badly and the defendant moved out. In an action for rent it was held by Scrutton, J., that although the landlord was under an obligation to keep the roof in repair, his failure to do so was no answer to a claim for rent but only gave a right to a cross-action for damages.

These authorities it seems to me effectually dispose of that part of the defence which is based on the non-repair of the roof.

It is argued that breach of agreement to heat to the premises stands on a different footing because in a case of non-repair the tenant may do the repairs himself if the landlord fails to make them and recover the costs as damages, but in the case of failure to heat where the heating plant is in the possession and under the control of the landlord the tenant is powerless. There is a good deal of force in that contention but, in my opinion, the law is settled to the contrary. I can see no difference between the non-repair of a roof which the landlord was obliged to maintain and which remained in his possession and under his control and with which the tenant could not interfere without committing trespass, and a failure by the landlord to fulfil his agreement as to the supply of heat under like circumstances. In both cases the tenant is equally helpless to remedy the defect. The principle deducible from the authorities appears to

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be that, after the tenant has gone into possession, his obligation to pay rent does not depend upon the performance by the lessor of any collateral obligations assumed by him and that nothing short of something done by the landlord which amounts to an eviction of the tenant will discharge the latter from his obligation to pay rent: *Gordon* v. *Sime*, *supra*. What constitutes an eviction was stated by Jervis, C.J., in *Upton* v. *Greenlees* (1855), 17 C.B. 30 at p. 51, 139 E.R. 976 at p. 986, in terms which have been accepted as accurate since that time. He there said (17 C.B. at p. 64):—

"I think it may now be taken to mean this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."

It appears to be an essential part of this definition that the act complained of as amounting to an eviction should have been done with that intention: *Ferguson* v. *Troop* (1890), 17 Can. S.C.R. 527; 18 Hals. 480.

There was in this case clearly no eviction within the above definition. On each occasion when complaint was made of insufficient heat the default was promptly remedied. No doubt the defendant and his family suffered much inconvenience and discomfort but they continued to occupy the suite until the very cold weather was at an end and left when there were but three weeks remaining of the time during which heat was to be supplied.

For these reasons, I hold against the defendant upon all grounds of defence raised.

The defendant counterclaims for damages, but he has already recovered substantial damages against the plaintiff for the very claim now made in his counterclaim, and he is not entitled to vex the plaintiff twice for the same cause of action. He claims also as damages the rent paid in his new premises. This claim is also untenable. He was entitled to remain and occupy the suite in the plaintiff's building and if he chose to leave it, he cannot charge the plaintiff with the expense of living elsewhere.

There will be judgment for the plaintiff for $625, and costs of suit. The counterclaim will be dismissed with costs.

I do not allow the plaintiff the cost of advertising for a new tenant as, in my view, the total liability of the defendant was the amount of the rent.

Judgment accordingly.

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Alberta Supreme Court, Tweedie, J. August 23, 1922.

AUTOMOBILES (§IIIB—225)—NEGLIGENCE OF DRIVER—DUTY AS TO APPROACHING VEHICLE—STREET CAR—STATUTORY ONUS—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—LAST CHANCE.

Where the driver of an automobile, in full view of a vehicle approaching a street car stopping place, merely sounds the horn but fails to take any other precautions to prevent an accident, resulting in his striking a person who had just alighted from the vehicle to board a street car, the statutory onus under sec. 33 of the Motor Vehicles Act, 1911-12 (Alta.) ch. 6 that the "loss or damage did not arise through the negligence or improper conduct of the owner or driver," has not been satisfied. The fact that the plaintiff failed to look out for an approaching automobile, or that he ran across the street to get the car, did amount to contributory negligence in the sense of having been the proximate cause of the accident, the driver having had the last chance to avoid it.

[See Annotations, 39 D.L.R. 4; 61 D.L.R. 170.]

ACTION to recover damages for personal injuries. Judgment for plaintiff.

C. C. McCaul, K.C., for plaintiff.

R. E. McLaughlin, for defendant.

TWEEDIE, J.:—This was an action brought by the plaintiff to recover damages from the defendant on account of the negligent driving of the defendant's motor car by his chauffeur, Burke. The defendant denies the negligence and sets up contributory negligence on the part of the plaintiff as a bar to his right to recover.

On October 17, 1921, at about 3 or 3.30 o'clock in the afternoon, the plaintiff in company with his daughter, was driving West on Athabasca Ave. on the North side; for the purpose of taking a street car at the corner of the avenue and 147th St., the end of the car line. As they were approaching 133rd St. which leads north from the avenue the daughter saw the street car approaching from the distance, and suggested to her father that they had better stop there and that he could get on the car at the stopping place at 133rd St. She drove the horse and rig some 20 or 30 feet west of 133rd St. and stopped and allowed her father to alight. After her father got out of the rig there is some evidence to the effect that he stopped and had a conversation with the daughter, and after some little delay suddenly rushed in front of defendant's motor car, but I am satisfied that if they had any conversation it occupied only a few seconds, in fact was simply a passing conversation carried on during the process of his alighting from the carriage onto the pavement. When he alighted he was facing south and

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immediately proceeded, moving at a rapid rate, in a south easterly direction at an angle of about 45 degrees to the point where he would get on the street car, and it would be necessary for him to turn his head slightly and look partially over his right shoulder to see any vehicle approaching him from the west. This he did not do, nor was he aware from any cause of the approach of the defendant's motor car. The defendant's car was in charge of his chauffeur, Burke, and was being driven at a reasonable rate of speed. He was driving the defendant's wife from her home on 135th St., which is only two blocks west of where the accident happened. The automobile would not be visible until it turned into Athabasca Ave. The defendant's chauffeur proceeded east along the avenue and when at 134th St. some 250 or 300 feet away he noticed the plaintiff alighting from the carriage and realised the possibility of an accident with a resulting injury to the plaintiff, and for the purpose of warning him sounded his horn, continuing all the while on his journey, without taking any other precaution to avoid an accident. The plaintiff did not hear the horn. The view of the chauffeur between 133rd St. and the point at which the accident happened was wholly unobstructed and there was nothing whatever to have prevented the chauffeur from seeing the plaintiff from the time he sounded his horn until the happening of the accident if he had been on the look-out. He says, however, that he did not see him from the time he sounded his horn until the instant immediately preceding the accident, when he observed him directly in front of the car. He has no explanation to offer as to why he did not see him. His range of vision was not limited in any way. He suggests that he was looking straight ahead in the direction in which he was driving. If that be so it is impossible to understand why he did not see the plaintiff advancing toward the course along which he was traveling until he was immediately in front of his car. I am of the opinion that the chauffeur is in error in stating the position of the plaintiff when he saw him just prior to the accident although I think that he honestly believed such to be the case. The emergency of the situation which arose no doubt confused him and he hardly realised what took place at that particular time. I do not think that the plaintiff was ever in front of his car. If he had been I think that he would have been run over and killed instead of having been hit a glancing blow, as he must have been, escaping with a broken leg. At the point where the accident happened the avenue is paved in the centre, with an unpaved portion on either side sufficiently wide to per-

mit of vehicular traffic. Street car tracks running east and west are embedded in the pavement, the pavement extending some 18 inches beyond the outer rails of either track with a devil strip in between of sufficient width to allow street cars to pass. The track on the north side, which was intended for cars travelling west, is used for traffic in both directions, the track to the south having been abandoned. Vehicles going east are driven along the pavement, the wheels astride the north rail of the abandoned track, with the wheels on the left of the driver very near the rail, thus leaving a very considerable space between the wheels of a vehicle being driven along the path ordinarily followed, judging from an examination of the place, and the south rail of the north track, which rail was north of the centre line of the avenue. The defendant's chauffeur was driving the motor car very close to this rail, in fact so close that if a street car had been approaching from the opposite direction, unobserved, and the automobile had been continued in its course there must inevitably have been a collision, while if he were driving along the course ordinarily followed no such collision could occur. In the course of crossing the street the plaintiff placed his foot on this rail and was hit by the defendant's car before he had time to proceed further. He was driving very close to the south rail of the north track, thus leaving ample room on the pavement to the south (his right) to enable him to swerve his car in that direction, without danger to himself, and thus he could have avoided the accident, had he been on the look-out. Even had there not been room on the pavement he could easily have turned in to the unpaved portion of the street without inconvenience and passed by without having hit the plaintiff. The chauffeur, after having become aware of the danger which presented itself and the possible resulting injury to the plaintiff, sounded his horn and then dismissed him from his mind and his view, without any reason or excuse to justify his so doing, and continued on in his course. When he again observed him he had driven his car so close to him that it was impossible to avoid the accident resulting in the injury alleged. The accident did not occur in a crowded thoroughfare; there were no other vehicles to attract the chauffeur's attention; his vision of the road before him between 134th St., from which point he first observed the plaintiff, to a point some considerable distance beyond where the accident happened was clear and unobstructed.

Section 33 of the Motor Vehicles Act, 1911-12 (Alta.) ch. 6, provides that: "When any loss or damage is incurred or sustained by any person by a motor vehicle the onus of proof that such

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loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle."

I do not think that the defendant has complied with the construction which has been placed upon this section by the Appeal Court of this Province. It was held in the case of *Carnat* v. *Matthews* (1921), 59 D.L.R. 505, 16 Alta. L.R. 275, that all that was necessary to meet the presumptive negligence imposed by that section of the statute was to make out a *prima facie* case of the absence of negligence by evidence accepted by the Court as reliable. Harvey, C.J. (59 D.L.R. at p. 508) says: "All the statute requires is that he should satisfy the Court or jury by the amount of proof required in civil trials that the damage was not due to his negligence. That can be established by shewing to what it was due which was not his negligence, or by shewing that he was not in fact negligent, from which it follows that it could not be due to his negligence." He defines negligence (59 D.L.R. at p. 508) as "the failure to exercise the care that a reasonably prudent man would exercise," to which must be added the words which appear in a subsequent passage in the same paragraph, "under the circumstances."

The defendant undertakes to shew that the accident was due to a cause other than his negligence (the negligence of his chauffeur) by attempting to prove contributory negligence on the part of the plaintiff; that is that the plaintiff's own negligence was really the decisive cause of the accident. For such negligence he relies at the trial mainly upon two facts, that the plaintiff did not look up and down the street to see whether any vehicles were approaching or not, and that he ran across the street. From the evidence there is no doubt but that he did not see the approaching motor car nor did he look to see if any were coming. If he had looked when he started to cross the street he might have seen the defendant's car approaching. While he may have been careless in not doing so, he was not negligent in the sense that his negligence was "the proximate cause of the mischief." See Pollock, The Law of Torts, 9th ed. p. 476. *White* v. *Hegler* (1916), 29 D.L.R. 480, 10 Alta. L.R. 57.

As to his contention that the plaintiff was negligent inasmuch as he ran across the street, the evidence as to the fact was conflicting. There are different degrees of speed in running. The defendant was I think moving at a higher rate of speed than attained in ordinary walking but how fast I am unable to

say more than as suggested in *Davies* v. *Mann* (1842), 10 M. & W. 546, 152 E.R. 588, 12 L.J. (Ex.) 10, at "a smartish pace." There does not appear to be any reason for his running very rapidly. He was going to a point a few feet distant to get on a street car but there is nothing to suggest that the street car was so close or so rapidly approaching that haste was necessary on his part. The street car was a very considerable distance away when he saw it approaching, it having left the end of the car line where he intended to get on. The rate of speed at which he was moving I do not think was excessive or dangerous under the circumstances. He was not aware of the motor car coming towards him. He was not moving rapidly across the path ordinarily followed by motor cars traveling in an easterly direction; in fact he was some few feet away from it on the north side of the centre line of the street at a place where he was not liable to come into conflict with vehicles other than those travelling in a westerly direction. His rapid movement brought him to the point where he was hit perhaps a little more quickly than would have been the case if he had been walking at his regular rate of speed; but it did not bring him in front of the car, nor did it bring him to a point where he would have been hit if the automobile had been following on the path ordinarily followed by vehicles. In moving as rapidly as he did I do not think that the plaintiff acted in a negligent manner. His act was not in my opinion the cause of the accident. Even though he had been running at a high rate of speed, if the defendant's chauffeur had been exercising reasonable care and kept a look out to see that no one was approaching from either side of the street the accident could easily have been avoided.

The defendant has not satisfied the burden imposed upon him by the statute. He has not shewn that it was not due to his negligence by shewing that his chauffeur was in the exercise of reasonable care when driving the car at the time of the accident, nor has he shewn that the accident was due to any other cause which was not his negligence. He is therefore liable to the plaintiff for the damages sustained by him by reason of the injury resulting from the accident.

Apart from sec. 33 of the Motor Vehicles Act 1911-12 (Alta.) ch. 6, I think that the plaintiff is entitled to recover. In view of the facts set forth the defendant was clearly negligent and I can find no negligence on the part of the plaintiff which contributed to the accident in the sense that it was "the proximate cause of the mischief." In fact in this case I do not think that

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there was any negligence on the part of the plaintiff which was even a part of the inducing cause of the accident.

Assume however that the plaintiff was negligent in the circumstances. How much better off would the defendant be? To what extent would it affect his liability? The defendant's chauffeur was aware of certain acts of the plaintiff which he deemed to be negligent. He anticipated what the plaintiff was about to do, namely to cross the street, and he foresaw the danger and the injury which might result. The plaintiff was unaware of the approaching motor car driven by the defendant's chauffeur. The defendant's chauffeur had, so to speak, the last chance to avoid the accident. Pollock on Torts, 9th ed. p. 475, in discussing the case of *Radley* v. *London North Western R. Co.* (1876), 1 App. Cas. 754 says: "In the House of Lords it was held that there was a question of fact for the jury but the law had not been sufficiently stated to them. They had not been clearly informed as they should have been, that not every negligence on the part of the plaintiff which in any degree contributes to the mischief will bar him of his remedy, but only such negligence that the defendant could not by the exercise of ordinary care have avoided the result." The defendant in this case could by the exercise of ordinary care have avoided the injury complained of. He owed a duty to pedestrians crossing the street to be on the lookout, which he was not in this case. He owed a greater duty to this plaintiff by reason of the fact that he was aware of his presence, to be not only on the lookout but to have observed his movements and to have exercised such care in the operation of his car until the possibility of danger to the plaintiff had passed. This he did not do, and is therefor liable in damages for the injury sustained by the plaintiff.

In regard to the amount of damages claimed, namely $1,500, after taking all the facts into consideration I am satisfied that if the plaintiff receives $750, as general damages in addition to the doctor's and hospital bills that it will be a sufficient amount. He gave evidence to the effect that he was earning 90c. an hour working 10 hours a day and that his busy season comprised about 4 months of the year. He had no books or records to establish this. He admitted that he might have lost some days on account of weather and other conditions. Between the time of the accident until he recovered so that he could reasonably carry on his work, a period of 4 months elapsed. Those 4 months comprised the quiet season of the year in his business which was that of a stone mason and bricklayer.

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During those months he said that he had teams employed in the woods but he did not establish what the loss, if any, was on account of his own personal absence. I am of the opinion that it was very small, if any. I think that $750 will suffice to cover his general damages.

There is a claim for special damages, Doctor's bill $60, Hospital bill $62.50, which are very reasonable, have been proven, and will be allowed.

There will, therefore, be judgment for the plaintiff for the sum of $872.50 being $122.50 special damages and $750 general damages, with costs to be taxed as directed upon the application of counsel for both parties at the close of the trial.

Judgment for plaintiff.

REX v. MORRIS (No. 2).

Nova Scotia Supreme Court, Harris, C.J., Longley, J., Ritchie, E.J., and Mellish, J. February 14, 1920.

1. SUMMARY CONVICTIONS (§II—20)—KEEPING DISORDERLY HOUSE—NO OPTION OF ACCUSED TO ELECT OTHER MODE OF TRIAL—CHARGE-SHEET WITHOUT SWORN INFORMATION AS BASIS OF TRIAL—CR. CODE, SECS. 225, 228, 773, 774.

The fact that there is no sworn information will not prevent the summary trial under Part XVI. of the Criminal Code of a person arrested on a charge of keeping a common bawdy house. The summary trial for that offence proceeds without the consent of the accused and the arraignment may be upon the written charge as entered in the police charge-book.

[*R.* v. *Crawford* (1912), 6 D.L.R. 380, 20 Can. Cr. Cas. 49, 5 Alta. L.R. 204, followed.]

2. JUSTICE OF THE PEACE (§III—10)—JURISDICTION—DEPUTY STIPENDIARY MAGISTRATE TO ACT IN ABSENCE OF STIPENDIARY FROM CITY—STIPENDIARY NOT RESIDENT IN CITY TO WHICH APPOINTED—SUMMARY TRIALS UNDER PART XVI. OF CRIMINAL CODE.

Where the jurisdiction of a Deputy Stipendiary Magistrate for a city to try a criminal charge under Part XVI. of the Criminal Code is, by the terms of the statute controlling his appointment to office, limited to his so acting during the temporary absence *from the city* of the Stipendiary Magistrate, a conviction appearing on its face to be made by the deputy "in and for the city (named) acting in the temporary absence of the Stipendiary Magistrate" is not bad on its face because the temporary absence was not explicitly stated to be "from the city" in the terms of the authorising statute. *Held*, also, that the temporary absence from the city of Halifax contemplated in the Halifax City Charter, N.S. Acts 1914, included a case in which the Stipendiary Magistrate resided outside of the city as regards the period of time in which he was away from the city.

3. APPEAL (§IC—25)—JURISDICTION—NO RESERVED CASE PERMISSIBLE ON SUMMARY TRIAL WITHOUT CONSENT UNDER CODE SECS. 773, 774 ON DISORDERLY HOUSE CHARGE—CR. CODE, SEC. 1013.

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On a summary trial without consent for keeping a disorderly house, it is not competent for a city police magistrate to reserve a case for the Court of Appeal in review of the conviction; the trial in such case proceeds under Cr. Code sec. 773 and not under Cr. Code sec. 777 referred to in Code sec. 1013 as to appeals.

[*R.* v. *Morris* (No. 1) (1920), 54 D.L.R. 436, 33 Can. Cr. Cas. 354, approved. Leave to appeal therefrom dismissed.]

APPEAL from the judgment of Drysdale, J., dismissing an application made on behalf of defendant for her discharge from custody in the Halifax City Prison, where she was undergoing a sentence of six months imprisonment as keeper of a common bawdy house. In the alternative, prisoner's counsel moved for her discharge as on an original application. The conviction was made by W. J. O'Hearn, K.C., deputy stipendiary magistrate of the city. The deputy stipendiary was asked to reserve a case and declined to do so. From this refusal there was also an appeal. By agreement all matters were to be heard and disposed of together.

The judgment of Drysdale, J., appealed from was as follows:—

"It is contended here that the deputy stipendiary was without jurisdiction in making the conviction against the defendant, in as much as the deputy can only act during the temporary absence from the city of the stipendiary; that the stipendiary lives at Rockingham and is permanently absent from the city and can have no deputy in case of a temporary absence. This involves a consideration of the scheme of the Act and the interpretation of the section providing for a deputy. The scheme of the Act provides a permanent stipendiary for the city with no provision as to residence in the city. A deputy is provided for in case of his temporary absence from the city. As a matter of fact, the stipendiary lives in Rockingham, a suburb of the city, is here daily to hold his Court but at times is necessarily temporarily absent from work in the city. For this latter case the Act provides for a deputy who shall take his work with all his jurisdiction, during such temporary absence.

The contention is that because the magistrate lives out of the city in actual residence permanently, although clothed with all jurisdiction to do his work daily in the city, there can be no such thing in his case as temporary absence from the city. I cannot agree with this contention as such a reading would render null the obvious intention of the Act. It provides a deputy to act in the absence from the city of the magistrate. The magistrate's residence in the city is not an essential as to

his jurisdiction and, bearing this in mind, there can, I think, be no objection to the scheme of the Act that provides a deputy to act when the magistrate is actually temporarily absent from the city.

In this case, while the magistrate was absent from the city on January 11, the applicant was arraigned before the deputy magistrate on the charge of keeping a disorderly house in the city. She arranged for bail and a continuance of the inquiry to January 23, on the latter day the inquiry was resumed when the defendant pleaded guilty and was sentenced. If the inquiry was properly before the deputy on the 17th—and I think it was—the subsequent proceedings were in order and regular. I think the charge on the 17th was in due form and the proceedings on that day properly a part of the necessary inquiry into the charge then made by and before the deputy.

Other points were taken by the applicant, viz. (*a*) That the magistrate was not absent from the city when the deputy acted in this case. On this question of fact, I find against the contention. (*b*) That there was no sworn information in the case. I hold this was not necessary. The charge as made, I think a good charge and the proceedings thereon regular. (*c*) That the arrest was irregular and improper. This I do not think can now be inquired into as the defendant was before the deputy. A proper charge was made and pleaded to, I cannot enter into an inquiry here. I refuse the defendant's application. On all points taken, I find in favor of the magistrate's jurisdiction."

The decision of the deputy stipendiary refusing the application to reserve a case is reported *sub nom., R.* v. *Morris* (No. 1) (1920), 54 D.L.R. 436, 33 Can. Cr. Cas. 354.

Halifax, February 20, 1920. *J. J. Power,* K.C., in support of appeal: The warrant is bad on its face. The conviction and warrant for keeping a common bawdy house are both bad on their face because the deputy stipendiary magistrate does not state therein that he acts as such during the temporary absence from the city of the stipendiary magistrate. City Charter 1907, sec. 145; *Christie* v. *Unwin* (1840), 11 Ad. & El. 373, 113 E.R. 457. City Charter 1914 sec. 161. Compare Acts 1891 (N.S.) ch. 58, sec. 136.

No amendment of conviction or warrant can now be made. *R.* v. *Shatford* (1917), 38 D.L.R. 366, 28 Can. Cr. Cas. 284, 51 N.S.R. 322; *In re Miller* (1898), 34 C.L.J. 662 (Nova Scotia); Paley on Convictions (8th ed.) p. 422.

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But in law, as the stipendiary magistrate is shewn by the record permanently to reside at Rockingham in the county of Halifax and without the city of Halifax, when his deputy acted, he was not (within the above sections of the city charter) temporarily absent from the city. *Brunet* v. *The King* (1918), 42 D.L.R. 405, 30 Can. Cr. Cas. 16, 57 Can. S.C.R. 83.

Of course, *Brunet's* case was based on a statute of Quebec, which had only the words, "absence or inability" though the Order-in-Council designating that he was to reside in Quebec city was invoked to help the statute, which the Court said it could not do. In this case we have the words in the statute, "from the city" and *Brunet's* case does not apply, though the reasoning at pp. 91-3, as invoked above, does.

For residence of magistrate, see Paley, ed. 8 p. 18; Marshall's N.S. Justice at p. 292.

As a matter of strict logic, and on which the prisoner is entitled to insist, and borrowing the reasoning of *Brunet* v. *The King*, *supra*, by parity of such reasoning, "temporary absence from the 'city' connotes permanent presence in the city," and this Mr. Fielding has not got under this record, and therefore the jurisdiction of his deputy does not attach.

In this particular instance the deputy had no jurisdiction because the record shews Mr. Fielding was in the city at the time he commenced to try the accused, and his acting in bailing her, a week before, as any Justice of the Peace might, and does so at Halifax, would not give him jurisdiction under sec. 145, (3) as it was not a case remaining undisposed of, as the trial does not commence till the prisoner pleads. *R.* v. *County Judge's Criminal Court* (1914), 16 D.L.R. 509, 23 Can. Cr. Cas. 78, 48 N.S.R. 13, per Graham, J. *Giroux* v. *The King* (1917), 29 Can. Cr. Cas. 258, 56 Can. S.C.R. 63, 67, 77. The warrant and conviction are both also bad on their face for not shewing the consent of the prisoner to be tried for this offence under sec. 777 of the Code.

The city stipendiary and his deputy have not jurisdiction under code sec. 773 (r) but only under code secs. 228, 582, 583 and 177, and as she did not give her consent or waive her trial by jury, as she would have to if tried summarily in the County Court Judge's Criminal Court the deputy has not jurisdiction. *R.* v. *McLeod* (1906), 12 Can. Cr. Cas. 73, 39 N.S.R. 108.

R. v. Honan (1912), 6 D.L.R. 276, 20 Can. Cr. Cas. 10, 26 O.L.R. 484, does not touch this point at all and only decides

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that the amending Dominion legislation of 1909, ch. 9, extends the meaning of "disorderly house" to include a "gaming house," and gives the Toronto city Police Magistrate the dual consent and non-consent jurisdiction in all cases, as of course, the Courts in Ontario made no distinction between city and ordinary magistrates as drawn by Graham, J., in *McLeod's* case, *supra*. It must be remembered that the basis of *McLeod's* case was the distinction between city and county magistrates and as regards bawdy houses, referred to by Graham, J., in this language, apparently they "may proceed under sec. 784 (774) in respect to any of them in which consent is not necessary." He was speaking of the dual-consent and non-consent jurisdiction, the latter as to 1892 (Can.), ch. 29 and 1895 (Can.), ch. 40 sec. 784 (now 774 R.S.C. 1906, ch. 146), in view of the proviso contained in the Act 1900 (Can.), ch. 46, sec. 3 amending 1892 Code sec. 785, as sub-sec. 3 (now 777) and which proviso kept alive the absolute jurisdiction in bawdy house cases under sec. 784 (now 774). But that proviso was swept away by the Act 1909 (Can.), ch. 9, sec. 2, which transplanted 773 (a) over to 777 as sub-sec. 5 as the only offence—theft under $10.00—under 773 that a city magistrate could try without the consent of the accused and that is the situation here. If this application was made prior to 1909 the last quoted observation of Graham, J. would apply and the city magistrate would have absolute jurisdiction.

No sworn information but only a bald statement impersonally made; signed or sworn by no one in the station book. If there are three alleged prosecutors who are all made parties to this motion, are they liable, under these circumstances in tort to the prisoner, if her imprisonment is unlawful.

Section 641 of the Code as amended, 1913 (Can.), ch. 13, sec. 21, provides in the interest of protecting private residences from unwarranted intrusion for a record in a case like this, but the powers of a constable to arrest without a warrant under 648 of the Code must not be confounded with the necessity of an information as giving jurisdiction to the magistrate; that is if "keeping a bawdy house," which is an indictable nuisance, is included in "found committing any criminal offence." *Reg.* v. *Ettinger* (1899), 3 Can. Cr. Cas. 387, 32 N.S.R. 176; *Re Seeley* (1908), 14 Can. Cr. Cas. 270, 41 Can. S.C.R. 5; *R.* v. *Shaak* (1918), 43 D.L.R. 608, 30 Can. Cr. Cas. 295, 14 Alta. L.R. 76.

The magistrate erroneously acted under city charter 1907, sec. 215 (3b) and it is familiar learning that a magistrate is

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not justified in acting without an information. *Re Seeley supra; Appleton* v. *Lepper* (1869), 20 U.C.C.P. 138; *Connors* v. *Darling* (1864), 23 U.C.Q.B. 541; *Crawford* v. *Beattie* (1876), 39 U.C.Q.B. 13; *Caudle* v. *Seymour* (1841), 1 Q.B. 889, 113 E.R. 1372; *Reg.* v. *Fletcher* (1871), L.R. 1 C.C.R. 320; *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614, 48 L.J. (M.C.) 151; *Reg.* v. *MacNutt* (1896), 28 N.S.R. 377; *R.* v. *Gill* (1908), 14 Can. Cr. Cas. 294, 18 O.L.R. 234.

And it cannot be waived in this case whether the proceedings are under 773 or 777 because it is essentially jurisdictional that the accused must be "charged," i.e., legally charged within secs. 773 or 777.

See for example, as to meaning of "charged," Code secs. 669, 696, and 702. See rule of construction. *R.* v. *Gibson* (1896), 29 N.S.R. 17.

And this charge must be in writing and made by the magistrate. See secs. 778 and 793 of the Code. *Re Seeley, supra.*

And there must be a written record which the magistrate by sec. 778 is directed to make as the basis of his jurisdiction. *Re Seeley, supra; R.* v. *Inglis* (1892), 25 N.S.R. 259.

There must be proof on oath of some kind of the conditions called for in section 145, of the city charter, before the deputy could act. *Adams* v. *Power* (1895), 31 C.L.J. 674 (Nova Scotia).

W. J. O'Hearn, K.C., contra. Any jurisdiction to deal with refusal of *habeas corpus* must be under the Crown Rules. *Ex parte Woodhall* (1888), 20 Q.B.D. 832, 57 L.J. (M.C.) 71, 36 W.R. 655; *R.* v. *Garrett, ex parte Scharfe* (1917), 33 Times L.R. 305; *Reg.* v. *Cameron* (1897), 1 Can. Cr. Cas. 170. Under the provisions of the Code the Court has power to make rules to control the practice in relation to *habeas corpus, certiorari*, etc., in criminal matters. The policy is to exclude appeals. In a criminal matter the application for *habeas corpus* is itself a criminal proceeding and cannot be affected by provincial legislation.

The stipendiary is appointed under a statute which says nothing as to where he shall live. The statute being silent as to residence the common law cannot assist. City charter of 1914, sec. 230 creates the office of stipendiary magistrate and prescribes the manner in which the magistrate or his deputy shall act. Absence, means temporary absence from the city for judicial purposes. As to directory provisions of statutes see *Montreal Street Ry.* v. *Normandin*, [1917] A.C. 170, 33

D.L.R. 195, 33 Times L.R. 174.

Information is only required in cases of summary conviction. In the case of a summary trial no information is required. *Reg.* v. *Hughes supra; R.* v. *Gill* (1908), 14 Can. Cr. Cas. 294, 18 O.L.R. 234; *R.* v. *McLean* (1901), 5 Can. Cr. Cas. 67; *R.* v. *Crawford* (1912), 6 D.L.R. 380, 20 Can. Cr. Cas. 49. The prisoner here was arrested without warrant. *R.* v. *Walton* (1905), 10 Can. Cr. Cas. 269; *R.* v. *Sarah Smith,* (1905), 9 Can. Cr. Cas. 338.

The offence was one that could be tried before the police magistrate and consent was not required. Code secs. 773, 774. "Magistrate" is defined by sec. 771, to mean recorder, etc. The jurisdiction of the magistrate was sustained in *R.* v. *Honan* (1912), 6 D.L.R. 276, 26 O.L.R. 484, 20 Can. Cr. Cas. 10; *R.* v. *Davidson* (1917), 35 D.L.R. 94, 28 Can. Cr. Cas. 56, 11 Alta. L.R. 491. The case of *R.* v. *McLeod,* (*supra*) does not apply. It dealt with a special thing.

In *R.* v. *Hayward* (1902), 6 Can. Cr. Cas. 399, 5 O.L.R. 65 and *Ex parte McDonald* (1904), 9 Can. Cr. Cas. 368 it was held that the jurisdiction in cases of theft under $10 was for offences exclusive of those in 783. *In re Worrell* (1915), 21 D. L.R. 522, 24 Can. Cr. Cas. 92, 8 S.L.R. 140 the case of *R.* v. *Hayward* was adopted. In *R.* v. *Davidson* (No. 2) (1917), 35 D.L.R. 94, 28 Can. Cr. Cas. 56, 11 Alta. L.R. 491, the same view was adopted. In this case the prisoner was charged before the deputy, and jurisdiction attached. Jurisdiction having attached would not be affected by granting an adjournment. Paley on Convictions, p. 54. Even if the stipendiary came back and sat on his bench with the deputy, the deputy both at common law and by statute, having begun the case would have the right to finish it. The charge was read from the book to the prisoner, who pleaded guilty. It is not necessary that the charge should be written by the deputy. The conviction cannot be set aside for mere irregularity. Code sec. 1124. It can be gathered from the document that the deputy was acting in the temporary absence of the stipendiary. There is a presumption that the stipendiary is lawfully absent and for good grounds. If not, the curative section applies. *R.* v. *Morrison* (1910), 16 Can. Cr. Cas. 1.

In *Reg.* v. *Murdock* (1900), 4 Can. Cr. Cas. 82 it was held that sec. 1124 included *certiorari* in aid of *habeas corpus. Spooner's* case (1900), 4 Can. Cr. Cas. 209. No objection was taken to the jurisdiction of the deputy magistrate. He was a

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judge *de facto*. *Ex parte Mainville* (1898), 1 Can. Cr. Cas. 528.

Power, K.C., in reply. Whatever is necessary to shew jurisdiction must be set out. *Christie* v. *Unwin, supra*. It is a jurisdictional condition precedent to the deputy acting that the stipendiary is absent from the city. *Sydney and Louisburg Coal and Railway Co.* v. *Kimber* (1891), 23 N.S.R. 338; *R.* v. *McDonald* (1901), 35 N.S.R. 323. Jurisdiction is not presumed in the case of inferior tribunals. Broom's Legal Maxims, 744. *R.* v. *J. W. McDonald* (1896), 29 N.S.R. 160; *Giroux* v. *The King* (1917), 56 Can. S.C.R. 63, 29 Can. Cr. Cas. 258. The deputy must have consent if he is acting under Code sec. 777 (3). Secs. 780 and 781 do not extend to that section without consent.

HARRIS, C.J. and LONGLEY, J., concurred with RITCHIE, E.J.

RITCHIE, E.J.:—Morris pleaded guilty before the deputy stipendiary magistrate to the criminal charge of keeping a common bawdy house in the city of Halifax, and was sentenced to six months in jail; she now applies for her discharge under *habeas corpus*.

The deputy stipendiary magistrate is appointed by the Governor in Council. He is to act as stipendiary magistrate in certain events, one of which is in the temporary absence from the city of the stipendiary magistrate.

The application came in the first instance before my brother Drysdale. In his judgment he states the main contention as follows:—

"It is contended here that the deputy stipendiary was without jurisdiction in making the conviction against the defendant, inasmuch as the deputy can only act during the temporary absence from the city of the stipendiary; that the stipendiary lives at Rockingham and is permanently absent from the city and can have no deputy in case of a temporary absence."

As to this point I am in entire accord with the judgment sought to be reversed, and adopt the reasoning on which it is based.

I give the statute a reasonable construction, having in mind its object and purpose, and decline to give what I regard as an unreasonable and strained construction, having for its object the defeat of the manifest intention of the Legislature.

The Judge has found that, as a matter of fact, the stipendiary was absent from the city and with that finding I agree. Keeping a common bawdy house is a crime. Morris was arrested and the charge entered in the charge book at the police station in the usual way. She was arraigned before the deputy stipendiary, asked for bail and an adjournment, which were granted. On the day appointed she pleaded guilty, and was sentenced; the contention is made that the absence of a sworn information is fatal to the proceedings. I am wholly unable to agree with this contention. The question is dealt with and decided adversely to the contention in *Rex* v. *Crawford, supra.* A further contention was that Morris could not be tried summarily without her consent. The answer to this contention is to be found in the Code, sec. 773. Sub-section (*f*) provides:—

"When any person is charged before a magistrate . . . . (*f*) with keeping a disorderly house under section 228, or with being an inmate of a common bawdy house under section 229 A . . . . the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way." [1915 (Can.) ch. 12, sec. 8.]

Section 228 defines a disorderly house to be (among other things) a common bawdy house.

Section 774 of the Code makes the jurisdiction of the magistrate absolute and unconditional in a case of this kind. I find nothing in other parts of the Code which, in my opinion, takes away the absolute jurisdiction given to the magistrate in the case of a keeper of a common bawdy house.

The warrant under which Morris is held is signed "W. J. O'Hearn (L.S.), deputy stipendiary magistrate in and for the city of Halifax, acting in the temporary absence of the stipendiary magistrate."

It is urged that the warrant is bad on its face, because, after the word "absence," the words "from the city" do not appear.

I cannot agree with this contention. On a reasonable construction, and having regard to the provisions in the city charter, I think it is clear that "in the temporary absence" means temporary absence from the city, and that it is in effect stated. I do not think it would be possible for anyone reading it to take any other meaning from it. The deputy stipendiary refused to reserve a case, and stated his reasons for such refusal. I agree with him, and have nothing to add to what he has said.

I would refuse the application.

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MELLISH, J.:—On January 23, 1920, the defendant was convicted of keeping a common bawdy house, and sentenced to 6 months' imprisonment. This conviction and sentence was made, as the convicting magistrate says, under sec. 773 of the Criminal Code.

An application for the prisoner's discharge from custody under the commitment made on this conviction was made before Drysdale, J. and refused.

The prisoner moves the Court for her discharge on appeal from this refusal, or, alternatively, on an original application.

I think that such an appeal lies, and that the provincial statute allowing such an appeal is not *ultra vires* on the ground that it is legislation dealing with criminal procedure. I do not think that legislation to secure the liberty of the subject from a legal imprisonment can properly be called legislation making, altering or affecting criminal law or criminal procedure. I am, therefore, of opinion that the appeal was properly taken under the provincial statute.

The grounds taken in support of the appeal on behalf of the prisoner were:—

1st. That no jurisdiction is shewn on the face of the conviction and commitment, because the deputy stipendiary magistrate who made the same has therein described himself as "deputy stipendiary magistrate in and for the city of Halifax, acting in the temporary absence of the stipendiary magistrate" and has not stated that such temporary absence was "from the city." Absence from the city of Halifax would seem to be the only kind of absence which would justify the deputy in acting under the provisions of the city charter authorising his appointment. Where the convicting magistrate describes himself as acting as a deputy, I think it is to be presumed that the necessary conditions enabling him to act as such have been fulfilled, and that to shew jurisdiction on the face of the proceedings it is not necessary for a convicting magistrate or deputy magistrate to set forth the fulfilment of the conditions which enable him to act as such. I was inclined to this view on the argument. No authority was cited on the point, but I find that the Supreme Court of Massachusetts took a similar view in the case of *The Commonwealth* v. *Lynn* (1891), 154 Mass. 405, and other cases there referred to.

On consideration, I am of opinion that the magistrate was temporarily absent "from the city" within the meaning of the statute when the deputy took up the case, and that he was therefore entitled to proceed with it. This, I think, disposes of

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the second point raised by the accused.

Thirdly, it is contended that the magistrate had no jurisdiction to try the accused without her consent, i.e., that the accused could not be convicted under sec. 773 but under sec. 777.

I cannot agree with this contention, and am of opinion that proceedings for summary conviction could properly be taken under sec. 773.

Fourthly, the accused, when arraigned before the magistrate, submitted to the jurisdiction and pleaded guilty. Under these circumstances I think the prisoner cannot take advantage of the absence of a sworn information, even if such were necessary, as to which I offer no opinion.

Fifthly, for the reasons already stated, I do not think that any proof of the deputy magistrate's qualification to act is necessary to support the conviction.

I would dismiss the appeal.

There was a further application on appeal from the magistrate's refusal to reserve a case. The magistrate's assertion that the proceedings were had under sec. 773 disposes of this application, which must be refused.

Appeal dismissed in the habeas corpus proceedings; motion for leave to appeal from the conviction refused.

THE KING v. LAFOND.

Exchequer Court of Canada, Audette, J. May 3, 1921.

EXPROPRIATION (§IIIC—135)—DAMAGES—LOSS OF TRADE—INCONVENIENCE COMMON TO PUBLIC GENERALLY.

No claim for damages can arise in respect of an inconvenience common to the public generally and the general depreciation of property resulting from the vicinage of a public work does not give rise to a claim by any particular owner, and especially when the claim is for loss of trade or business resulting from the same cause.

[*The King* v. *MacArthur* (1904), 34 Can. S.C.R. 570, followed.]

INFORMATION exhibited by the Attorney-General for Canada to have the easement and right to flood certain lands expropriated under the Expropriation Act valued by the Court.

R. V. Sinclair, K.C., and *Louis Cousineau*, for plaintiff.

E. B. Devlin, K.C., and *J. W. Ste Marie*, K.C., for defendant.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the right to flood the land described in the information and belonging to the defendant was, under the provisions of the Ex-

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propriation Act, taken and expropriated, for the purposes of the construction and operation of the Quinze Lake Dam and Reservoir, a public work of Canada, by depositing, both on October 26, 1917, and March 26, 1920, plans and descriptions, of the said lands, in the office of the Registrar of Deeds for the County or Registration Division of the County of Temiscaming.

The reason of the deposit of the amended plan and description of the said lands on the 26th March, 1920, was, as stated at Bar, because the description deposited in 1917 was not considered sufficient to comply with the requirements of the Expropriation Act. The two plans are identical.

The date of expropriation will be taken, for all purposes, to be October 26, 1917.

The Crown has tendered and by the information offers the sum of $66 as compensation for the expropriation of this right to flood the said land and for all damages resulting from the same. The defendant by his statement in defence claims the sum of $6,500. The defendant's title is admitted.

After the conclusion of the hearing of the cases of *The King* v. *A. Carufel*, under No. 3606, and *The King* v. *A. Grignon*, under No. 3609, counsel at Bar, in the present case, agreed to the following admission, reading as follows, viz:—

Admission—It is hereby admitted by the defendant that all the general evidence as to value of the different classes of land in the locality in question, as testified to in the two cases (viz., No. 3606, *The King* v. *Carufel*, and No. 3609, *The King* v. *A. Grignon*) shall be common to this case.

And it is admitted by the Crown that all the evidence of a similar nature adduced on its behalf in the two above mentioned cases, shall be common to the present case, the Crown, however, undertaking to file a statement shewing the particulars of how their expert witnesses have arrived at the amount of their valuation.

It is further admitted that the plan ex. 5 herein, which is the particular plan applicable to this case, will be admitted without further evidence and taken as proved.

It is also agreed between counsel for the respective parties that the evidence of Henry H. Robertson given in these two previous cases mentioned under Nos. 3606 and 3609 will be taken as also given in this case, that is according to his own view, of what would be the area of the land flooded.

To avoid unnecessary repetition, the reasons for judgment given this day by me in the case of *The King* v. *Adelard Carufel*, under No. 3606, are hereby made part hereof and more

especially in respect to the general observation respecting the nature of the expropriation, the area taken and the compensation so far as applicable.

The expropriated easement in this case is in respect to .90 acre which I would allow at $50 an acre, namely, $45, and for the area of .75 acre I would allow as in the other cases at $5 an acre, namely, the sum of $3.75, making in all the sum of $48.75. The small piece of bush land affected is at the north east boundary and does not affect the farm in any way. The other piece of 0.90 acre affected thereby is in stump and in a deep ravine which witnesses Chester and Coutts say could not be cultivated. However, there is the other question of a small bridge over the ravine or that expropriated part, which would have to be slightly larger than before. At the northern end the bridge would be small and there is also the consideration that the northern part of lot 6 abuts on the highway. I think the additional sum of $40 should be allowed in respect of the higher degree of difficulty in communicating over these 0.90 acres, from east to west of lot 6, making in all, $88.75. The actual damage caused to the farm as a farm, the defendant has qualified as "*une bagatelle insignifiante*", and this sum of $88.75 a very liberal compensation.

However, the substantial part of the defendant's claim is in respect to the damage to his trade and business, resulting, as he contends, from the flooding of all the neighboring farms, which has had the effect of sending the people away from that locality, injuring thereby his trade and business. The damages result in the decrease of population occasioned, as alleged, by the expropriation.

The evidence adduced discloses the opinion of witnesses that, had it not been for the flood, resulting from the dam, and sending the settlers away, the locality had quite a potential future. That, within a comparatively short time, the locality would have become quite a centre, with a church, a post office, with the result of prosperity and increase in value of property.

However, for such damage, if any suffered, the law does not recognise a right of recovery. No claim can arise in respect of an inconvenience common to the public generally. The general depreciation of property resulting from the vicinage of a public work does not give rise to a claim by any particular owner and much less for loss of trade or business resulting from the same cause. *The King* v. *MacArthur* (1904), 34 Can. S.C.R. 570. A number of authorities will be found in this *MacArthur* case in support of this proposition which is too well known and

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recognised to labour any more upon the same. See also *Cowper Essex* v. *Local Board for Acton* (1889), 14 App. Cas. 153 at p. 161.

The defendant recovers, it is true, a somewhat larger sum than the one offered, but he fails on the main issue, on the principal element of compensation upon which the plaintiff succeeds, which is the more important claim; however, this being the case when the subject's property is taken against his will, I will set off the cost by denying costs to either party. See also *McLeod* v. *The Queen* (1889), 2 Can. Ex. 106.

Therefore there will be judgment as follows, viz.:—1. The right to flood the lands in question is declared vested in the Crown as of October 26, 1917. 2. The compensation for the right to so flood the defendant's lands and for all damages whatsoever resulting from the said expropriation is hereby fixed at the sum of $88.75 with interest thereon from October 26, 1917, to the date hereof. 3. The defendant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, mortgages, and incumbrances whatsoever, is entitled to recover from and be paid by the plaintiff the said sum of $88.75 with interest as above mentioned and without costs to either party.

Judgment accordingly.

MAXWELL v. UNION BANK OF CANADA.

Alberta Supreme Court, Appellate Division, Stuart, Beck Hyndman and Clarke, JJ.A. October 4, 1921.

BANKS (§IIIC—35)—LIABILITY FOR ACTS OF OFFICER—DRAFT—FAILURE TO REMIT—SCOPE OF EMPLOYMENT.

No liability attaches to a bank for the failure of a branch manager or teller to remit a draft purchased by a customer, in accordance with the latter's instructions, thereby resulting in the customer's forfeiting a land contract on which the draft was to be applied as payment; the bank's duty having been completed when the draft was issued, the undertaking to forward the draft was merely the voluntary act of the officer and not a duty connected with his office for which the bank is liable.

APPEAL from a judgment of Scott, J., in an action against a bank for damages for failing to remit draft. Dismissed.

The judgment appealed from is as follows:—

SCOTT, J.:—The plaintiff's claim is for damages sustained by him by reason of the defendant failing to remit within a reasonable time certain moneys payable by him on the purchase money of land.

The plaintiff formerly lived near Jenner, Alberta, and had

been a customer of defendant's branch there. On July 28, 1919, he entered into an agreement with one Krause to purchase from him certain lands near Wetaskiwin which were the property of his wife together with a portion of the crop growing thereon for $13,984. The agreement provided that $1,000 should be paid on account of the purchase money, in cash, at the time the agreement was entered into. The plaintiff was not prepared to pay that amount at the time it was entered into and the vendor appears to have verbally extended the time for its payment until August 6, following.

At the time the agreement was entered into, the plaintiff had a small balance to his credit in defendant's branch at Jenner. On August 1, he went to that branch and obtained a loan of $800 through Mr. Hughes the teller and accountant, who was then acting as manager in the absence of the manager. The proceeds of the loan were carried to the plaintiff's credit and he then gave Hughes a cheque for $1,000 and $2.15 in cash and obtained from him a draft for $1,000 on the Canadian Bank of Commerce at Wetaskiwin. He then handed the draft to Hughes requesting him to forward it to that bank and paid him 10c. for its transmission. If it had been mailed to that bank at that time, it would have reached it in due course of mail on or before August 6, but by a mistake of the clerk in defendant's bank, the letter containing it was addressed to Winnipeg instead of Wetaskiwin and it did not reach the latter place until about August 13. On that day Mr. Manley, the plaintiff's solicitor there, obtained the proceeds of the draft, and on the following day he tendered the amount to Krause, the vendor, who refused to accept it and demanded the return of the agreement for sale, which Mr. Manley thereupon delivered to him.

On August 26, the plaintiff entered into a new agreement with Krause for the purchase of the same lands at an advanced price of $608 over that payable under the first agreement and with a smaller share of the crop growing thereon.

The plaintiff states that when he went to see Hughes on August 1, he explained the whole deal to him and told him that it was necessary to have the money in Wetaskiwin by August 5, or a day later, that Hughes then suggested that he should telegraph the money there and that he had replied that there was plenty of time and that the other way was safer.

Hughes states that the plaintiff told him that he had to make a payment on a land deal and that he had to send the money to Mr. Manley at Wetaskiwin.

Mr. Proud, the inspector of defendant's bank, states that

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there are no instructions issued to branch managers to write letters for customers, that the usual way for the bank to transmit moneys is by telegraph or cable transfers, money orders, express orders and settlement debit slips between banks, that in telegraphing moneys they take a signed order from the customer, that the form of the draft which the plaintiff obtained is that used when sold over the counter to customers, that in all his 15 years' banking experience he has never known a bank manager to make any charge for writing letters for customers, that a branch manager has no authority to agree to have money at a certain place at a certain time and that Hughes' acts were not in violation of any express instructions.

Hadley v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145 is the leading case on the question of what damages should be awarded for breach of contract. The principle stated in that case is that the damages awarded must be:—

"Such as may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it."

The principle laid down in that case appears to be recognised as the proper principle in the numerous cases in which it has been referred to. The only question discussed in them appears to have been under which of the two alternative propositions the damages claimed should be classed.

Assuming that by reason of the draft issued to the plaintiff not having reached the bank at Wetaskiwin until August 13, the plaintiff forfeited his right to purchase the property under the first agreement, as to which I entertain serious doubt, the defendant would not, in any event, be liable for damages beyond interest on the money unless the plaintiff informed Hughes during their interview on August 1, that that would be the result of the delay in transmission. This, in my opinion, is the reasonable deduction from the judgment in *Hadley* v. *Baxendale, supra.* (See also *Horne* (or *Horn*) v. *Midland Railway Co.* (1872), L.R. 7 C.P. 583, 41 L.J. (C.P.) 264, and see L.R. 8 C.P. 131, 21 W.R. 481.)

The plaintiff states that he explained the whole deal to Hughes and told him that it was necessary to have the money in Wetaskiwin on August 5 or a day later. Had he given the exact words of his explanation, I would have been in a position to determine whether he had told Hughes that if the money

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was not in Wetaskiwin at that time his right to purchase would be forfeited. Hughes states that what the plaintiff told him was that he wanted the money to make a payment on a land deal and that he did not mention from whom he was purchasing, what land he was buying or what he was paying for it. It is, therefore, evident that there were a number of matters connected with the transaction which he did not explain. I find it difficult to believe that he told Hughes anything further than that he had to make a payment on his purchase on or before a certain date.

I am of opinion, however, that upon another ground the plaintiff must fail to recover.

The evidence shews that the plaintiff not only purchased but also received from Hughes a draft for the money payable in Wetaskiwin. He, therefore, received what the defendant had contracted to give him and the contract was, therefore, fully performed by the defendant. What occurred after that was that the plaintiff returned the draft to Hughes with the request that he should forward it by mail to the bank at Wetaskiwin, and paid him 10c. to pay the cost of its transmission. The undertaking of Hughes to do so was a voluntary act on his part, without remuneration, and was undertaken by him merely to oblige a customer of the bank, and it was no part of his duty as an officer of the bank to perform it. It would, therefore, be unreasonable that the defendant should be held responsible for his omission to perform it.

I dismiss the action with costs.

W. J. Loggie, K.C., for appellant.

N. D. Maclean, K.C., for respondent.

The Appellate Division of the Supreme Court of Alberta dismissed the appeal without written reasons.

Appeal dismissed.

REX v. CARNEY.

Saskatchewan Court of Appeal, Lamont, McKay and Turgeon, JJ.A. May 29, 1922.

INTOXICATING LIQUORS (§IIIA—50)—UNLAWFUL KEEPING—STATUTORY PRESUMPTION FROM FINDING IN FORBIDDEN PLACE—TESTIMONY OF ACCUSED DENYING KNOWLEDGE—REVIEW OF EVIDENCE NOT PERMISSIBLE ON CERTIORARI—TEMPERANCE ACT, R.S.S. 1920, CH. 194, SECS. 49, 73.

On a charge of unlawfully keeping liquor in a grain elevator office, contrary to the Temperance Act, R.S.S. 1920, ch. 194, and proof made of the finding of intoxicating liquor, the effect of sec. 73 is to cast upon the accused the onus of establishing his right to have it there. The magistrate trying the charge is not bound to credit the denial under oath by the accused of any knowledge

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that it was there. He may, notwithstanding such denial, give effect to the statutory presumption created by sec. 73; and, if he does so, his finding of guilt, and the summary conviction entered thereon, cannot be reviewed on certiorari based upon any lack of evidence to contravert his denial, as to do so would be to review the evidence given before the magistrate which it is not competent for the Court to do on certiorari.

[*Rex* v. *Nat. Bell Liquors Co.* (1922), 65 D.L.R. 1, 37 Can. Cr. Cas. 129, [1922] 2 A.C. 128, applied.]

APPEAL from the order of the Court of King's Bench refusing a certiorari to quash a summary conviction. Appeal dismissed.

A. T. Procter, for appellant.

T. D. Brown, K.C., Director of Prosecutions, for the Crown.

LAMONT, J.A.:—This is an appeal from a refusal of a Judge of the Court of King's Bench in Chambers to direct the issue of a writ of *certiorari* to bring before that Court the conviction of the accused, for the purpose of having the same quashed. The accused was convicted before a magistrate for that he did on or about December 5, 1921, "unlawfully keep liquor in a grain elevator office contrary to sec. 49, sub-sec. (3), clause (c.) of the Saskatchewan Temperance Act." [R.S.S. 1920, ch. 194.]

The evidence against the accused was that of W. E. Baillon, a police officer, who testified as follows:—

"I then proceeded to the Commercial Hotel, here I met the accused Dan Carney. I said to him, I am going to search your office and elevator for liquor. Carney replied all right. I searched the elevator to the best of my ability, but found no liquor there. I next proceeded to the elevator office occupied by the accused and on searching the office with the accused, I found a bottle in the North West corner of the office. I examined the bottle and found it to contain about two tablespoons of some liquid. I asked Carney what the bottle was doing there and he replied, I use that for putting gasoline in. I said to him that does not smell like gasoline to me. I put my initials on the label and then asked the accused to do the same, this he did. The accused then said: What are you going to do with that, and I replied, get it analysed in Regina, to see if it is gasoline or liquor." . . . . I have seen the accused under the influence of liquor on one or two occasions during the past two months. He also stated to me that I possibly went to his office because someone had told me that he had been drinking lately. I know Dan Carney to be the operator of the elevator in question."

The accused testified that he found the bottle behind the door,

near an oil can, one morning when sweeping up; that he threw it into the box; that he did not know that it contained whiskey or other liquor; that in cold weather it was his custom to leave his office door unlocked when he went to meals, and that farmers were in the habit of going in there to get warm, and his conjecture was that someone had entered his office and left the bottle behind the door. The liquor in the bottle on analysis was found to be intoxicating liquor. Under the Act, the burden of proving the right to keep liquor is upon the person charged with unlawfully keeping it. (sec. 73) The finding of liquor in his office cast upon the accused the onus of establishing his right to have it there. His only explanation was, that he had no knowledge that it was there. He having sworn to this, his counsel contended that that was sufficient to rebut the presumption of guilt raised by the statute, and he relied upon *Rex* v. *Covert* (1916), 34 D.L.R. 662, 10 Alta. L.R. 349, 28 Can. Cr. Cas. 25.

In the recent case of *R.* v. *Nat. Bell Liquors Co.* (1922), 65 D.L.R. 1, 37 Can. Cr. Cas. 129, the Privy Council has made it clear that on an application for a writ of *certiorari* a superior Court, apart from statutory provisions to that effect, cannot review the evidence given before a magistrate. We therefore cannot say that the magistrate should have accepted the defendant's explanation. The credibility of the witnesses, and the weight to be given to the testimony, are matters for the magistrate alone, and his judgment on these is not open to review. I may say, however, that, on the above evidence, I would have reached the same conclusion as the magistrate. The appeal, in my opinion, should be dismissed.

McKAY, J.A.:—The material facts herein are shortly as follows:—On December 19, 1921, an information was laid at Moosomin, in the Province of Saskatchewan, against the appellant before A. C. Sarvis, a Justice of the Peace in and for the Province of Saskatchewan, charging him with unlawfully keeping liquor in a grain elevator office at Wapella, in said Province, on December 5, 1921, contrary to sec. 49 sub-sec. 3, clause (c) of The Saskatchewan Temperance Act. [R.S.S. 1920, ch. 194.]

The above offence with which the appellant was charged is triable by one Justice of the Peace under part XV. of the Criminal Code, and was so tried by said A. C. Sarvis, J.P., on December 27, 1921, at Moosomin, in the Province of Saskatchewan, and the said appellant was convicted by said A. C. Sarvis for said offence and adjudged to pay a fine of $100, and costs $13.75.

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The appellant thereupon, by notice of motion, appealed to a King's Bench Judge in Chambers for an order that a writ of *certiorari* be issued out of the Court of King's Bench directed to said A. C. Sarvis and to G. B. Murphy, the clerk of the District Court of the Judicial District of Moosomin, to remove and return into the Court of King's Bench the said information, conviction, etc., and for an order quashing the said conviction, etc. The King's Bench Judge in Chambers made an order dismissing the application with costs, on the ground that the appellant should have appealed instead of applying for a writ of *certiorari*, and from this order the appellant now appeals to this Court.

The appellant's ground of appeal is that the chamber Judge should have disposed of the application on the merits, and the evidence of the appellant should be taken as sufficient to rebut the evidence of guilt.

Counsel for the respondent contends: (1) that the appellant has no right of appeal, and asks that the appeal be dismissed on this ground, (2) That even if there is an appeal, the appeal should be dismissed, because the chamber Judge was right in dismissing the application for the reason given; (3) That there is evidence to support the conviction, and it should not be disturbed.

Owing to the view I take of the third objection, it is not necessary for me to consider the first and second.

Ordinarily in *certiorari* proceedings the evidence may not be looked at for the purpose of quashing a conviction, (*R.* v. *Nat. Bell Liquors, Ltd.*, 65 D.L.R. 1, 37 Can. Cr. Cas. 129) but the Saskatchewan Temperance Act, sec. 82 (2), states that on an application to quash a conviction by way of *certiorari*, the Judge hearing the application shall dispose of the application upon the merits.

Even if this means that he is to examine and weigh the evidence for the purpose of quashing the conviction (which I do not now decide it does) I find upon reading the evidence that there is ample evidence to sustain the conviction. The evidence is that liquor was found in a bottle in the appellant's office, which was a grain elevator office within the Act. By the Act, that raised a presumption of guilt against the appellant. To rebut this presumption the appellant gave evidence to the effect that he knew nothing of the liquor being there. The appellant's counsel urges that the Justice of the Peace should have accepted this evidence as sufficient rebuttal of the presumption of guilt, and as proof of innocence, and asks us to accept it as such and

quash the conviction, contending that this evidence can be rejected only if it fails to fulfil the conditions laid down by Beck, J., in *R.* v. *Covert* (1917), 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, 34 D.L.R. 662 at pp. 673-4. The conditions referred to are as follows:—

"1. That the statements of the witness are not in themselves improbable or unreasonable. 2. That there is no contradiction of them. 3. That the credibility of the witness has not been attacked by evidence against his character. 4. That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit on his character. 5. That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness."

Assuming that these conditions rightly state under what circumstances a Justice of the Peace or Judge of fact must accept, that is believe, evidence given before him, this Court, not having seen or heard the appellant give his evidence, cannot say that he satisfied all the above conditions. For instance, as stated by the chamber Judge, his demeanour in Court when giving his evidence might have been such as to suggest untruthfulness. Furthermore, material statements of the accused at the trial are contradicted by the witness Baillon. Appellant says, referring to the time Baillon found the bottle, he told Baillon that he might want the bottle for gasoline; whereas Baillon says what appellant then said was: "I use that" (the bottle) "for putting gasoline in." If this were true it would have had indications of having been used for gasoline, instead of actually having whiskey in it. And with regard to how the bottle got in the cigar box where Baillon found it, at the trial appellant said that he did not take the bottle into his office, but that he found it behind the office door when sweeping. Before the trial, Baillon says appellant told him he picked up the bottle near the elevator and put it in the office.

In my opinion, it was for the Justice to say whether he believed the appellant or not, and, from the result, apparently he did not believe him, and we cannot say that he was wrong in disbelieving him. He had the advantage of seeing and hearing the appellant give his evidence, which we have not.

In my opinion the application should be dismissed with costs.

TURGEON, J.:—Even if we leave out of consideration the rules governning *certiorari* proceedings recently laid down by the Judicial Committee of the Privy Council in *R.* v. *Nat. Bell Liquors Co.*, 65 D.L.R. 1, 37 Can. Cr. Cas. 129, I still think that

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the conviction in this case could not have been quashed upon the authority of any previous decision of this Court. In this case the magistrate had before him (1) the fact that the liquor was found in the possession of the accused in a prohibited place, and (2) the evidence of the police officer of the statement made to him by the accused when the liquor was found. There is no rule of law which obliges a magistrate in such a case to accept the defendant's explanation of the matter. The accused, if dissatisfied with the magistrate's decision, might have had the case re-heard by a Judge of King's Bench upon appeal to that Court. The law provides no other remedy. In any event there can now be no doubt, in view of the decision in the *Nat. Bell* case, that *certiorari* does not lie in this case.

The application should be dismissed with costs.

Appeal dismissed and certiorari refused.

LOUPIDES v. THE SCHOONER "CALIMERIS."

Exchequer Court of Canada, N.B. Admiralty District, Hazen, L.J.A. January 19, 1921.

SEAMEN (§I—5)—ASSAULT ON BY CAPTAIN OF SHIP—ACTION IN REM FOR DAMAGES—JURISDICTION OF EXCHEQUER COURT IN ADMIRALTY.

An action *in rem* does not lie against a ship to recover damages due to an assault by the Captain of the vessel on a seaman on board such ship.

SEAMEN (§I—4)—WAGES—LEAVING SHIP BEFORE TERMINATION OF VOYAGE—VIATICUM.

A seaman who leaves the ship of his own free will and for his own accommodation, before the termination of the voyage, is not entitled to anything by way of viaticum to enable him to return to his home port.

ACTION *in rem* by the male plaintiff to recover wages due as cook, and a sum for wrongful dismissal and by female plaintiff, for wages, a sum for wrongful dismissal, and a further sum for assault upon her by the captain, on the ship. Both also claim viaticum, having engaged for the return voyage to Cardiff and having been dismissed at a Canadian port.

F. R. Taylor, K.C.:—There seem to be four claims made by the plaintiff: 1. for wages of both plaintiffs; 2. damages for wrongful dismissal. 3. for a viaticum; 4. damages for an assault. As to the fourth claim, it is submitted that there is no jurisdiction *in rem* for an assault by the captain. The Admiralty Court Act 1861 (Imp.) ch. 10, sec. 7; *The Teddington land* (1909), 12 Can. Ex. 252. Furthermore, as the (1881), Stock. Adm. 45; *The Theta*, [1894] P. 280; *The Neder-*

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assault occurred in Morocco, the plaintiff must shew that under the laws of Morocco, such cause of action would lie there, the foreign law being a question of fact to be shewn by the plaintiff. *The M. Moxham* (1876), 1 P.D. 107. The claim for wages is very largely a question of fact. *Thompson* v. *H. & W. Nelson, Ltd.*, [1913] 2 K.B. 523, holds that the ship's articles are conclusive as to wages. If therefore, this were an English ship, and Mrs. Loupides were on the articles at five shillings a month, she could not receive more than the amount stated in the articles, notwithstanding an agreement to pay her more for work as a stewardess. It is submitted that in this case the law of the flag, that of Greece, is applicable. An English seaman engaged on a voyage to end in the United Kingdom, as this was, must wait until he gets to the United Kingdom unless regularly discharged. 26 Hals. p. 53 sec. 84, Merchants Shipping Act, 1906, sec. 30. It may be open to question if this applies to foreign seamen. There is no viaticum; the voyage was at an end; they were voluntarily discharged. *The Raffaelluccia* (1877), 3 Asp. M.L.C. 505, 37 L.T. 365.

D. Mullin, K.C.:—The ship is liable *in rem* for the assault. *The Sarah* (1836), 1 Stuart's Adm. 86. The very title indicates it was an action *in rem*, and the decree was for 70 pounds. In the case of *The Teddington*, Stock. Adm. 45, the damage was done by the ship. *The Enrique* (1888), Stock. Adm. 157; *The Maggie M.* (1890), Stock. Adm. 185. The ship is liable for all the acts of the master in the discharge of his duty, and there cannot be any distinction made between an act which he does wilfully in the discharge of his duty and negligence for which the ship unquestionably has been held liable. The Court: If the master of the ship should steal some valuable article belonging to a passenger, is the ship responsible? Yes. It is *per se* as master that he renders the ship liable. No duty devolves on the plaintiffs to produce the laws of Greece. If there was to be any intervention on the part of the Greek authorities, it should have been by the Consul General taking some step to protest. He was notified and no protest was entered. As to the contention that the action for assault would only be maintainable if it were so under the laws of the country in which it took place, the assault took place under the Greek flag on board the vessel, and the law of Morocco has no bearing on it at all. *The Nina; La Blache* v. *Rangel* (1867), L.R. 2 P.C. 38, 5 Moo. (N.S.) 51, 16 E.R. 434; *The Leon XIII* (1883), 8 P.D. 121.

HAZEN, L.J.A.:—This was an action *in rem*, brought by Elias

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Loupides and Olga Loupides, his wife, against the five masted schooner "Calimeris," a Greek ship registered under the Greek flag. The plaintiff Elias Loupides claimed a balance for wages due him as cook, and a further amount for damages for wrongful dismissal before the termination of his voyage; and the plaintiff Olga Loupides claimed a sum due her as wages as assistant cook and a further sum for damages for wrongful dismissal before the termination of her voyage, and she also claimed damages for assault and battery, alleged to have been committed by the captain of the schooner, George Nicolaris, on her on board the said schooner on the voyage, while she was assistant cook; and both plaintiffs claim a sum of money by way of viaticum to enable them to return to their home in Cardiff.

First of all I will deal with the question of assault, which it was alleged was committed while the schooner was in the harbour at Rebat, in Morocco. In this connection the defendant has raised the point that an action *in rem*, against a vessel for assault committed by the captain is not warranted by any statute or decision, and that the Court has no jurisdiction in such a matter. Roscoe in his work on Admiralty Practice says that the jurisdiction of the Admiralty over actions of damages is at the present day based partly upon its original jurisdiction and partly on the modern statutes.

Under sec. 7 of the Act of 1861 it has been held that it includes all injuries done by ships to ships or by ships to things other than ships, or by other objects to ships, wherever damage is done. The jurisdiction of the High Court of Admiralty was extended by the Imperial Statute passed in the year 1861 (Imp.) ch. 10 and sec. 7 of that Act indicated that the Court should have jurisdiction over any claims for damage done by any ship. The jurisdiction of the Vice Admiralty Court was also extended by the Imperial Act of 1863 (Imp.) ch. 24 which among other clauses contained a provision in its sec. 10 similar to the above, viz., that these Courts shall have jurisdiction over "claims for damages done by any ship." The object of the two statutes of 1861 and 1863 was to extend the jurisdiction of the respective Courts, and the decisions of the High Court in construing the meaning of sec. 7 of the Act of 1861 are as pointed out by Judge Watters in the case of the *Teddington* (1881), Stock. Adm. 45, very applicable and may be safely followed in considering that portion of sec. 10 of the Act of 1863 relating to this Court. In the case of the *Theta*, [1894] P. 280, the facts were that the plaintiff issued a writ *in rem* and arrested a vessel claiming damages for personal injuries sustained

through falling down in the hold of that vessel, owing to the hatchway being covered with a tarpaulin at the time he was crossing to his own ship, which was moored outside of the first mentioned vessel in the Regent's Canal Dock, but it was held by Bruce, J., that the action must be dismissed, for though the word "damage" included personal injury the damage was not "done by any ship within the meaning of the Act." Bruce, J., said at pp. 283-284:—

"I cannot think that the present case falls within the provisions of the Act of Parliament. Damage done by a ship is I think, applicable only to those cases where, in the words of the Master of the Rolls in the *Vera Cruz* (1884), 9 P.D. 96, at p. 99, the ship was the 'active cause' of the damage. The same idea was expressed by Bowen, L.J., who said the damage 'done by a ship means damage done by those in charge of a ship with the ship as the noxious instrument.'"

The case of the *Barber* v. *The Nederland* (1909), 12 Can. Ex. 252, was an action by the plaintiff for damages for personal injury sustained while working on a foreign ship as stevedore, such injuries being sustained by faulty construction of hatch covers and beams supporting the same, and Martin, L.J. for B.C., allowed a motion to set aside the proceedings, on the ground as I understand it, that the ship must be the active cause of the damage. In that case, counsel for the plaintiff relied on the case of *Wyman* v. *The Duart Castle* (1899), 6 Can. Ex. 387, in which the judgment was given by the late Judge of this Court Sir Ezekiel McLeod. I do not think, however, that it, in any way, conflicts with the authority of *The Theta, supra*. In that case a valve spoken of as a stop valve, broke on board the ship and caused injury to the plaintiff. On the morning of the accident the stop valve was closed, and a valve called a butterfly valve was also closed. After the accident, however, the butterfly valve was found open but was not broken, and witnesses on behalf of the defendant said that if it had been closed it could not have been forced open, that it would break first, while the plaintiff claimed that it was forced open by a rush of the steam and he was thereby injured, and that that was an injury that was caused by the ship itself. While the suit was dismissed, I understand the Judge to have held that the valve being part of the machinery of the ship it was the active cause of the injury and that the damage was done by the ship, and that it could not make any difference in what way the ship did the damage or what part of the ship did the damage. The suit, however,

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was dismissed on other grounds, and it seems to me is really an authority in favour of the defendant's contention on the point which I am now considering.

The counsel for the plaintiffs cited three cases in support of his contention that an action *in rem* for assault would lie. The first case was that of *The Sarah* (1836), 1 Stuart's Adm. 86, but an examination of this case shews that it was not an action *in rem*, but an action for damages brought by the steward of the vessel against the master for various assaults during the voyage of the ship. The second case to which he called my attention was *The Enrique* (1888), Stock. Adm. 157. In that case a foreign steamship while in the harbour of St. John, New Brunswick, loading a cargo of deals, bought and received on board a quantity of coals for the use of the ship. The coals were purchased to be delivered in the bunkers of the steamer, and the coal merchant employed a third party to put the coals on board. The steam power to hoist the coals on board was furnished by the "Enrique." The plaintiff was employed by the third party to put the coals on board, and as so employed was injured by the breaking of the hoisting rope. It was held that an action could not be maintained against the steamer, that the Court had no jurisdiction and that the Vice Admiralty Courts Act, 1863 (Imp.) ch. 24, sec. 10, sub-sec. 6, did not confer authority to entertain such an action.

It is true that the Judge based his judgment to some extent on the case of *The Robert Pow* (1863), 1 Brown. & Lush. 99, and in a subsequent case, that of *The Maggie M.* (1890), Stock. Adm. 185 decided afterwards, the same Judge (Watters, J.), stated that the case of *The Robert Pow* did not appear to have been followed by any subsequent case, but he held that the Court had jurisdiction to entertain a suit in the case where a tug-boat was engaged by the charterers of a vessel to tow through the falls at the mouth of the river, beneath the suspension bridge which spans the falls at the point where the river flows into the harbour, and the tug having waited to take another vessel in tow, together with the vessel first mentioned, was too late on the tide, and in coming under the bridge the top-mast of the "Enrique" came into collision with the bridge and was damaged.

I can find no authority that would lead me to the conclusion that I should go so far as to decide that a maritime lien attaches in the case of an assault on board of a ship by the captain. To do so, I would have to decide that such an assault was damage done by the ship, or that the ship was the active cause of

the damage. In the present instance, that cannot be said to have been the case. I, therefore, decide that the claim for assault must fail on this ground. It may be well, however, that I should consider the matter and make a finding on the question on the merits, so that, in the event of an appeal being taken from my judgment, and it being held that on the point just considered that I have come to a wrong conclusion, it will not be necessary to send the case back for a new trial. There were many witnesses called by both plaintiff and defendant in respect to this branch of the claim. The evidence of Mrs. Loupides is to the effect that when the vessel was lying in the harbour at Rebat she was working in the galley with her husband. Some trouble occurred, and the captain who had previously sent word to her to go in and do the work of the toilets instead of the galley, came in where she was working and without her knowing anything about it or having any idea with regard to it, struck her on the left side with his fist. That he then turned her around and pulled her outside of the door—to use her own words "laid me down outside the door." Asked if she was on her feet when the captain left her, she says "When the captain left I fell down, and then my husband pick me up." That after that she had violent pain inside and at night, but continued working until she got to St. John, though the pain was worse every day. After getting to St. John she remained on the vessel for 11 days working about as usual, and then went to the hospital, remaining there for 16 days. She stated positively that she continued working up to the day the vessel got to St. John, and after coming to St. John every day but one before going to he hospital. Her statement with regard to the assault is confirmed to a certain extent by her husband, who says that he saw the captain strike her in the galley in the afternoon. That the captain came in the galley and hit his wife from the back, and then dragged her out and left her on the deck, and that she was lying down when he left her, and that he went over and lifted her up. The only other witness called by the plaintiff was Elias Glissis, who was a sailor on the "Calimeris" at the time, who says he saw the captain in the door of the galley, and he saw him pulling Mrs. Loupides outside from the galley. That he took her out and left her on the deck and got away from her. This was all he saw but he says that when the captain left Mrs. Loupides she was standing up on her feet and remained standing, thus contradicting both Mrs. Loupides and her husband in one somewhat important respect.

The defendant stated in most positive terms that he did not

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hit Mrs. Loupides; that he was summoned to the galley by the steward; that he went forward to the galley and told Mrs. Loupides she had no business there in the way of the cook and the steward, and said "You had better get out of the way the time they are getting the grub along because you are always in the way." In reply she said to him "I am helping my husband," to which he replied she had better go to her room. She said "No, I won't come out." He said "You had better come out—I will make you come out because I am the captain of the ship and when I say anything to you you must do it for you have no business here." He then put his hand on her to pull her out, taking hold of her by the wrist, but he alleges that as soon as he put his hand on her she came out without any force, complaining a little and saying something of which he took no notice. He absolutely denies having struck her or having knocked her down, or that she was lying on the deck. In cross-examination he stated that he did not go into the galley but went in the door of the galley and remained out on the deck close to the door all the time, and that Mrs. Loupides was in the kitchen not far from the door; that he reached in and took hold of her and grabbed her by the hand, but that he did not pull her out for when he put his hand on her she came out without making any fuss.

Nicholas Dimitriades, a witness called for the defendant, says he saw the disturbance that took place, and he contradicts the captain in one important particular. He states that the steward went out and called the captain to go over and take Mrs. Loupides out of the galley, as she was creating a disturbance there, and when the captain came and told her to get out of the galley and she did not pay any attention to him, he took her by the hands and just as she got outside of the door Mr. Loupides came out with a knife and then he got hold of his wife. He swears that the captain did not hit Mrs. Loupides, but in cross-examination stated that the captain went inside the galley and did not stay outside or just at the kitchen door as he alleged in his own evidence. He supports the statement of the captain, Nicolaris, that he spoke to Mrs. Loupides and told her to go to her room, and emphatically states that the captain could not have struck her because he was there at or close to the galley when the captain came and saw what took place. The other witnesses called were Michael Casedas, the steward, who states that the captain stayed outside the kitchen door and did not go in, and simply took Mrs. Loupides out by the hand, and that she pulled back a little and then went out. John Cotrogos,

whose evidence is not of very much value, as he was 150 feet away from where the occurrence took place, and George Gogas, who swears that he saw the alleged attack by the captain on Mrs. Loupides at Rebat, and that he did not strike her, though he was not in a position to see what happened inside the door of the galley. His statement agrees with the captain's as to his not going into the galley, however, and he says that he simply stayed outside the door and told her to come out, and when she did not do so the captain got angry and pulled her from the hand, taking her out gently, however. He, subsequently, stated that he was not very angry, and that the captain did not use any force to pull her out on the deck.

It will be seen, therefore, that there is a great deal of conflict of evidence, but having heard the witnesses and noted their demeanour on the stand I have come to the conclusion that the weight of evidence is against the contention of the plaintiffs that the captain struck Mrs. Loupides a blow on the left side. I have come to the conclusion, however, taking the evidence of the captain and that of his own witnesses, that there was an assault, more or less of a technical character, as it was not necessary for the captain to take Mrs. Loupides by the arm and pull her out on the deck. According to the evidence of the witnesses, after he put his hand upon her she came out quietly and without making very much opposition, and I cannot think that it was necessary for him in order to make her obey his order and come out on the deck, to place his hand upon her and to pull her towards him in the way in which he did. That she received a blow on the side such as she described is I think negatived not only by the evidence of a number of witnesses but also from the fact that she continued to work about the ship as she had done previously for a number of weeks, or until the vessel arrived in St. John, and that she remained on the ship for 11 days after the ship arrived in St. John, working, as her husband has said, every day but one before going to the hospital. There is no evidence of an independent character to shew that her going to the hospital was in consequence of the blow she received on board the vessel, although it would have been an easy matter to have summoned some of the doctors or other officials of the hospital to have given evidence in regard to this. I do not think it would have been possible for her, had she received such a blow as she said the captain gave her to have continued working for so long a period of time. There is nothing to shew that there was any expense incurred in consequence of the assault, and the statement that after she was pulled out by the captain she was lying

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on the deck is contradicted by one of the witnesses who was called on her behalf. I have come to the conclusion, therefore, that an assault was committed, but that it was a very slight one. It was not of an aggravated character, and there is nothing but her own unsupported evidence to shew that she suffered at all in consequence of it. I would, therefore, have found damages against the captain for $10 for assault, had the action been one *in personam*, and I decide that that is the amount of damage which should be awarded the female plaintiff in the event of its being held that an action *in rem* will lie against the ship and that I am in error in deciding otherwise. I have not lost sight of the fact that a master may, apart from the power conferred upon him by statute, take all reasonable means to preserve discipline in his ship, and that he is given power under the Criminal Code to do so. I do not think, however, there was any necessity in this case for his laying hands on the defendant at all, and that is the reason why I find that the assault was proved as I have stated.

[His Lordship here discusses the evidence touching upon the question of wages to the female plaintiff, and accepts the version of the captain, that she was only on the ship as a favour to her, and to keep her husband, and was put on the ship's articles solely because of the provision forbidding the carrying of passengers on such ships. This is not printed here as being entirely a finding on the facts.]

In the course of his remarks on this point, His Lordship says "We therefore have her statement to the effect that she shipped with an understanding that she was to receive five pounds a month, and the captain's explanation that he took her solely to oblige her husband, and the further fact that she is entered on the ship's articles at five shillings a month, a fact about which if she was an English ship there would, I think be no question, because it has been held that the ship's articles are conclusive as to wages. (See *Thompson* v. *H. & W. Nelson*, [1913] 2 K.B. 523.) There is this difference, however, that the articles were not signed by Mrs. Loupides. Under the system that prevails on a Greek ship, as sworn to by the captain and other witnesses, the captain makes out on a slip of paper the agreement of each man hired, and takes it to the consul and the consul then fills in the articles in his own handwrting and they are not signed by the crew. Mrs. Loupides did not sign any slip which was taken to the consul, and I think under the circumstances of the case, especially as this is a Greek ship registered under the Greek flag, I had better deal with the case

upon its merits."

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[His Lordship then discusses the evidence as to whether the plaintiffs were wrongfully dismissed, and therefore entitled to damage or whether, on the facts, they were not simply discharged at their request and with their approval, and upon the male plaintiff furnishing a substitute, and arrives at the conclusion] That they were not wrongfully dismissed, but left the ship of their own free will, and that their action for wrongful dismissal cannot be maintained.

[His Lordship then continues:—]

For the same reason the claim so far as money by way of viaticum is concerned to enable them to return to their home in Cardiff must also fail.

It was stated by counsel that there never had been any unwillingness to pay Mrs. Loupides five shillings a month from the time when she joined the vessel at Swansea until she left it to go to the hospital in St. John, or to pay to Loupides the £3 that had been deducted from his wages during the few days that he was unable to cook in consequence of seasickness. I find, therefore, that they are entitled to these amounts, and there will be no costs of this trial.

In view of the conclusion which I have come to as above, I have not considered it necessary to determine the point raised by the counsel for the ship to the effect that as the assault occurred in Rebat, within the exclusive jurisdiction of Morocco no action can be brought in this Court against the ship, unless the plaintiff first shews affirmatively that under the laws of Morocco such action would lie in that state, the foreign law being a question of fact to be shewn by the plaintiff.

I only mention it now so that in case of an appeal it will be clear that the point was taken in this Court.

Judgment accordingly.

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Exchequer Court of Canada, Audette, J. March 10, 1921.

MASTER AND SERVANT (§V—345)—RAILWAY EMPLOYEE—USE OF HAND CAR—AFTER WORKING HOURS—USE FORBIDDEN BY FOREMAN—ACCIDENT—DEATH—LIABILITY OF COMPANY—TRESSPASSER AB INITIO.

A railway employee, who after his day's work is over and when his time is entirely his own, takes a hand car to go for coal for his sleeping van, notwithstanding that he has been forbidden to do so by his foreman, and while proceeding along the track is struck and killed by one of the railway company's trains is a trespasser *ab initio* and the railway company is not liable in damages for his death.

[See Annotation 5 D.L.R. 328.]

PETITION of right to recover $2,000 for the death of his son

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which occurred whilst in the employ of the Canadian National Railways.

G. Ringuet, for suppliant.

John A. Sullivan, for respondent.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $2,000, being the damages, he alleges, he suffered from the death of his son, resulting from an accident on the Canadian National Railways, a public work of Canada.

Lajoie, the son, who was 19 years old (hereafter called Lajoie, as distinguished from Lajoie, the father and suppliant) on November 26, 1918, formed part of an extra gang of men working on the right of way of the said railroad.

The gang of men in question were under the superintendence and direction of foreman Chappedelaine, and their working hours were from 6.30 a.m., to 5.30 p.m. The railway was supplying them with 5 or 6 vans or box-cars in which they lived. That is one car was used for their tools and equipment, 3 or 4 cars were used for dormitories, and one car was used both as a kitchen and dining room. The men fed themselves at their own expense, the cook bought the food, and they clubbed together and each of them paid his share of such expenses at every week end.

After the day's work the men could at their will sleep in these cars or at their homes, or at any other place, provided they would report on time for work. The man sleeping in the car was paid the same wages as the man who would not. The car, under the circumstances, became a residence, a dwelling or habitation, *Rex* v. *Gulex* (1917), 28 Can. Cr. Cas. 261, 39 O.L.R. 539; *Corriveau* v. *The King* (1918), 18 Can. Ex. 275.

These vans were lighted by stationary oil lamps and heated with coal.

On November 26, 1918, between 6 and 7 o'clock in the evening (as stated by witness Bernaquay) after his day's work, and after taking his evening meal, Lajoie went to foreman Chappedelaine and asked his leave to take a hand-car to go and get coal and oil. Foreman Chappedelaine refused him such leave or permission, stating that it was too dark to go and get coal, adding he would send for some next day, in day-time. There was still some little coal left in Lajoie's van, but he stated he did not have enough for the night; but as Chappedelaine said, in such a case, coal could be borrowed and taken from another van,—there was no necessity to go any distance for coal.

After refusing Lajoie the permission to take the hand-car, Chappedelaine, all dressed up, threw himself on his bed, as was customary for him to do after his day's work and meal. His

attention being attracted by some noise on the track, he got up and came to the door of his van and distinguished a hand-car already leaving easterly in the dark. Lajoie, notwithstanding foreman Chappedelaine's refusal to give him permission to take the hand-car, took it out and secured three companions, among whom were Bernaquay and Plante, who testified at trial. He also procured an ordinary hand-lamp, with white light,—but not the kind of lamps daily used by railway employees.

The night was dark and cold, with a slight wind. This hand-car was operated by these four men with the ordinary handle. Lajoie and Lepaille, had their back turned to the front or rather towards the direction in which they were travelling and Bernaquay and Plante faced them. After leaving Blake on their errand towards Carmel, just after leaving a curve and after getting on a straight stretch, and going up grade, the hand-car was struck by a mixed train, that is a freight and passenger train, running on the usual time-table, and as a result of such accident Lajoie was killed. Hence the present action by the father on behalf of his son.

Now, Lajoie was on this hand-car against the orders of his foreman or employer. Hand-cars are not allowed out at night except under very special circumstances, and whenever they are taken out there must be a foreman in charge,—and at night they must, under the regulations, carry a red light and signals for protection,—and the men operating them should at times stop and listen.

It is true they had that white light, from an ordinary hand-lamp, which was probably obstructed by the men working upon the handles, and the closeness of the light to these men would justify hazarding the inference that they were thereby blinded and prevented from seeing any distance. Moreover, when they were struck, they had just left a curve and, therefore, were not in a position to see and notice or to be noticed and seen from any distance. They were working their car on an upgrade and as some witness said, the noise of the hand-car was considerable.

Witness Bernaquay, on examination in chief, said he did not see any light on the coming train, and on cross-examination he said he saw something like an engine. Then he added, he jumped when he saw the engine, and adds Lajoie could not see it.

The suppliant lays great stress on his allegation that the engine which struck the hand-car had no head-light. In support of such allegation, he called four witnesses: Witnesses Bernaquay and Plante who were on the hand-car, said they did not see

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any light on the front of the engine. However, the collision occurred just as they had left the curve and had not much time or opportunity of taking their bearings before being struck. Their own light would prevent them from seeing any distance.

Then comes the evidence of Charles Jacques, an hotel-keeper, at St. Cyrille, who says his hotel is situate at 25 or 30 feet from the railway track, and that at 5 o'clock on the day of the accident, *a train* stopped for about 15 minutes at St. Cyrille, and he noticed the engine had no light in front, no "big light upon the engine which projects ahead." Joseph Laroche, the other witness, who was in the hotel with the previous witness says there was no light in front of the train; but he adds, that on leaving the crew placed, on the front of the engine, a white light, in the centre, but at about the height of the coupling device.

As against the suppliant's evidence, on the question of head light, there is on behalf of the respondent the following evidence. Witness Chappedelaine testified he noticed a head-light on the train at the usual place when it passed near their vans, but adds he could not say what kind of light. There was even enough light to allow him to take the number of the engine. Conductor St. Pierre says that as the electric light was out of order, there was a hand-lamp in the headlight, inside the magnifying glass. He further says he saw the hand lamp in place and burning when they arrived at St. Leonard. Stoker Boucher, says that the engineer was looking out on his side of the cab, and he was looking out on the other side. They saw no light on the track, and never noticed the accident until after their arrival at St. Leonard, when boards and debris were found entangled on the front of the engine. He further testified he himself placed the lamp in question in the head-light space of the engine at Drummondville, because the dynamo was out of order. Their light could be seen at a pretty fair distance, and at every station they stopped he ascertained the head light was burning. Brakeman Areand also testified there was a hand-lamp in the head-light's space of the engine, and contends that the light could be seen at a distance of 3 to 4 miles. When he got off at St. Leonard, the light was burning, and brakeman Lebrun also testified they had a lamp in the head-light that night.

As against the positive evidence of these five witnesses on behalf of the respondent, in respect of the head-light,—a question not material in the view I take of the case,—there is the evidence of two persons who were on the hand-car who testified

they did not see any light on the engine,—as above explained, together with the evidence of the two persons in the hotel at St. Cyrille, who saw a train there around five o'clock and one of them said there was no big light in front of the engine, which projects ahead,—and the other said they placed a hand-lamp in front. *Magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. That train was seen at St. Cyrille around 5 o'clock, and the accident occurred between 6 and 7 o'clock and there is a distance of not quite 4 miles,—(as ascertained from the time-table) between St. Cyrille and Carmel. That train was not even identified as having been the train which collided with the hand-car.

Under the circumstances, I, unhesitatingly, find the engine carried an oil hand-lamp in the space inside the magnifying glass of the usual head light of the engine and such light was sufficient to comply with the railway regulations.

Now, I must also find that when Lajoie was out on this hand-car, without leave, after 5.30 o'clock in the evening, his day's work was over, and he was then absolute master of his time and leisure and therefore was not acting within the scope of his employment *Philbin* v. *Hayes*, [1918] W.C. & I. Rep. 194, 87 L.J. (K.B.) 779, 34 Times L.R. 403; *Corriveau* v. *The King*, 18 Can. Ex. 275, he was not doing work arising out or in course of his employment.

When Lajoie was killed, he was not acting in the course of his day's work. After his daily work was over, Lajoie was not working for his employer. He chose to live in the van to avoid expenses, and he did so of his own volition, and to serve his personal advantage, *Limpus* v. *London Gen'l. Omnibus Co.* (1862), 1 H. & C. 526, at p. 543, 158 E.R. 993, at p. 1000.

By the employer forbidding an employee to do a certain thing it makes it an act which is not incidental to his employment, and takes the employee outside the sphere of his employment, so as to disentitle him to recover *Moore & Co.* v. *Donnelly*, [1921] 1 A.C. 329, 37 Times L.R. 198.

Lajoie was on the railway track, on the hand-car, not only without leave but in face of a refusal by his superior officer to allow him to do so and without taking the usual necessary precautions in handling the hand-car. He was, therefore, in the position of a trespasser *ab initio*, having deliberately contravened the instructions of his superior officer. "When entry, authority, or license is given to anyone by the law, and he doth

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abuse it, he shall be a trespasser *ab initio.*" Pollock, Law of Torts, 11th ed. pp. 399-400. See also Beven, on Negligence, 3rd ed. pp. 442 *et seq.* and p. 935; *G.T.R.* v. *Barnett,* [1911] A.C. 361, at p. 370; *C.P.R. Co.* v. *Hinrich* (1913), 15 D.L.R. 472, 16 C.R.C. 303, 48 Can. S.C.R. 557.

Furthermore, knowing as he did the risk he took in entering upon a track used by trains, he must be held to be *volens* in respect of the risk confronting him and which he accepted.

Lajoie had no right to go upon the railway in the hand-car, as he did, *Walsh* v. *International Bridge and Terminal Co.* (1918), 45 D.L.R. 701, 44 O.L.R. 117. There was no duty infringed on behalf of the railway, and Lajoie by his wrongful act cannot impose any new duty upon the same, *Degg* v. *Midland R. Co.* (1857), 1 H. & N. 773, at p. 782, 156 E.R. 1413, at p. 1416. See also the Rule of the Roman law, 3, 4, 5, under the *Lex Aquilia,* (Sandars, Institutes of Justinian, 3rd ed. pp. 502 *et seq.*)

The following observation from Sington's Law of Negligence, at pp. 216-217 is quite apposite:—

"A trespasser, who is an adult, cannot, as a general rule, recover damages. If, however, the defendant has done an inhuman or an unlawful act, such as setting a spring gun, then, although the trespasser be by his own act the immediate cause of the injury he sustains, he can maintain an action. The view of the law seems to be that, no duty is owed to a trespasser; but there is a duty owed to all the world not to do something unlawful, or inhumanely cruel. When, however, it is said that no duty is owed to a trespasser, this only means that there is no such duty towards him to prevent consequential injury happening, as would be owed to one who is not a trespasser. It does not mean that you have no duties to him at all, merely because he is a trespasser; and, therefore, if you go out of your way to inflict injury upon him deliberately you would be liable. . . . In the cases where a plaintiff has succeeded notwithstanding that he was a trespasser, circumstances were present which made the trespass immaterial." (See also Hunter's Roman Law, 2nd ed. p. 246.)

The proximate and determining cause of the accident was the conduct of Lajoie in venturing upon the track, at night, in a hand-car, against the will of his superior officer and in violation of the regulations above mentioned and he is, therefore, responsible for the determining cause of the accident and the doctrine of *faute commune,* mentioned at Bar, does not apply. He was the victim of his own negligence and reckless conduct.

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No action sounding in tort will lie against the Crown, unless it is made liable therefor by statute. To succeed in the present case, the suppliant must bring his case within the ambit of sec. 20 of the Exchequer Court Act R.S.C. 1906, ch. 140, and he can only succeed where the accident is the result of negligence on behalf of an officer of the Crown acting within the scope of his duties and employment. It is a law of exception. I find there is not a tittle of evidence in respect of actual negligence. The only duty owed to Lajoie by the railway was not to run him down knowingly and recklessly. *Herdman* v. *Maritime Coal Ry. Co.* (1919), 49 D.L.R. 90, 25 C.R.C. 206, 59 Can. S.C.R. 127.

Having found as above set forth, it becomes unnecessary to pass upon the question of insurance raised at Bar.

There will be judgment declaring that the suppliant is not entitled to any part of the relief sought by his petition of right.

Judgment accordingly.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 10, 1922.

INTOXICATING LIQUORS (§IA—5)—LEGISLATION FOR GOVERNMENT CONTROL OF SALES—GOVERNMENT LIQUOR ACT, 1921 (B.C.), CH. 30—VALIDITY—PROCLAMATION BRINGING ACT INTO OPERATION.

The Government Liquor Act, 1921 (B.C.), ch. 30, is within the legislative competence of the Province of British Columbia and due proclamation was made thereof under sec. 117 of the Act so as to bring it into operation.

APPEAL by accused from an order of Lampman, Co. J., of 1st Nov., 1921, affirming on appeal a summary conviction under the Government Liquor Act, 1921 (B.C.), ch. 30.

Frank Higgins, K.C., and *R. C. Lowe*, for appellant.

C. L. Harrison, for respondent.

MACDONALD, C.J.A.:—The proclamation which brought the Act into effect recites an order-in-council authorising it, and this it was submitted by counsel for the appellant destroyed the efficacy of the proclamation. In view of sec. 41 of the Interpretation Act, R.S.B.C. 1911, ch. 1, this contention fails.

The next point urged was that the proclamation was not proved at the trial. This objection is met by sec. 101 of the Summary Convictions Act, 1915 (B.C.) ch. 59.

The principal objection, however, was that the Liquor Act itself (Government Liquor Act, 1921 (B.C.), ch. 30) is *ultra vires*. It was contended that it is a revenue Act imposing in-

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direct taxation and, therefore, beyond the competence of the Provincial Legislature. In my opinion the tax imposed is a direct tax: *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, 56 L.J. (P.C.) 87; *Workmen's Compensation Board* v. *C.P.R. Co.*, 48 D.L.R. 218, [1920] A.C. 184. That revenue is derived from its operation is only an incident. Whether or not the Province would have power to undertake, for profit, the liquor business to the exclusion of all others is a question which I do not find it necessary to decide. If I am right in thinking that the Province has the power to control the liquor traffic and that the Liquor Act effects this control by vesting in a Board of Control under provincial authority the exclusive sale of liquor within the Province, then, I think that it is in the same category as the Prohibition Act 1916 (B.C.), ch. 49, which it replaced. That Act prohibiting the sale of liquor for beverage purposes was declared to be *intra vires* of the Provincial Legislature by the Privy Council. Incidentally a very considerable revenue was made under that Act, but that fact did not render it *ultra vires*. The present Act is wider in its scope than the Prohibition Act was, it permits the sale of liquor for beverage purposes as well as for medicinal purposes, but this sale is for the purpose of controlling the traffic, and is just as much within the competence of the Provincial Legislature as was the Prohibition Act, which exercised a more stringent control it is true, but, nevertheless, was passed for the like purpose.

The case was also argued on the merits, it being contended that there was no evidence to sustain the conviction. The evidence, in my opinion, was ample, and on this ground also the appeal must be dismissed.

MARTIN, J.A. (dissenting):—This is an appeal from the conviction of the appellant for keeping liquor for sale contrary to sec. 26 of 1921 (B.C.), ch. 30, entitled An Act to Provide for Government Control and Sale of Alcohol Liquors.

Three objections to the validity of the conviction are raised, the first being that the said Act is *ultra vires* of the Provincial Legislature and as this goes to the root of the whole matter, it requires primary consideration. Two main grounds are advanced in support of this submission of *ultra vires;* the first being that the real and unconstitutional object of the statute is to raise a revenue indirectly for Provincial purposes contrary to sec. 92 (2) of the B.N.A. Act, under the professed intention of restricting, i.e., regulating, the liquor traffic under sec. 92 (16) of said Act; and the second being that the Province is not authorised by said Act to engage in any trade or business, and, therefore, cannot engage in trade even in the professed

exercise of any power to regulate or restrict trade that it may possess.

As to the first, in order to arrive at the real intention, it is necessary, as was said by the Privy Council in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at p. 583, to consider the probabilities of the case (and) the frame of the Act, and also to apply those tests mentioned in *Great West Saddlery Co.* v. *The King*, 58 D.L.R. 1, [1921] 2 A.C. 91, which I cited in my judgment in *Little* v. *Attorney General for British Columbia*, (1922), 65 D.L.R. 297, 37 Can. Cr. Cas. 189, and I refer to that judgment because it contains a consideration of said Act in certain aspects which are essential to this case. I there came to the conclusion, for reasons given, which I shall not repeat here, that it was the intention of said Act to establish a government monopoly in the sale of liquor within the Province, and, to secure that end, to illegally suppress and prohibit the import trade for internal Provincial consumption by means of a tax imposed to effect that object. That illegality, however, does not extend to the invalidation of the whole Act because the illegal power could be severed and restricted to importation alone, (*Great West Saddlery* case 58 D.L.R. at p. 23) but the object before us affects the validity of the whole Act and so cannot be severed. To reach a conclusion I have again carefully scrutinized every section of the Act and, in particular, the sections so much relied upon by Mr. Higgins viz. secs. 107 and 108, 1921 (B.C.) ch. 30, as follows:—

"107. From the profits arising under this Act, as certified by the Comptroller-General from time to time, there shall be taken such sums as may be determined by the Lieutenant-Governor in Council for the creation of a Reserve Fund to meet any loss that may be incurred by the Government in connection with the administration of this Act, or by reason of its repeal.

108. (1) The net profits remaining from time to time after providing the sums required for purposes of the Reserve Fund shall be disposed of as follows:

(a) One-half of the net amount shall be paid into the Consolidated Revenue Fund for the public service of the Province; and

(b) One-half of the net amount shall be apportioned and paid to the several municipalities in the Province in proportion to their respective population, and of all moneys so paid to each municipality one-half thereof shall be placed to the credit of a special account in the municipal treasury, and shall be paid thereout only for maintaining or granting aid to hospitals in that municipality, or for such other purposes of municipal ex-

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penditure as may be approved by the Lieutenant-Governor in Council."

It is to be observed by sec. 105, permit fees are excluded from profits and form part of the general revenue, and that while sec. 106 also speaks of the "profit and loss" to be shewn in the semi-annual balance sheet and statement directed to be prepared by the Board for the Legislature, yet that can only be in a bookkeeping sense, because in the case of a business so notoriously and exceptionally lucrative as the liquor business has been in this Province, even in the face of competition, nothing less than a great profit could possibly be expected when all competitors have been suppressed and a complete monopoly established; only by mismanagement (or worse) of so gross a kind as to be inconceivable could there be a loss in such exceptionally favorable circumstances. As to any loss in the administration of the Act, the loss referred to in sec. 107 or what may be caused by its repeal, that could not, in practice, be considerable, because the chief danger of loss would be from fire, which should be covered by insurance, and as to that from repeal the stock of liquors could always be sold off profitably and the premises purchased or leased for the business would be available for other business purposes if ordinary business judgment has been shown in their selection. But the question of loss becomes merely academic in view of what has, in fact, happened, and is to happen (according to the Legislative estimates) because the expected great profits have in part already been and are continuing to be realized as is proved by the fact that as a result of the first 3½ months' business the sum of about $543,000 has (as is a matter of public knowledge) been received as profit out of a small population of 523,369 according to the recent census (despite those heavy initial expenses of establishment which are incidental to every business conducted on a great scale like this) and applied to the Reserve Fund and distributed among the municipalities as the Act directs. What the profit will be for the next period is a matter of estimation, but it will unquestionably be great, and in the statement of the revenue for the fiscal year ending March 31, 1922, in the Supply Act, 1921 (B.C. 1st sess.), ch. 61, (p. 492), it is estimated at $2,500,000 under the item—"Government Liquor Act—Profit on Liquor Sold, etc;" and the same estimate of profit is made for the next fiscal year ending March 31, 1923 in the Supply Act, 1921 (B.C. 2nd sess.) ch. 46, (p. 142), so it is thus seen that, if ordinary business advantage be taken of the opportunity afford-

ed by the monopoly, an immense revenue will be realized so long as the system prevails, and it must prevail for at least the considerable period covered by the present estimates.

Under the former Prohibition Act, 1916 (B.C.) ch. 49, the estimated profits for the fiscal year ending March 31, 1921, on the restricted sale of liquor for special purposes only, and unquestionably "necessarily incidental" to the lawful exercise of the powers duly conferred by that statute, were only $25,000—Supply Act, 1920, (B.C.) ch. 88, (p. 453), and this great difference illustrates clearly the fiscal result of the practically unrestricted sale of "controlled" Government liquor.

"An examination of said estimates for 1923 shews that this item of two and a half millions profit on sales only, is the largest in the receipts of the Province with the exception of the Income Tax (three million dollars) and being all profit as the result of the operations of a distinct statutory Board, viz., the Liquor Control Board, (1921 (B.C.) ch. 30, secs. 4 and 92 *et seq.*) there is no countervailing charge against it for departmental administration such as the other items of revenue are subject to, with immaterial exceptions.

The real intention of an enactment is often manifested by its results, and, to my mind, there is no escape from the inference obviously to be drawn from the amount of revenue already derived and the very conservative estimates for the future up to March 31, 1923, viz., that the Act was passed to obtain a revenue and is being maintained with the settled intention of retaining that great net revenue of two and a half millions from this liquor business out of a total estimated Provincial revenue of nineteen million dollars from all sources. It is, of course, largely a question of degree, because it would be said in answer to the present challenge, that if no revenue were being derived there could be no indirect unlawful intention to raise it, but here what has already happened and what is practically assured for the future, bear so great, not to say startling, proportion to the general revenue, that I am driven to the conclusion that the Act is intended to do just what it has done and will continue to do while it remains in force, viz., indirectly raise a great revenue; and, indeed, the Legislature expressly declares its intention in the most solemn manner by making the said statement of its expected profits in its estimates, and it cannot be heard to impeach its own declaration respecting the raising of public revenue upon which the credit of the Province is based.

It must be borne in mind that the present Liquor Control

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Act is of an essentially different nature from the said preceding Prohibition Act of 1916, which this Court held was *intra vires* in *Rex.* v. *Western Canada Liquor Co.* (1921), 60 D.L.R. 217, 36 Can. Cr. Cas. 65, 29 B.C.R. 499 at p. 504 and it was upheld by the Privy Council in *Canadian Pacific Wine Co.* v. *Tuley*, 60 D.L.R. 520, [1921] 2 A.C. 417, 36 Can. Cr. Cas. 130. That Act was undoubtedly passed with the sole intention to prohibit, in the exercise of powers conferred by sec. 92 (16) of the B.N.A. Act. (as a "matter of local and private interest within the Province") all sales and consumption of liquor (except in the few cases specified in sec. 4 (a) viz., "for medicinal, mechanical, scientific, and sacramental purposes" other than such inter-provincial transactions and importations thereunder as were unavoidably permissible under federal powers. But the object of the present Act is exactly the contrary, being to allow once more the sale of liquor to the public generally, and unlimited in quantity if so desired, but only after the Government had obtained sole control of it by suppressing private persons or companies from engaging in it as formerly, and to more effectually secure that object in competition of rival extra-Provincial firms by means of importation for private consumption was got rid of by means of the illegal (in my opinion) tax already considered.

I emphasize this point because, with all due respect, it seems to have been overlooked in certain quarters that while certain things may be lawfully done as being "necessarily incidental" to the lawful prohibition of the liquor traffic, those same things may not be incidental to carrying on the business of selling liquor by the Government (assuming it can lawfully be done), which is fundamentally antagonistic to prohibition and restriction.

The cumulative expression "control and sale" in the title of the act, 1921 (B.C.) ch. 30, is clearly not used in the sense of restricting the supply of liquor to those who wish to buy it, because by means of an unlimited permit, obtainable under sec. 11 as of right for a fee of $5 by all adult persons of both sexes who are residents of one month's standing (except, of course, Indians, who are wards of the Crown Federal, sec. 36) such persons are entitled to buy as much liquor as they please and consume it privately (and give it to their children) but not in a public place, sec. 33, or other places prohibited by secs. 29 and 43. And to meet the various wishes of various classes of the public, various kinds of limited permits are granted for lesser quantities and periods at corresponding prices so that every one, including temporary residents and sojourners can, as of right, get as much or as little liquor as he or she wants. Hence "control" means here, first, the appropriation, and second, the

committal of the entire trade to a sole authority which alone shall have the power to carry on the business of selling it and solely reap the profit. The only essential distinction in principle between the old Liquor Licence Act, R.S.B.C. 1911, ch. 142, and the present one, is that, speaking generally, under the former the private vendors were licensed to sell liquor in their licensed premises to the general public to an unlimited extent, while under the latter, permits which are are a form of licence) are granted to the public to buy liquor to an unlimited extent from the Government stores, i.e., in the one case the vendor is licensed to sell under a heavy fee in the other the consumer to drink under a light one. Of course in each Act there are found similar provisions appropriate to the varying circumstances (some of which are noted in *Rex* v. *Western Canada Liquor Co.*, 60 D.L.R. 217, for regulating sales, as to time, place, etc., and the interdiction of certain persons, and penalties of varying severity are imposed for breaches, the most severe, and usually disastrous one, being the cancellation under the old Act of the licence for the hotel premises, which practically meant their ruin. The other feature now meriting notice is that more regulations of a certain kind were required under the old Act because the many licensed vendors were subjected to more supervision than is now necessary when the Government as vendor is carrying out its own laws, but on the other hand there are many more regulations under the new Act relating to the very much larger number of licences of a new kind, i.e., the customers of the Government.

In his argument, the counsel for the respondent did not take the ground that the regulation of the trade was being attempted but submitted that it was being restricted and the revenue derived was only incidental to that restriction, and that if the Province could prohibit the sale by others, it could sell itself, which, however, does not at all follow under the scheme of the B.N.A. Act, which will be considered later. I do not think that where the Government extinguishes a certain trade by prohibiting those engaged in it from carrying it on, and then converts the sale of the commodity in question into a Government monopoly, that then it could properly be said that the trade, which in the ordinary sense of private business enterprise and open competition free to all the lieges had ceased to exist, was being "regulated" because there was no longer any trade (which is composed of buying and selling by the general public) to regulate, the Government having extinguished it and become sole master of the situation—that proceeding is not regulation,

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but extinction followed by monopoly—See the principle laid down in *Mun. Corp'n of City of Toronto* v. *Virgo*, [1896] A.C. 88, followed in *Att'y-Gen'l. for Ontario* v. *Att'y-Gen'l. for The Dominion*, [1896] A.C. 348. But of course it may be that the Government has power by "controlling and selling" to create a monopoly, and, if so, such a power would properly be exercised independent of regulation, and that aspect of the matter will be considered later.

The power of a Province to prohibit dealings in liquor is based upon the principle set out in *Att'y-Gen'l. for Ontario* v. *Att'y-Gen'l. for the Dominion*, to cure a local evil upon which their Lordships said, [1896] A.C. at pp. 364-5:

"A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the Province, and does not affect transactions in liquor between persons in the Province and persons in other Provinces or in foreign countries, concerns property in the Province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the Province. It is not impossible that the vice of intemperance may prevail in particular localities within a Province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *primâ facie* within no. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the Province where prohibition was urgently needed."

By "prohibition" their Lordships meant, of course, practical "abolition" which is the expression, "restriction or abolition," they use later on, p. 365, and the appellant's counsel submits that a genuine intention to cure the "vice of intemperance" cannot be extracted from a statute which admittedly does not prohibit, but, on the contrary, affords facilities for unlimited supply by unlimited licences (called permits); in other words a return in principle to the old licensing system but with the additional and illegal object of obtaining, apart from legal licence fees, an additional indirect revenue from the profits of the monopoly it has established to attain that end. This aspect of the matter merits weighty consideration, and it is open to grave question whether the evil is not "cured" but really intensified because of the fact that the liquor business is put on a more attractive plane to the people owing to the encouragement held out to increased consumption by a forced profit-sharing plan

with the public at large, as well as consumers, through their municipalities and their Government's revenue, and the further fact that the deterring stigma formerly attached to the traffic when in private hands is now removed since it is invested with the prestige of Government sanction and supply. In this connection it was suggested during the argument that the effect of the present act has been to decrease the drunkenness caused by illicit transactions that, as a matter of common knowledge, recently existed despite the penalties of the late Prohibition Act, but in the total absence of statistics it is impossible to speak with any comparative certainty on this point, particularly because, unhappily, it is a matter of equally common knowledge that the same regrettable state of affairs exists today, as might indeed have been expected in the light of economic history, because the establishment of any state monopoly of trade, be it of salt, sugar, tobacco ,or otherwise, is, with its attendant high prices, inevitably followed by those illicit transactions which the monopoly itself invites. While it cannot be gain-said that the present act, continues the suppression (introduced by the former Prohibition Act) of some of the worst evils of the old licensing system, such as the abolition of the bar, yet that is no legal justification of selecting a way for so doing which involves a breach of the B.N.A. Act respecting revenue by insisting upon obtaining profits as well as licence fees out of its control of the traffic.

It must, however, be clearly understood that if the Province has the power to create this trade monopoly, then the way it chooses to exercise it is not open to review or even comment by this court, however much many people who are not prohibitionists may conscientiously and strongly object to becoming forced participants in such a traffic; but where the power is challenged by one who is suffering from its exercise, upon the ground that what is really being attempted is unauthorised, then, as has been noted, to ascertain the real intention "the probabilities of the case" must be carefully considered and weighed in all their aspects in the light of the facts in proof, and also those which appear in the statutes, and those which are matters of common knowledge of which judicial notice must be taken; cf.e.g., *Welch* v. *Kracovsky* (1919), 27 B.C.R. 170; *Rex* v. *Lachance* (1920), 53 D.L.R. 313, 33 Can. Cr. Cas. 170, 30 Man. L.R. 432; and *Price Bros. & Co.* v. *Bd. of Commerce of Canada* (1920), 54 D.L.R. 286, 60 Can. S.C.R. 265.

A leading example of the real intention of the Legislature, and not the professed, being extracted from its legislation is

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to be found in the well known case from this Province of *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580; as explained in *Cunningham* v. *Homma*, [1903] A.C. 151, at p. 157, wherein the Privy Council "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, etc."

The authorities cited in the *Little* case 65 D.L.R. 297, show that the intention to exercise powers must be lawful and single, and, if so, effects which are "necessarily incidental" to that exercise are not *ultra vires*, but the power is not saved where there is a dual intention, one being legal and the other illegal. In the present case, I have reached the conclusion after prolonged, indeed I may say, anxious consideration of it, in view of its exceptional public importance, that there is, even in its most favorable aspect, at least a dual intention embodied in the statute, the illegal and very important one being that which aims at indirectly raising a great revenue from the "control and sale" of liquor and, therefore, as it is not severable in this respect, the Act is *ultra vires* as a whole and the conviction thereunder should be quashed and the appeal allowed.

Then, as to the second point, that the Province is not authorized by the B.N.A. Act to engage in trade or business and, therefore, the Act in question which professes to give it that power is *ultra vires*, now, when such a question arises it was said by the Privy Council in *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, at p. 109, that:—

"That first question to be decided is, whether the Act impeached . . . falls within any of the classes of subjects enumerated in sec. 92, and assigned exclusively to the Legislatures of the Provinces; for if it does not it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *primâ facie* falls within one of these classes of subjects that the further questions arise, *viz.*, whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sec. 91, and whether the power of the Provincial Legislature is or is not thereby overborne."

I, therefore, proceed to inquire if such a power is so enumerated in sec. 92. The only sub-section of it which directly authorizes the sale of property and, inferentially, the carrying on of business in its disposal is sub-sec. 5, viz.:—

"The management and sale of the public lands belonging to

the Province and of the timber and wood thereon."

That undoubtedly authorized the Province to go into land and timber business but to the extent only of its own possessions, and to derive a profit therefrom.

Then sub-sec. 7 confers powers for

"The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the Province, other than marine hospitals."

Seeing that, e.g., many private hospitals are conducted as business ventures and are, undoubtedly, profitable, I can see no legal reason why a profit should not be derived from Government hospitals, if possible, since the Province is authorized to establish and manage them; and I suppose it is possible that some of the other public institutions mentioned might, in specially favorable circumstances, become more than self-sustaining and hence a source of revenue from which the public exchequer could clearly benefit under this sub-section.

Then sub-sec. 10 authorizes:—

"Local works and undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:

(*b*) Lines of steamships between the Province and any British or foreign country;

(*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

This expression "works and undertakings" clearly, I think, relates to works of construction in the way of transportation, communication and public utilities, e.g., highways, railways, canals, telegraphs, telephones, power conservation and transmission, bridges, wharves, local ferries (c.f. sec. 91 (13)), etc., but I do not understand it as being directed to those ordinary trades which it is the inherent and personal right of every subject to engage in, which view is borne out by *City of Montreal* v. *Montreal Street Ry.*, 1 D.L.R. 681, [1912] A.C. 333, at 342, wherein the Privy Council said of this sub-sec.: "These works are physical things, not services." The incorporation of companies with Provincial objects is empowered by the next sub-sec. 11. No case has been cited to assist us, because the matter has never before arisen for adjudication.

It is to be noted that even where power is given to the Pro-

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vince to engage in what may be called trade and business (as above noted) or in "works and undertakings," there is no hint of anything that would justify the establishment of a monopoly and the exclusion of the business community from any branch of trade or commerce, which subject is reserved for the federal Parliament. And if the Province may take over and monopolize the whole trade in the drink of the people, it may do the same with their "food and raiment" and everything else, because no line of demarcation can be drawn, and if it did, the result would be complete provincial communism, i.e., in brief, the abolition of private rights and their absorption into state (provincial) control. I can discover nothing in the B.N.A. Act contemplating any such far-reaching result, which is totally at variance with the scheme of Confederation which aims at a strong and united federation of Provinces built up upon the interlacing distribution of federal and provincial powers under secs. 91-2, and the reserved and special powers of raising "duties and revenues" conferred by secs. 102 and 126 of that Act. Moreover, the removal by any one of, and, therefore, all of (if they see fit) the Provinces of its or their entire or partial "property" from "liability of taxation" under sec. 125 would, if adopted to any considerable extent, financially disrupt Confederation, and it is no answer to say that it is very improbable that such an extreme result might come to pass, because no one can say what may not happen if the opportunity is created, and once the door is even partially opened to illegal courses of a certain nature, it is impossible to close it and here, it must be remembered, the door has, in fact, been opened and one of the largest and most lucrative branches of trade appropriated by the Province; if this can be done, I repeat, in this business, it can be done in all businesses and it is just as illegal in the case of one as in all, and if it is illegal in its extreme end it is just as illegal in its smaller beginning. It is, moreover, a fair deduction that the B.N.A. Act not only never contemplated, but intended to guard against the particular or general engagement of a Province in mercantile pursuits, from the fact that it considered it necessary to confer the power in the special cases already enumerated, and even in the case of lands and timber, limited the power to its own Provincial property.

It is to be observed, as was, I think in the main, correctly stated (subject to exceptions) in the argument of Sir R. Finlay, K.C., in *Royal Bank of Canada* v. *The King* 9 D.L.R. 337, (annotated), [1913] A.C. 283, at p. 286, that the powers of a Province to raise money are expressly limited by the B.N.A.

Act to four specified classes under sec. 92, viz.: direct taxation, under sub-sec. 2; borrowing on its sole credit under sub-sec. 3; management and sale of public lands and timber under sub-sec. 5; and licences under sub-sec. 9; to which I would add as exceptions any revenue that might result from business or "works and undertakings" authorized to be carried on under sub-secs. 7 and 10, as aforesaid, and also any revenue that might be necessarily incidentally derived by way of fees, fines, or otherwise from the other classes of subjects enumerated. But these receipts, directly authorized or incidental, as the case may be, are quite distinct from the revenue that would result from the Province itself engaging in business, to justify which grave departure from constitutional precedent, I, for one, shall require some clear authority, and I cannot find it in sub-sec. 16, relating to "matters of a merely local or private nature in the Province." It has never been suggested before that this confers a power upon the Province to go into trade and business and create a monopoly thereof, and to my mind and with all due respect it is a complete fallacy to say that because the Province has the power to prohibit the liquor traffic, it has the further power to engage in it after prohibition. The authorized object of sub-sec. 16, may, in my opinion, be completely attained as regards the restraint or regulation of the liquor traffic without the Province entering into that business, but if they cannot, then they must be attained so far as possible for the Province to do so up to that constitutional limitation. I do not enter into the immaterial inquiry as to whether or no the federal Parliament with its much wider field of legislation than the Provinces, can engage in business ventures, but will only observe that though it has, under sec. 91, the power to "make laws for the peace, order and good government of Canada in relation to all matters" not assigned exclusively to the Provinces, yet by Part VI. of the B.N.A. Act, Parliament, like the Provincial Legislatures, has only those prescribed powers which it derives from the "Distribution of Legislative Powers" conferred by that Act, because, despite grandiose and misleading statements to the contrary, Canada is still constitutionally and internationally only a dependency of the United Kingdom, viz., a "Dominion under the Crown of the United Kingdom of Great Britain and Ireland" as the preamble of that Act recites, and while it is true that within its limits the federal Parliament is supreme, yet it is equally true that its area is restricted as the Privy Council said in *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282, at p. 290, (after considering *Reg.* v. *Burah* (1878), 3 App. Cas. 889,

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and *Hodge* v. *The Queen* (1883), 9 App. Cas. 117), viz.:

"These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate.".

One of the most striking illustrations of the "restricted area" of federal powers is afforded by the subject of copyright as to which it is pointed out in Lefroy's Canada's Federal System 1913, pp. 52 *et seq.* that though this is a subject matter over which Parliament is given exclusive jurisdiction by sec. 91 (23), yet that jurisdiction was over-ridden by the Imperial Copyright Act of 1842 (Imp.) ch. 45 as was held in *Smiles* v. *Belford* (1877), 1 A.R. (Ont.) 436, 1 Cart. Cas. 576, and *Routledge* v. *Low* (1868), L.R. 3 H.L. 100, 37 L.J. (Ch.) 454, and the Imperial Parliament again asserted its right to deal with it by the Copyright Act of 1911 (Imp.) ch. 46, the effect of which is considered in Clement's Canadian Constitution 1916 pp. 251, *et seq.* And in the last cited authority, at pp. 4 *et seq.*, it is said; *sub. tit* "Imperial Acts Extending to Canada."

"Apart then from the B. N. A. Act, it will be shown that with reference to various matters of great moment the law in force in Canada is to be found in Imperial statutes."

And he proceeds to consider a number of them, but it is unnecessary to pursue the subject further, and I have only noticed it because of the way legislation is affected by the misleading idea which prevails in many quarters that this dependent Dominion has the powers of a sovereign state.

From all the foregoing, it follows that, in my opinion, the Act in question is *ultra vires*, and so on this second ground also the appeal should be allowed. Such being the case, it is unnecessary for me to express an opinion upon the other grounds that were advanced against the conviction.

GALLIHER, J.A.:—I would dismiss the appeal.

McPHILLIPS, J.A.:—I am of the opinion that His Honour Judge Lampman had before him ample evidence to find as he did that there had been an infraction of the Government Liquor Act 1921 (B.C.), ch. 30, and that he rightly affirmed the conviction made by Alexis Martin, Acting Police Magistrate for the City of Victoria, wherein he found the appellant, John Ferguson, guilty of unlawfully keeping liquor for sale contrary to the provisions of the Act. With deference to the arguments advanced by counsel for the appellant, it is clear to demonstration that the Act was duly proclaimed; the requisite proclam-

ation of His Honour the Lieutenant-Governor took place and at the time the offence was committed the Government Liquor Act was in full force and effect. I do not find it necessary to, in detail, set forth the reasons for this conclusion as I cannot, after full consideration, say that any of the exceptions taken as to the manner and form of the proclamation have merit, the usual and customary procedure was had and taken founded upon custom, usage and precedent extending over many years during the time of responsible government in this Province. Then, there remains only the point taken by Mr. Higgins, the counsel for the appellant, that the Act is in its entirety *ultra vires* of the Legislative Assembly of the Province of British Columbia.

The first contention advanced is that the Act is one authorising the Government to embark in trade for the purpose of raising a revenue. Were it such an enactment, I am far from saying that that would not be admissible. What the subject may do, Parliament may authorise a corporation to do, or, as in the present case, constitute a Liquor Control Board acting under the Government to, exclusively to all others, carry on—namely the vending of liquors—the admitted policy of the Act is that of control and the abatement of a local evil. Further, it is a matter of merely local or private nature in the Province and within the exclusive power of the Parliament of the Province, B.N.A. Act, 1867, sec. 92 (16)—that it interferes with property and civil rights in the Province B.N.A. Act sec. 92 (13), is an exception without force as it is an *exclusive* power of the Parliament of the Province, and property may be taken and civil rights abrogated or circumscribed, if it be done by the utilisation of apt words in the statute law, and we find the apt words in the enactment we have before us.

If it be that the liquor traffic may be suppressed, it may equally be restricted and the control may be that of the Government of the Province, if there be the statutory mandate from Parliament, and that we have here. It was held in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders' Ass'n*, [1902] A.C. 73, 18 Times L.R. 94 that the suppression of the liquor traffic was *intra vires*, B.N.A. Act sec. 92 (16), notwithstanding that in its practical working it would interfere with Dominion revenue and, indirectly, at least, with business operations in the Province; so that there is no force in the contention that the Government Liquor Act drives others out of the trade, to the extent of its provisions. It is, undoubtedly, an interference with and exploitation of the subject out of engaging in a particular business and to this extent is restrictive of a civil right, but then it

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is in respect of a matter in which Parliament [the Legislature] is paramount. It may be that in the carrying out of the provisions of the Government Liquor Act some revenue may be obtained by the Province, but on the other hand, such may not be the case. The subject in business oftentimes fails, so may the Crown, and, unquestionably, the cost of vending the liquor with the attendant system of control to abate the existent local evil, will necessitate large outlays. However, even admitting that there will be a large surplus going into the Consolidated Fund of the Province, as do all other moneys collected by the Province by means of taxation and other imposts derivable from the sale of the natural and other resources of the Province. The revenue derivable is analogous to that derivable from the operation of Provincial railways, hydro-electric power plants (so extensive in the Province of Ontario), and the many other undertakings in the public interest carried on by the Governments of the Province—being undertakings "of merely local or private nature" in the Province B.N.A. Act, sec. 92 (16)—and can it be said that these must be carried on without profit to the Province?

I feel constrained to say that the answer must be in the negative. It is a matter, as I have said before, in which the Parliament of the Province is paramount. Lord Macnaghten in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders' Ass'n*, [1902] A.C. 73, at pp. 77-78, said:—

"On the other hand, according to the decision in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348, 65 L.J. (P.C.) 26, it is not incompetent for a provincial legislature to pass a measure for repression or even for the total abolition of the liquor traffic within the province, provided the subject is dealt with as a matter 'of a merely local nature' in the province ,and the Act itself is not repugnant to any Act of the Parliament of Canada."

The Provinces have embarked in many undertakings, and as I view the constitutional powers of the Provinces, may do so with impunity so long as they are "of a merely local nature." Let us consider what Lord Hobhouse said in delivering the judgment of their Lordships of the Privy Council in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at p. 588:—

"And they [the Judicial Committee] adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament."

This irresistibly establishes that if the Province cannot embark upon the liquor vending business the Dominion must be enabled to do so. In my opinion, this consideration impels me to say that as the undertaking is "of a merely local nature" that the power to embark in it is vested in the Province. It is instructive generally upon the question of the validity of the Government Liquor Act—and in particular in that the Act is an attempt to cope with a "local evil"—to note what Duff, J., said when considering a statute with analogous moral purpose, namely, in *Quong Wing* v. *The King* (1914), 18 D.L.R. 121, at pp. 137-138, 23 Can. Cr. Cas. 113, 49 Can. S.C.R. 440:—

"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 *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders Ass'n*, [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 employment 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 *Att'y-Gen'l for Ontario* v. *Att'y Gen'l for The Dominion*, [1896] A.C. 348, as well as in *Att'y-Gen'l of Manitoba* v. *Manitoba License-Holders' Ass'n*, 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 authorised by sec. 92 (15)."

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The Government Liquor Act 1921 (B.C.) ch. 30, is, in many of its provisions similar to the British Columbia Prohibition Act 1916, (B.C.) ch. 49, which put an absolute bar upon all sales of liquor within the Province and other very drastic provisions; notably, there is similarity in the Government Liquor Act to secs. 10, 11, 19, 30, 48, 49, 50 and 28 as contained in the B.C. Prohibition Act. The Government Liquor Act provides for sale within the Province but the sale may only be made by the Liquor Control Board. The Prohibition Act (B.C.) was held to be within the powers of the Provincial Legislature in *Canadian Pacific Wine Co. Ltd. v. Tuley*, 60 D.L.R. 520, [1921] 2 A.C. 417, 36 Can. Cr. Cas. 130. Lord Birkenhead, L.C., at p. 522, said:—

"Their Lordships are of opinion that it was within the power of the Legislature of British Columbia to enact it. The case is in their opinion governed by the principles enumerated when their decision was given in favour of the Province of Manitoba on the interpretation of secs. 91 and 92 of the B.N.A. Act, 1867, in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders' Ass'n*, [1902] A.C. 73."

In my opinion the Government Liquor Act is also within the powers of the Provincial Legislature and within the *ratio decidendi* of the *Manitoba License Holders'* case. I will not further enlarge upon the considerations that weigh with me in coming to the conclusion that the impeached Act is *intra vires* of the Legislature of the Province of British Columbia, save to say that my reasons for judgment already given in *Little* v. *Att'y-Gen'l for British Columbia* (1922), 65 D.L.R. 297, 37 Can. Cr. Cas. 189, are applicable to this case as well.

In my opinion the appeal should be dismissed.

EBERTS, J.A., would dismiss the appeal.

Defendant's appeal dismissed.

THOMPSON v. THE KING.

Exchequer Court of Canada, Audette, J. March 14, 1921.

CONTRACTS (§IIIC—243)—GOVERNMENT RAILWAY—TEMPORARY EMPLOYEE—CONTRACT AGAINST LIABILITY FOR INJURIES—VALIDITY—RECEIPT AND ACCEPTANCE OF CHEQUE—LIABILITY OF CROWN—PUBLIC POLICY.

A temporary employee of a Government railway who is a member of an Employer's Relief and Insurance Association and as such has received a copy of the rules and regulations of such association and has contributed a certain sum to the association fund, to which fund the railway department also contributes an annual amount in consideration of which it is relieved from all claims for liability in case of injury or death of a member, has no as-

tion against the Crown for injuries received while in the employ of the railway, he having received and accepted two cheques from the association payable out of the fund to which he contributed, such agreement being part of his contract of employment, and not being against public policy.

LIMITATION OF ACTIONS (§ID—28)—PRESCRIPTION—RIGHT OF CROWN—ARTICLE 2211 C.C. (QUE.).

Under art. 2211 of the Quebec Civil Code, the Crown may avail itself of prescription, and a delay of more than a year from the time of the accident before leaving the petition of right with the Secretary of State is a bar under art. 2262 to an action against the Crown for damages for injuries received while in its employ.

PETITION of right to recover $10,500 damages alleged to have been suffered whilst employed in the Transcontinental Railway.

Savard, for suppliant; *Auguste Sirois*, for respondent.

AUDETTE, J.:—This is a petition of right whereby it is sought, by the suppliant, to recover the sum of $10,500 as damages, he alleges, he suffered as the result of an accident he met with, in the railway yard, at Parent, on the Transcontinental Railway, a public work of Canada.

Counsel at bar for the suppliant, having become informed from the evidence adduced, that the Crown had paid all hospital and medical charges in respect of the suppliant's accident and injuries, abandoned his claim for $500 made in respect of the same by para. 15 of the petition of right.

The suppliant met with an accident late in the evening of February 16, 1918, when engaged, as brakeman, in the making up of a train called Snow Plow Extra, in the railway yard, at Parent, in the course of necessary shunting therefor. After leaving the switch and while backing, tender foremost, he was standing at the side, on the rear end of the tender—one foot on the sill and the other on the step, holding on with his right hand, facing the direction in which they were travelling, and with his back turned to the engine, carrying his lamp in the left hand. After leaving the switch, he gave the signal to the engineer to back towards the two cars they intended to remove, to allow them to get at their van and, when at about 5 car lengths from these two cars, he gave the signal to stop. He contends he looked back to ascertain if the engineer was getting the signal, but he could not see him. Then, being at about 20 ft. distance from him, he hailed him (yelled), but received no reply. The tender and engine collided with the two cars, the suppliant was thrown from where he stood and suffered injuries both to his head and his right arm, for which he now sues. These injuries consisted of his right arm being injured, without being broken.

The accident happened on February 17, 1918, and the petition of right, in compliance with sec. 4 of the Petition of Right Act,

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R.S.C. 1906, ch. 142, appears, from the departmental stamp affixed thereon, to have been left with the Secretary of State on April 30, 1919; that is more than 1 year after the accident, and would, therefore, appear on its face to be prescribed. It was filed in the Court on May 9, 1919.

Under sec. 33 of the Exchequer Court Act, R.S.C. 1906, ch. 140, the laws respecting prescription and the limitation of actions in force in the Province of Quebec must apply in a case of this kind.

Under art. 2211 C.C. (Que.) the Crown may avail itself of prescription and the manner in which the subject may interrupt prescription is by means of a petition of right,—apart from the cases in which the law gives another remedy.

Under art. 2262 C.C. (Que.) the right of action for bodily injuries is prescribed by 1 year and art. 2267 further enacts that in such case the debt is absolutely extinguished, and that no action can be maintained after the delay for prescription has expired. See also art. 2188 and *The Queen* v. *Martin* (1892), 20 Can. S.C.R. 240.

The injury complained of in this case having been received more than a year before the lodging of the petition of right with the Secretary of State, the right of action is absolutely prescribed and extinguished.

Moreover, there is the further question of the insurance. I may say in a summary manner, that the suppliant was a temporary employee at the time of the accident; that he signed ex. A and received the booklet ex. C, whereby by art. 115 thereof the railway in consideration of its financial contribution is relieved from all claims for compensation in respect to injuries or death of the insured.

The suppliant received two cheques, cashed them and kept the proceeds thereof. These cheques were handed to him because of his being a member of the association and a daily or monthly deduction was duly made, to his knowledge, from his wages, towards the insurance,—"he is estopped from setting up any claim inconsistent with those rules and regulations and, therefore, precluded from maintaining this action"—See Fitzpatrick, C.J., in *Conrod* v. *The King* (1914), 49 Can. S.C.R. 577 at p. 581-2.

Having said so much, it becomes unnecessary to express any opinion as to whether or not the suppliant's claim could have been sustained on the ground of negligence. It is unfortunate and greatly to be regretted that we did not have the advantage of hearing Marcotte, the engineer, as he might have thrown more light upon the circumstances of the accident. The agreement (ex. A) entered into by the suppliant, whereby he became a

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member of the insurance society and consented to be bound by its rules, was a part of a contract of service which it was competent for him to enter into. And this contract is an answer and a bar to this action, for the restrictive rules are such as an insurance society might reasonably make for the protection of their funds, and the contract as a whole was to a large extent for the benefit of the suppliant and binding upon him. *Clements* v. *London North-Western R. Co.*, [1894] 2 Q.B. 482.

Such contract of service is perfectly valid and is not against public policy, *Griffiths* v. *Earl of Dudley* (1882), 9 Q.B.D. 357, and in the absence of any legislation to the contrary,—as with respect to the Quebec Workmen's Compensation Act, R.S.Q. 1909, art., 7339—any arrangement made before or after the accident would seem perfectly valid. Sachet, Legislation sur les Accidents du Travail, vol. 2, 209 *et seq.*

The present case is in no way affected by the decision in the case *Saindon* v. *The King* (1914), 15 Can. Ex. 305, and *Miller* v. *G. T. R. Co.*, [1906] A.C. 187, because in those two cases the question at issue was with respect to a *permanent* employee where the moneys and compensation due him, under the rules and regulations of the insurance company, were not taken from the funds toward which the Government or the Crown were contributing. It is otherwise in the case of a *temporary* employee, and I regret to come to the conclusion, following the decision in *Conrod* v. *The King supra*, that the suppliant's claim is absolutely barred by the condition of his engagement with the I.C. Ry.

See *Gingras* v. *The King* (1918), 44 D.L.R. 740, 18 Can. Ex. 248; *Gagnon* v. *The King* (1917), 41 D.L.R. 493, 17 Can. Ex. 301.

There will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right. *Judgment accordingly.*

THE KING v. HYE.

Exchequer Court of Canada, Audette, J. May 3, 1921.

EXPROPRIATION (§IIIC—135)—RIGHT TO FLOOD PROPERTY—SALE BY OWNER, WITH ASSIGNMENT OF RIGHT TO COMPENSATION—RIGHTS OF PURCHASER.

Where after the expropriation by the Crown of the right to flood property in connection with the erection of a dam, the owner of the property sells it to another together with his right to recover the compensation for damages caused by the flooding: such assignment is not an assignment of litigious rights and the assignee is entitled to recover compensation for damage to the lands by the flooding.

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INFORMATION exhibited by the Attorney-General for Canada to have the easement and right to flood certain lands expropriated under the Expropriation Act, R.S.C. 1906, ch. 143, valued by the Court.

R. V. Sinclair, K.C., and *Louis Cousineau*, for plaintiff.

E. B. Devlin, K.C., and *J. W. Ste Marie*, K.C., for defendant.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the right to flood the land described in the information, and belonging to the defendant, was, under the provisions of the Expropriation Act, R.S.C. 1906, ch. 143, taken and expropriated, for the purposes of the construction and operation of the Quinze Lake Dam and Reservoir, a public work of Canada, by depositing, both on October 26, 1917, and March 26, 1920, plans and descriptions, of the said lands, in the office of the Registrar of Deeds for the County or Registration Division of the County of Temiscaming.

The reason of the deposit of the amended plan and description of the said lands on March 26, 1920, was, as stated at bar, because the description deposited in 1917 was not considered sufficient to comply with the requirements of the Expropriation Act. The two plans are identical. The date of expropriation will be taken, for all purposes, to be October 26, 1917.

The Crown has tendered and by the information offers the sum of $105.50 as compensation for the expropriation of this right to flood the said land and for all damages resulting from the same.

The defendant by his statement in defence claims the sum of $2,000.

The defendant's title is admitted.

After the conclusion of the hearing of the cases of *The King* v. *A. Carufel*, under No. 3606 and *The King* v. *A. Grignon*, under No. 3609, counsel at bar, in the present case, agreed to the following admission, reading as follows, viz.:—

Admission—It is hereby admitted by the defendant that all the general evidence as to value of the different classes of land in the locality in question, as testified to in the two cases (viz., No. 3606, *The King* v. *A. Carufel*, and No. 3609, *The King* v. *A. Grignon*) shall be common to this case.

And it is admitted by the Crown that all the evidence of a similar nature adduced on its behalf in the two above mentioned cases, shall be common to the present case, the Crown, however, undertaking to file a statement shewing the particulars of how their expert witnesses have arrived at the amount of their

valuation. It is further admitted that the plan ex. No. 5 herein, which is the particular plan applicable to this case, will be admitted without further evidence and taken as proved.

It is also agreed between counsel for the respective parties that the evidence of Henry H. Robertson given in these two previous cases mentioned under Nos. 3606 and 3609 will be taken as also given in this case, that is according to his own view, of what would be the area of the land flooded.

At the date of the expropriation the lands in question belonged to one Vien, who, on November 1, 1918, sold the same to the present defendant, as it then stood, with the right to recover from the Crown the compensation for the flooding of the said lands.

Counsel at Bar, on behalf of the Crown, contended that, under the case of *Olmstead* v. *The King* (1916), 30 D.L.R. 345, 53 Can. S.C.R. 450 a claim for damages arising out of flooding of land cannot be transferred or assigned. However, the present case does not come within the ambit of *Olmstead* v. *The King*, where the action was one sounding in tort. The assignment of such a claim would be in the nature of an assignment of litigious rights. What is sought to recover herein, is the compensation for the easement of flooding that the Crown has expropriated, and in which the information, acknowledging liability, seeks to have the amount of compensation duly fixed, under the provisions of the Expropriation Act.

It is not a case which can be qualified as one involving litigious rights, in the true acceptance of such terms. It is a case flowing from the right and interest that a subject has in a property compulsorily taken and in respect of which the Crown admits liability, and the plaintiff does not suffer as a result of such mutation of property. *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A.C. 368, 35 Times L.R. 167. The rights and interests expropriated are appurtenant to real estate, and for which the right to compensation is recognised both by the deposit of the plans and description and by the information herein. And the compensation money for such rights and interests is, by sec. 22 of the Expropriation Act R.S.C. 1906, ch. 143, converted by mere operation of law, into a claim to the same. *Re Lucas and the Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, 24 Times L.R. 858.

It is not the case of a property changing hands after the entire fee has been expropriated. The expropriation is limited to an easement to flood over bench mark 866, which left Vien, the defendant's predecessor in title, as the owner of the land

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itself, even after the expropriation. The land has not been expropriated and, therefore, the property never became *extra commercium*. *Lamontagne* v. *The King* (1917), 16 Can. Ex. 203, at 211. Vien had a perfect right to sell his property under the circumstances, even after the easement had been expropriated, and as his assignee has been brought into Court by the Crown in these proceedings, I see no reason why the compensation should not be paid to him. The compensation for this easement has never been satisfied and the right and interest thereto can be assigned, as distinguished from a litigious right as mentioned in the *Olmstead* case, 30 D.L.R. 345.

To avoid unnecessary repetition, the reasons for judgment given this day by me in the case of *The King* v. *A. Carufel*, under No. 3606 are hereby made part hereof and more especially in respect to the general observation respecting the nature of the expropriation, the area taken and the compensation so far as applicable.

The expropriation of the easement is with respect to 21.10 acres, of which 1½ acre under cultivation and the balance 19.60 in bush land. For the 1½ acre under cultivation I will allow at $60 an acre the sum of $90; for the 19.60 at $5, $98; for the 7.15 acres that *enclavés*, isolated from rest of farm by the severance, at $5 an acre, $35.75.

His communication to the east of his farm resulting from the severance of this 7.15 is also a serious matter and for that element of compensation and for the difficulty arising from the want of a bridge and the extra expenses in fencing I will allow, as covering also all elements of compensation, the further sum of $200, making in all the sum of $423.75 as a just and fair compensation under the circumstances.

Counsel at Bar, on behalf of the Crown, has laid stress on the fact that as this farm changed hands for the sum of $250, that this sale should be used as a criterion of the value of land in that neighborhood. He also pressed, on the argument of the 18 other cases, that in fixing the compensation therein the present sale should be taken into consideration. I am unable to accede to this view for the obvious reason that the defendant's evidence in the present case is not common to the other cases, but is limited to the present one. It is the opinion evidence of witnesses on both sides only that is common to all these cases. Moreover, the sale in question took place after the property had been damaged and when settlers were leaving that part of the country, as established by general evidence.

Therefore there will be judgment as follows, viz.:—1. The

right to flood the lands in question is declared vested in the Crown as of October 26, 1917. 2. The compensation for the right to so flood the lands in question and for all damages whatsoever resulting from the said expropriation is hereby fixed at the total sum of $423.75 with interest thereon from October 26, 1917, to the date hereof. 3. The defendant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, mortgages and incumbrances whatsoever, is entitled to recover from and be paid by the plaintiff the sum of $423.75 with interest as above mentioned and costs.

Judgment accordingly.

ROCKMAKER v. MOTOR UNION INSURANCE Co.*

Ontario Supreme Court, Riddell, J. June 26, 1922.

INSURANCE (§ III E—80)—PURCHASER OF AUTOMOBILE UNDER LIEN AGREEMENT—INSURANCE AGAINST FIRE—ASSIGNMENT OF AUTOMOBILE FOR DEBT—ASSIGNMENT OF INSURANCE POLICY—DAMAGE BY FIRE—AUTOMOBILE NOT FULLY PAID FOR—REPRESENTATIONS AND CONDITIONS—ONTARIO INSURANCE ACT R.S.O. 1914, CH. 183, SEC. 194—LIABILITY OF INSURANCE COMPANY.

An insurance policy in Ontario insuring an automobile against accidental fire, etc., is subject to the statutory conditions in the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194, and to these only, notwithstanding that it has certain general conditions to which it purports to be subject, and the assured is the "owner" of the automobile within the meaning of the Act although he has purchased under an agreement under which the property is not to pass to him until fully paid for, and has made an assignment of it as security for a debt, and has assigned his interest in the insurance to such creditor and these transactions do not avoid the policy, and the insurance company is liable for loss within the terms of the policy although it had not been fully paid for at the time the loss occurred.

[*Brock* v. *United States Fidelity and Guaranty Co.* (1921), 20 O.W.N. 278, distinguished; *Drumbolus* v. *Home Ins. Co.* (1916), 37 O.L.R. 465; *Western Ass'ce Co.* v. *Temple* (1901), 31 Can. S.C.R. 373, applied; *North British and Mercantile Ins. Co.* v. *McLellan* (1892), 21 Can. S.C.R. 288; *Coulter* v. *Equity Fire Ins. Co.* (1904), 9 O.L.R. 35, referred to.]

ACTION to recover under an insurance policy for damage to an automobile caused by fire. Judgment for plaintiff.

R. H. Greer, K.C., for plaintiff.

D. Inglis Grant, K.C., for defendants.

RIDDELL, J.:—The plaintiff, the owner of an automobile, insured it in the defendant insurance company under a policy, August 12, 1920, which bound the company to pay "loss the immediate and direct result of (a) accidental fire, lightning, or external explosion; (b) criminal act of any person not an employee or a member of the household of the assured; (c) the collision, stranding, sinking, or burning, or derailment," etc.

*Affirmed by Appellate Division, (1922), 23 O.W.N. 265. A full report of the reasons for judgment will be published later in the Dominion Law Reports.

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Printed in ordinary type and colour were "General Conditions," of which condition 2 was: "If there be any misrepresentation in or material omission from the proposal for this policy, this insurance shall be void." The policy also contained the following condition 5: "This policy shall cease to be in force in the event of any sale, transfer, or assignment of or any lien on the . . . . . automobile or any part of the interest in this policy unless the company expressly consents thereto in writing." The policy also contained the following:—

"Declarations of the assured which are the basis of this contract . . . . . 7. Assured warranted to be the sole and unconditional owner of insured automobile. . . . . In witness whereof and fully relying on the truth of the foregoing declarations, this policy has been executed . . . . ."

July 18, 1921, the automobile was stolen, but it was found in a few hours; it had, however, been burned, apparently by accident. The company denied liability, the plaintiff sued, and the case was tried before me at the Toronto non-jury sittings.

The defences were: (1) that the plaintiff was not the sole and unconditional owner of the automobile, which was a material misrepresentation rendering the policy void "according to condition 3" (no doubt a *lapsus calami* for 2); (2) breach of condition 5 by sale, etc., of automobile to one Garkovitch; (3) assignment of policy after fire to Garkovitch.

As to the last, it appears that the plaintiff, being indebted to Garkovitch (or Gerskovitz), on July 20, 1921, made an assignment of the automobile and "all her interest in the insurance upon the said car and all her claims in connection with the said insurance;" but it also appears that the assignment, absolute in form, was in fact only a security for the debt. I, therefore, added Garkovitch as a party plaintiff under R. 134 (1) (2), following my own decision in *Thompson* v. *Equity Fire Ins. Co.* (1907), 17 O.L.R. 214, approved in the Court of Appeal, (1908), 17 O.L.R. 226, and the Judicial Committee, [1910] A.C. 592 (after a reversal in the Supreme Court (1909), 41 Can. S.C.R. 491).

The facts relied upon to support the other defences are as follows:—The car was sold by Ross & Millar to the plaintiff under a "lien-agreement," dated August 7, 1920, "subject to the terms and conditions hereinafter set forth"—amongst others: "2. Title to said property shall not pass to the purchaser until the said amount is fully paid in cash;" and other usual conditions. The price was $1,955, cash on or before delivery $680, which, with certain additions left a balance of $1,368.50 to be paid in 10 equal instalments monthly, the first September 7,

1920, and the last 9 months thereafter, June 7, 1921. This "lien-agreement" was duly filed, August 13, 1920.

Then, May 20, 1921, the plaintiff, owing to Garkovitch $300, borrowed a further sum of $200 from him and gave him a chattel mortgage upon the automobile for $550.

It is necessary to consider whether the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194, applies to this policy.

The defendant claims that this section cannot apply, as it rather contemplates something permanently fixed—but that argument is answered by sec. 194 itself, as the insurances contemplated are to be on property in Ontario or in transit therefrom or thereto. There is no limitation in these words, and I cannot think that the Court should impose one.

The decision of my brother Middleton in *Brock* v. *United States Fidelity and Guaranty Co.* (1921), 20 O.W.N. 278, is not in point; the Judge gave no decision as to the applicability of sec. 194, nor did he intend to do so.

In view of the wide language of the section, I think that it applies to this policy.

The result is that the policy is subject to the statutory conditions and to those only; *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96.

The statutory conditions 1, 2, 3 and 6 are to be considered in their effect upon this policy in view of the state of the title.

The representation was made that the plaintiff was the "sole and unconditional" owner of the insured automobile."

That a person who has bought a chattel under an agreement that the property is not to pass until payment in full is the "owner" of the chattel has been decided by Hodgins, J.A., in *Drumbolus* v. *Home Ins. Co.* (1916), 37 O.L.R. 465.

A mortgagor has been held to be the "sole and unconditional owner" by the Supreme Court of Canada in *Western Ass'ce Co.* v. *Temple* (1901), 31 Can. S.C.R. 373; see also *North British and Mercantile Ins. Co.* v. *McLellan* (1892), 21 Can. S.C.R. 288.

It would be to draw too subtle a distinction to hold that the plaintiff here was not.

Moreover, condition 1 covers only misrepresentations which are material to the risk: *Coulter* v. *Equity Fire Ins. Co.* (1904), 9 O.L.R. 35, at pp. 41-42; and here there is no evidence that the state of the title was material to the risk. It is common knowledge that these cars are bought on lien-agreements, and I do not think that the company would consider the fact that this car was under such an agreement of any consequence whatever. As to statutory condition 2, the chattel mortgage is not a "change" within the meaning of the condition: *McKay* v. *Norwich Union*

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Ins. Co. (1895), 27 O.R. 251; *Fritzley* v. *Germania, etc., Fire Ins. Co.* (1909), 19 O.L.R. 49.

Nor is the chattel mortgage an assignment within the meaning of statutory condition 3: *McQueen* v. *Phœnix Mutual Fire Ins. Co.* (1880), 4 Can. S.C.R. 660, at p. 689; *Sovereign Fire Ins. Co.* v. *Peters* (1885), 12 Can. S.C.R. 33; *Sands* v. *Standard Ins. Co.* (1878), 26 Gr. 113, (1879), 27 Gr. 167.

As to statutory condition 6 (a), the plaintiff was the owner, and the case is covered by *Drumbolus* v. *Home Ins. Co., supra.*

I can find no valid defence to this action. There will be judgment for the plaintiff with costs, the amount, if not agreed upon, to be determined by the Master in Ordinary, who will deal with the costs before him.

Ten days' stay.

Judgment accordingly.

REX v. NELSON.

Alberta Supreme Court, Tweedie J. May 9, 1922.

SEARCH AND SEIZURE (§I—2)—LIQUOR LAWS—INSUFFICIENCY OF INFORMATION FOR SEARCH WARRANT—EFFECT ON ARREST AND SEIZURE—FAILURE TO OBJECT—WAIVER—LIQUOR ACT (ALTA.) 1916, CH. 4.

A search warrant for liquors under the Liquor Act 1916 (Alta.) is void if the information upon which it was issued was defective on its face in not shewing the cause of the suspicion deposed to. Both the arrest and the seizure under the warrant would be illegal, but if the person arrested proceeds with the trial without objecting, the right thereafter to take objection that he was improperly before the Magistrate is waived.

INTOXICATING LIQUORS (§IIIA—55)—KEEPING FOR SALE—FORM OF INFORMATION—REFERENCE TO STATUTORY DEFINITION OF "LIQUOR" IN INTERPRETING THE INFORMATION—DETAILS OF KIND OF INTOXICATING LIQUOR NOT ESSENTIAL TO THE CHARGE—LIQUOR ACT, 1916, (ALTA.), CH. 4.

An information under the Liquor Act, 1916 (Alta.), for keeping "liquor" for sale contrary to sec. 23 of that Act is sufficient to charge the illegal keeping for sale of intoxicating liquor within the definition of "liquor" contained in the Act itself.

EVIDENCE (§IE—67)—JUDICIAL NOTICE—WHISKY AN INTOXICATING LIQUOR.

Judicial notice will be taken on a charge of illegally keeping intoxicating liquor for sale that whisky is intoxicating liquor.

EVIDENCE (§VIII—670)—PROOF OBTAINED THROUGH ILLEGAL SEARCH WARRANT—FACTS FOUND BY SEARCH UNDER WARRANT ADMISSIBLE THOUGH THE WARRANT IS VOID—LIQUOR ACT, 1916 (ALTA.) CH. 4.

The illegality of a search warrant issued under the Liquor Act, 1916 (Alta.), ch. 4, does not render inadmissible in evidence, upon a trial for illegally keeping liquor for sale, proof of what liquor was found upon the search.

REVIEW OF SENTENCE (§VII—70)—SPECIAL STATUTORY POWERS UNDER LIQUOR ACT, 1916 (ALTA.), CH. 4, SEC. 63, AS AMENDED 1918

(ALTA.), CH. 4—MODIFYING THE DECISION OF THE MAGISTRATE WHILE CONFIRMING FINDING OF GUILT.

Although the Court on an application to quash a summary conviction under the Liquor Act, 1916 (Alta.), ch. 4, and amendments, affirms the Magistrate's finding of guilt, it has a special statutory jurisdiction under sec. 63 (as amended 1918 (Alta.), ch. 4) to modify the penalty imposed.

[Cr. Code, sec. 1124, considered.]

MOTION to quash a summary conviction.

James Short, K.C., for the Crown.

J. McKinley Cameron, K.C., for defence.

TWEEDIE, J.:—This was an application made upon return of a Notice of Motion on behalf of one, C. E. Nelson, before me, in chambers, "that the conviction made by the said Gilbert E. Saunders, on the 23rd day of January, A.D., 1922, against the said C. E. Nelson for that he, the said C. E. Nelson on January 13, 1922, at the Midnapore Hotel, Midnapore, in the said Province, did by himself, his clerk, servant or agent unlawfully keep liquor for sale contrary to sec. 23 of the Liquor Act 1916 (Alta.) ch. 4 and Amendments thereto and the sentence to pay a fine of One Thousand Dollars and costs, be quashed and set aside," on various grounds, ten in number.

The first of these suggests that the accused was illegally arrested and, therefore, was improperly before the Court and consequently the magistrate had no jurisdiction to try the case. The illegality of the arrest is based upon the illegality of the search warrant referred to in the second ground of the application which is to the effect that the conviction and other proceedings are void because instituted by a search warrant, issued for the purpose of searching for liquor, which was void owing to the fact that it was founded upon an information defective upon its face. The information simply set forth that the informant had "just and reasonable cause to suspect and suspects the said goods and chattels or some part of them are concealed in the Midnapore Hotel" and did not set forth the reasons or the causes of his belief, which as a matter of law it should have done. The search warrant was, therefore, void and the officers having entered the premises under a void search warrant and arrested the accused were improperly on the premises and in my opinion could not effect a legal arrest or a legal seizure of the goods there found.

The accused, however, when arraigned before the magistrate took no objection to the jurisdiction of the magistrate on the

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ground that he was improperly before the Court and the trial was proceeded with, resulting in a conviction. As a result of his not having objected to the jurisdiction at the commencement of the proceedings he must be held to have waived the right to do so and submitted to it. As to the two first objections the conviction must stand.

See: *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614, 48 L.J. (M.C.) 151. *Reg.* v. *Hanley* (1917), 41 O.L.R. 177, 30 Can. Cr. Cas. 63. *Reg.* v. *Flavin* (1921), 56 D.L.R. 666, 54 N.S.R. 188, 35 Can. Cr. Cas. 38.

The 3rd and 4th grounds upon which the application was based are "that the information herein is bad on its face and void and discloses no offence against the Liquor Act or in law," and "it is not alleged that liquor. . . . . was intoxicating or otherwise prohibited" respectively. The information sets forth "That C. E. Nelson, of Midnapore, on the 13th day of January, A.D., 1922, at Midnapore Hotel, Midnapore, in the said Province by himself, his clerk, servant or agent unlawfully did keep liquor for sale contrary to section 23 of the Liquor Act of 1916 and Amendments thereto." Section 23, under which the information was laid provides as follows:—

23. "No person shall, within the Province of Alberta, by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly or upon any pretence, or device, sell, barter, or offer to any other person any liquor except as authorised by this Act." (1916, ch. 4, sec. 23; 1917, ch. 22, sec. 5).

The interpretation clause defines liquor as follows:—

Sec. 2, sub-sec. e.

"The expression 'liquor' or 'liquors' shall include all fermented, spirituous and malt liquors, and all liquors which are intoxicating; and any liquor which contains more than two and a half per cent. (2½%) of proof spirits shall be conclusively deemed to be intoxicating; regardless of whether the same is being used as a beverage or not. (1918, ch. 4, sec. 55)."

Counsel for the applicant contends that it is not sufficient to use the word "liquor" as set out in sec. 23 but that the liquor should be described in the information as "fermented" or "spirituous" or "malt liquor" or that it was intoxicating.

I am, however, unable to give effect to this contention.

Section 43 of the Act provides:—"The description of any offence under this Act in the words of this Act or in words of like effect, shall be sufficient in law. . . . . "

Section 44 provides:—

"In describing offences respecting the sale or keeping for

sale or other disposal of liquor, or the having, keeping, giving, purchasing, receiving or the consumption of liquor, in any information, summons, conviction, warrant, or proceeding under this Act, it shall be sufficient to state the sale, or keeping for sale or disposal, having, keeping, giving, purchasing, receiving or consumption of liquor simply, without stating the name or kind of such liquor. . . . . ''

Section 52 provides as follows:—

52. ''In any prosecution under this Act, in respect of any sale, purchase, disposal, giving, having, keeping or receiving of liquor it shall not be necessary that any witness depose directly to the precise description of the liquor sold, purchased, disposed of, given, had, kept or received, or the precise consideration, if any, therefor. (1916, ch. 4, sec. 52).''

And he cites authorities in support of his view but they are all clearly distinguishable from this case. It seems to me that the principle to be followed in regard to the information is that the accused should be given fair information and reasonable particulars of the offence with which he is charged and upon which he is before the Court. See *R.* v. *Hankey*, [1905] 2 K.B. 687; *Smith* v. *Moody* (1903), 1 K.B. 56, 72 L.J. (K.B.) 43, 51 W.R. 252; *R.* v. *Saunderson* (1921), 34 Can. Cr. Cas. 81. In this case he was definitely charged with the sale of liquor contrary to sec. 23 of the Liquor Act, that is liquor as described in the interpretation clause. It is true that he had whiskey and beer both of which were intoxicating or contained proof spirits in excess of the quantity prescribed; he also had liquor which was non-alcoholic but the word liquor in the charge must be construed as relating to the whiskey and the beer, or to liquor as defined in the interpretation clause as the word liquor is qualified by the words which follow, viz.: contrary to sec. 23 of the Liquor Act. I do not think that the accused was in any way prejudiced by the omission of words specifying the particular nature of this liquor. To hold otherwise would make it almost an impossibility to procure a conviction under the Liquor Act.

Sections 43 and 44 above quoted dispense with the necessity of such particularization. If these particulars were necessary in the information sec. 52 would be meaningless because if the particulars were essential to information these essential elements should be proven but this proof is dispensed with by that section.

The fifth objection is that ''the said information was bad on its face and void in charging several offences in the alternative.'' The information, in my opinion, charges only one offence namely, keeping of liquor for sale at the time and place alleged.

The sixth objection is that ''there was no evidence of the

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offence charged or of any offence." In regard to this aspect of the case I have come to the conclusion that there was evidence upon which the Magistrate could properly convict the accused. I wish, however, to call attention in connection with this to the evidence upon which the Crown very strongly relied, that is the certificate of the Provincial Analyst. Section 82 provides as follows:—

"In any prosecution under *The Liquor Act*, or amendments thereto or regulations made thereunder, production by a police officer, policeman, constable or inspector of a certificate or report signed or purporting to be signed by a Dominion or provincial analyst as to the analysis or ingredients of any liquor or other fluid or any compound or substance, such certificate or report shall be conclusive evidence of the facts stated in such certificate or report and of the authority of the person giving or making the same without any proof of appointment or signature. (1917, ch. 22, sec. 15)."

What happened in this case was the seizure of the liquor in the hotel in Midnapore its sealing in the presence of the accused, its forwarding by the police here through Dominion Express to the Provincial Analyst, Doctor Kelso, at Edmonton, its receipt by him in a sealed condition, the subsequent analysis and its return presumably by express with a certificate. There is no evidence that the seal had been in any way tampered with. The liquor was thus out of the custody of the Police and in the possession of a common carrier and if I had no other evidence before me than that of the analyst I would feel that it was my duty to quash the conviction. If the prosecution are going to rely on that class of evidence I think that a duty rests upon the Court to see that the identity of the liquor seized and forwarded for analysis, and in connection with which the analyst's certificate has been issued, has been established fully.

This is a section which extends to the prosecution in these cases an extraordinary power in procuring the most essential evidence. The certificate need not be signed by the analyst. It need only purport to be signed by him and it is admissible in evidence. It is conclusive evidence of the contents of the packages analyzed. The accused or his counsel have no opportunity whatever of cross-questioning the analyst and it is wholly beyond their power through that medium to bring to the notice of the Court any error which he may have made in his analysis, in fact no matter how defective the analysis may be, proof of its erroneous nature by many equally competent analysts, would be of no avail, as the certificate is conclusive.

In addition to the proof by means of the certificate of the in-

toxicating nature of the liquor the evidence of one of the witnesses shows that when the liquor was seized he tasted it and he pronounced it to be whiskey. I was at first of the opinion that evidence establishing that the liquor seized was whiskey was not sufficient to establish that it came within the terms of the Liquor Act but after looking into the authorities I have come to the conclusion that when the word "whiskey" is used by a witness and he positively identifies the liquor as such the Court is entitled to take judicial notice of the fact that it is intoxicating liquor.

"The Court will take judicial notice of facts which are notorious." Phipson Law of Evidence 5th Ed. p. 17. See also *R.* v. *Scaynetti* (1915), 34 O.L.R. 373, 25 Can. Cr. Cas. 40; *R.* v. *Lachance* (1920), 53 D.L.R. 313, 30 Man. L.R. 432, 33 Can. Cr. Cas. 170.

The seventh objection sets forth that the "evidence of the analysis of the alleged liquor was illegally received by said magistrate." The magistrate was justified, in my opinion, in receiving it under sec. 82 above quoted.

The eighth and ninth objection respectively set forth that "the only evidence of the offence charged was illegal, and inadmissible evidence," and that "the magistrate received and acted on illegal and inadmissible evidence in making said conviction." These objections are based upon the fact that the police officers entered upon the premises under a search warrant which I find to be invalid and void it being, as I pointed out before, based upon defective information. While, however, the search warrant itself may be invalid and void and proceedings taken under it such as the seizure of the liquor, set aside, this fact alone does not render inadmissible evidence otherwise admissible. It has been so held in this Court in the case of *R.* v. *Gibson* (1919), 30 Can. Cr. Cas. 308; and see *R.* v. *Moore* (1922), 63 D.L.R. 472, 37 Can. Cr. Cas. 72, 17 Alta. L.R. 503.

The ninth and last objection was a general allegation "and for other grounds appearing on the face of the proceedings" but no reasons were advanced in connection with this objection which were not dealt with in connection with the others.

My conclusion is that the Magistrate was justified in convicting the accused and as the conviction is regular on its face, the application to quash the conviction must be dismissed.

Counsel for the accused, however, urges upon the Court his right in view of all the circumstances to have the penalty which was imposed by the magistrate reduced. I am of opinion that this should be done.

I had some doubt at first as to whether or not I had author-

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ity to do so but after hearing argument on a subsequent date on this point I am satisfied that it is quite within the power of the Court to make an order to that effect. When the Liquor Act was passed in 1916 there was enacted sec. 70 which reads as follows:—

"No judge, magistrate, justice or inspector shall have any power or authority *to remit, suspend or compromise any* penalty or punishment inflicted under this Act; . . . . (1916, ch. 4, sec. 70)."

There was also enacted at the same time two sections of this Act 62 and 63 which were subsequently found to be unworkable and were repealed by sub-secs. 16 and 17 respectively of sec. 55, ch. 4, stats. 1918 substituting, therefore, two new sections, 62 and 63. These sections read as follows:—

"62. No conviction, order or warrant for enforcing the same or other process shall upon any application by way of *certiorari* or for *habeas corpus* or upon any appeal be held insufficient or invalid for any irregularity, informality or insufficiency therein, or by reason of any defect of form or substance therein, *if the court or judge hearing the application or appeal is satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed.*

63. The Court or Judge hearing any such application or appeal, may *upon being satisfied as aforesaid confirm, reverse or modify* the decision which is the subject of the application or appeal or may amend the conviction or other process or may make such other conviction or order in the matter as he thinks just, and may by such order exercise any power which might have been exercised at the trial and may make any order as to costs.

(2) Such conviction or order or such amended conviction shall have the same effect and may be enforced in the same manner as if it had been made at the trial or by process of the court hearing the application or appeal. (1918, ch. 4, sec. 55)."

Council for the accused contends that while the Court in the past has exercised its jurisdiction to reduce penalties imposed in cases of this kind to within the limits prescribed for the particular offence alleged if the penalty exceeds that limit or to impose a different penalty if the offence disclosed in the depositions is an offence other than that alleged it has power and should exercise its discretion to modify penalties imposed even though they are within the prescribed limits if they are excessive. While the Legislature probably intended that no Judge should have the power on a *certiorari* application to reduce the fine imposed within the prescribed limits by the magistrate we

are nevertheless bound, not by what it may have intended but by the intention as expressed in the statute. Dealing with the intent of the Legislature it cannot be better expressed than was done by Stuart, J., in the case of *R.* v. *Fox* (1918), 42 D.L.R. 650 at p. 651, 13 Alta. L.R. 535, 30 Can. Cr. Cas. 232, 233, where he says:—"The fact that the legislature did not say what it meant is no very good reason for not holding that it meant what it said." While it may have meant that we could not reduce penalties imposed within the prescribed limits I think in effect that it has granted to the Court the power to do so. It is quite true that while sec. 70 which was in the original Act passed in 1916 is prohibitive it is prohibitive only to the extent that no Judge, magistrate, Justice of the Peace or inspector shall have any power or authority *to remit, suspend or compromise* any penalty or punishment enacted under the Act. Section 62 says:—"No conviction . . . . . shall be held insufficient . . . . . if the court or judge hearing the application or appeal is satisfied *by a perusal of the depositions* that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed." Sec. 63 says:—"The court or judge hearing any such application or appeal, may upon being *satisfied as aforesaid confirm, reverse or modify* the decision which is the subject of the application or appeal. . . . . ."

Counsel for the accused contends that secs. 63 and 70 are not in conflict, that 70 prohibits the *remission, suspension or compromise* of any penalty while 63 gives the Court under certain circumstances the right to *confirm, reverse or modify* the decision. On the other hand counsel for the Crown contends that the word "compromise" as used in sec. 70 is the same in effect as the word "modify" as used in sec. 63 and that to modify the penalty would in effect be to compromise it. He relies upon the definition of the word "compromise" as set out in Murray's Dictionary, which is as follows:—"To adjust or settle differences, conflicting claims, etc., between parties," and from this he argues that the Court in making an order reducing would be settling a difference between the King and the accused. Bouvier's Law Dictionary defines compromise as:—"An agreement made between two or more parties as a settlement of matters in dispute."

It is pretty difficult to tell just what the Legislature meant by the word "compromise" as used in sec. 70 but I cannot believe that they meant to use the word as synonymous with an order made by a Court of competent jurisdiction. It perhaps may have intended officers under the Liquor Act, such as in-

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spectors, acting honestly and in good faith, should compromise a penalty by accepting a smaller amount than that adjudged. To compromise implies of itself a mutual agreement as where the Magistrate or other officers acting in behalf of the Crown and not in his official capacity negotiates with the accused and agrees upon a settlement of the penalty.

In my opinion there is no conflict between the words used in the two sections. The power to modify is a power granted to the Court by virtue of the Act itself and not by reason of any agreement with or between the parties before the Court. Assuming, however, that there may be a conflict it is further urged on behalf of the accused that sec. 63, having been passed in 1918 and sec. 70 having been passed in 1916 that there is a repeal, although not by express words, by implication of sec. 70 insofar as it is inconsistent with sec. 63, and, therefore, effect should be given to sec. 63 and consequently the Court has the right to reduce the penalty if satisfied that an offence has been committed. The words are clear and intelligible. If the Court is satisfied, after a perusal of the definitions as set forth in sec. 62, that an offence against the provisions of the Liquor Act has been committed then he has the jurisdiction to confirm, reverse or modify the decision or to make any order in connection therewith under sec. 63 of the Act. I am satisfied that an offence against the Act has been committed otherwise I would be bound to quash the conviction.

It is quite possible that the Legislature had in mind at the time that if an offence other than the one alleged or other than the one for which the man was convicted had been committed then the conviction might be amended and an order made to suit the conviction as amended, but they have not said so. In this connection it might be well to call attention to sec. 1124 of the Criminal Code which gives certain powers to the Court in connection with the amending of convictions. The wording there is much more specific and contemplates that while the evidence may not have disclosed the offence itself with which the man was charged that it can be amended if it disclosed an offence of a similar nature. Section 1124 of the Criminal Code is as follows:—

"1124. No conviction or order made by any justice, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge before which or whom the question is raised, upon perusal of the depositions, is

satisfied that *an offence of the nature described* in the conviction, order or warrant, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; Provided that the Court or Judge, where so satisfied, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respect to deal with the case as seems just as are by sec. 754 conferred upon the Court to which an appeal is taken under the provisions of sec. 749."

In this section of the Criminal Code they refer to "an offence of the nature described in the conviction" while under sec. 62 of the Liquor Act they refer to "an offence against the provisions of this Act" which must necessarily include the offence for which the accused was convicted.

The Legislature in endeavouring to confer upon the Court very wide powers in upholding the convictions or amending the conviction to cover offences not alleged but disclosed by the depositions, have granted to it jurisdiction to review, and if thought advisable, revise penalties under certain circumstances. The result of the legislation is, however, salutary. We find that in all Criminal proceedings in England that the Criminal Court of Appeal has a right there to review sentences which are imposed in the case of indictable offences. In 1921 Parliament of Canada (Statutes 1921 ch. 25, sec. 22) saw fit to amend the Criminal Code by conferring upon the Appeal Courts of the various Provinces the right to review sentences "where an offender has been convicted of an indictable offence other than one punishable with death." And this power of review is given notwithstanding that the penalties to be imposed are no greater than those under the Liquor Act in force in this Province.

Offences under the Liquor Act, in my opinion, should be dealt with by the Courts on the same lines as indictable offences. The Legislature considers nearly all offences under the Act sufficiently dangerous to the State to require punishment similar to that which is provided for in the cases of indictable offences under the Criminal Code. Exceedingly heavy fines may be imposed and in default terms of imprisonment ordered or the goods of the accused distrained as the case may be or liberty of the subject may be restrained in the first instance. The punishment imposed stamps the majority of offences under the Act as crimes, legislation by the Parliament of Canada being all that is lacking to make them such in law. The offence here charged being in the nature of a crime the Legislature has acted wisely although unintentionally in granting to a limited degree power

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to review the adjudication of the magistrate as to penalties when before the Court upon application of this nature. The penalties provided by the Act are in the discretion of the Court having original jurisdiction within certain minimum and maximum limitations. It could not have been intended that such Court should impose the maximum penalty. If that were the case the Legislature would have fixed a definite penalty, the maximum. There is a discretion to be exercised by the Court trying the case in the first instance. In this case a penalty of $1,000, the maximum, was imposed. From a careful survey of the whole of the evidence I can find nothing to justify this excessive fine. There was some evidence to the effect that the accused endeavored to bribe the police officer who arrested him but I attach very little importance to that, as up to the date of the hearing of this application no charge had been laid against him for that offence, which should have been done if the attempted bribery took place. This was not a circumstance which the magistrate should have taken into consideration in fixing the penalty. The accused was not being punished for attempting to bribe a police officer in the performance of his duty but for a violation of the Liquor Act.

The conviction will, therefore, be affirmed but the fine reduced from $1,000 to $500 without costs to either party.

Conviction affirmed, but fine reduced.

CLARKE v. JANSE DRILLING Co.

Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ.A. September 30, 1922.

JUDGMENT (§ II A—60)—CONCLUSION OF TRIAL JUDGE—CONFLICTING EVIDENCE—EVIDENCE TO SUPPORT CONCLUSION—APPEAL.

Where evidence as to the ownership of goods is conflicting but the trial Judge rightly holds it established beyond doubt that the plaintiff had had a quantity of goods at the place in question of the dimensions represented by him and that the same disappeared without his knowledge or authority, and where there is evidence from which the Judge might draw the conclusion that it was the defendant who removed the goods, an Appellate Court will not disturb his finding unless it is shewn that he was clearly wrong.

APPEAL by defendant from the judgment of Walsh, J., in favour of the plaintiff for $731.50 in an action for damages for wrongful conversion of goods. Affirmed.

H. P. O. Savary, K.C., for appellant.

A. L. Smith, K.C., for respondent.

HYNDMAN, J.A.:—The action was for damages for the wrongful conversion by the defendant company in that they converted to their own use certain pipe or casing belonging to the plaintiff and sold same to the Imperial Oil Co.

Both parties owned casing of the same general description in the town of Okotiks, piled at different locations close to the

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railway tracks and the question is largely one of identification.

The evidence adduced was conflicting but the trial Judge held (and a perusal of the case convinces me rightly) that it was established beyond doubt that the plaintiff had had a quantity of casing there of the dimensions represented by him and that the same disappeared without his knowledge or authority.

If there was any evidence from which the trial Judge might draw the conclusion that it was the defendant who removed the goods in question then, unless it is shewn that he was clearly wrong, I think the authorities are almost unanimously to the effect that such finding ought not to be disturbed.

The evidence of the plaintiff is that he had the casing mentioned piled at a certain point in the railway yards. The witness Bateman testified that this same casing was shown to him by Clarke, out of which, at his request he removed some 6¼ inch casing not in question here. Clarke and Bateman positively identify this casing.

The latter witness swears that, subsequently to this, he saw the same pipe being removed by two men, Horsman and McNeill.

The last mentioned witnesses testified that whilst they did haul away piping it was not this but another pile. The description of the goods sold by Janse to the Imperial Oil Co. corresponds almost exactly to that which plaintiff says he had stored there.

It was established that the defendant company had a large quantity of similar material in this same vicinity from time to time, and I would gather that not the greatest care was exercised in keeping account of it and there was much room for mistakes or confusion.

No comments were made by the trial Judge as to the credibility of any of the witnesses and I think, therefore, it must be assumed that the evidence for the successful party must have appeared to him more satisfactory than that of the other side.

But granting the evidence of both sides to be equally balanced, it seems to me the probabilities are in favour of the plaintiff's contention.

I would dismiss the appeal with costs.

CLARKE, J.A.:—I concur.

BECK, J.A. (dissenting):—I take a different view of the facts and would allow the appeal with costs. *Appeal dismissed.*

REX v. GURSKI.

Saskatchewan Court of King's Bench, Bigelow, J. October 12, 1922.

ANIMALS (§ ID—35)—STRAY ANIMALS ACT, R.S.S. 1920, CH. 124, SEC. 49 (*d*)—APPLICATION—WRONGFUL CONVICTION UNDER SECTION 949 CR. CODE, R.S.C. 1906, CH. 146—APPLICATION.

Section 49 (*d*) of the Stray Animals Act, R.S.S. 1920, ch. 124, applies only to (*a*) unorganised portions of the Province not included within a herd district, and (*b*) to the herd district and to organised portions

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of the Province in the event of a pound for any reason not being accessible or available. A conviction under this section is, therefore, bad and will be quashed where the evidence shews that the district in question was an organised district, being a rural municipality, and that the municipality had a by-law restraining animals from running at large, and that a pound was accessible and available. Section 949 of the Cr. Code does not apply to an offence against a provincial statute.

CASE stated by two Justices of the Peace under sec. 761 of the Cr. Code, on a conviction under sec. 49 (*d*) of the Stray Animals Act, R.S.S. 1920, ch. 124. Conviction quashed.

P. H. Gordon, for appellant. No one for respondent.

BIGELOW, J.:—This is a case stated by two Justices of the Peace under sec. 761 of the Cr. Code R.S.C. 1906, ch. 146.

Appellant was charged under sec. 49 (*d*) of the Stray Animals Act, R.S.S. 1920 ch. 124, with unlawfully rescuing cattle. The evidence showed that he did not actually rescue the cattle, but that he only incited or attempted to rescue. He was found guilty as charged.

If the only question here were whether the accused was wrongfully convicted of the offense charged when he should have been convicted of an attempt, I would, under sec. 765 of the Cr. Code, remit the matter to the Magistrates to amend the conviction. But, in my opinion, the appellant could not be convicted of an attempt. Section 949 of the Cr. Code relied on by the Magistrates only refers to indictable offences, and does not refer to an offence against a Provincial statute; and sec. 49 (*d*) of the Stray Animals Act only applies to (*a*) unorganised portions of the Province not included within the herd district, (*b*) the herd district and to organised portions of the Province in the event of a pound for any reason not being accessible or available. See sec. 40 of the said Act. Section 49 (*d*) is part of Part V of the Act, and the provisions of Part V only apply to (*a*) and (*b*) above quoted. The evidence was that the district in question is an organised district, being a rural municipality; that the municipality had a bylaw restraining animals from running at large; and that a pound was accessible and available. In my opinion, the conviction is bad, and is, therefore, quashed, with costs against the informant.

Mr. Gordon asked for an order allowing costs of the service of the appointment, notwithstanding that the service was made by a person other than the sheriff or his deputy. Two appointments were served. The charges for service are $10.15 and $39.20 respectively. The first service should not be allowed, as it was useless. The second service seems to me to have been very expensive. I allow the appellant the costs of the second service, but no more than would be allowed to a sheriff for similar service, the amount to be fixed by the Local Registrar on taxation.

Judgment accordingly.

ALLEN v. HAY.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 31, 1922.

ESTOPPEL (§ III I—118)—FRAUD ON BANK—NOTE GIVEN TO BANK MANAGER TO MAKE APPEARANCE OF ASSETS—INSOLVENCY OF BANK—ACTION BY BANK COMMISSIONER OF STATE OF WASHINGTON—LIABILITY OF MAKER OF NOTE.

The defendant gave a promissory note to make an appearance of assets, so as to deceive the bank examiner in the State of Washington in connection with the account of a certain company. In an action by the bank commissioner of the State of Washington on the insolvency of the bank to recover on the note, the Court held, affirming the judgment of the British Columbia Court of Appeal, that the case must be decided by the law of the State of Washington and under that law the defendant was estopped from alleging want of consideration for the note, although the manager of the bank with whom the transaction was made had agreed, at the time the note was given, that he should not be liable.

[*Hay* v. *Allen* (1922), 67 D.L.R. 248, affirmed.]

APPEAL by defendant from the judgment of the British Columbia Court of Appeal (1922), 67 D.L.R. 248, in an action by the bank commissioner of the State of Washington to recover on a promissory note. Affirmed.

Craig, K.C., for appellant.

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

IDINGTON, J. (dissenting):—Respondent sued in his capacity of Bank Commissioner of the State of Washington upon a promissory note for $10,521, given by the appellant to the Northern Bank & Trust Co. of which and by virtue of statutory enactments of said state the said respondent has become, by reason of its insolvency, the administrator, and as such entitled, instead of said bank, to sue upon said promissory note.

There never was any consideration for said promissory note. It, therefore, never was a valid security. This is established by the evidence of appellant and a memorandum of agreement given by the president of the bank contemporaneously with the giving of the said note.

It is sought and, so far successfully, before the trial Judge Macdonald, J., (1921), 29 B.C.R. 323, and in the Court of Appeal (1922), 67 D.L.R. 248, to overcome that difficulty by virtue of the law, it is said, estopping the appellant from setting up any such defence under the circumstances in question which are alleged to have constituted fraud on the part of the appellant.

To render such an estoppel *in pais* an effective answer to the defence of no valuable consideration, there must be shewn on the part of the party setting up such an estoppel, not only the exis-

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tence of actual misrepresentation or fraud, but also that the party contracted with was ignorant thereof and was thereby induced to change his position on the faith of it.

Such, as I understand the evidence of the expert giving the law of the State of Washington, is the law of that state on the issue thus raised herein, as it is our law on the subject.

The only doubt created as to such statement of the law was the hesitation of the witness as to the effect of the decision by the Supreme Court of that state in the case of *Moore, State Bank Examiner* v. *Kildall* (1920), 191 Pac. Rep. 394, to which he referred the trial Judge for his consideration.

I find, on reading it for myself therefore, that the Court found and, as I agree, correctly so, if I may be permitted to say so, that there was, in fact, valuable consideration for the note in question therein. I am unable, therefore, to attach much importance to that case for what we are concerned with herein.

The estoppel, as pleaded in some of the pleas, sets up the misleading of the state examiner as something the respondent can rely upon. There seem to be several answers thereto.

It is the claim of the bank that is here in question. And there is no evidence that the bank was either misled or that it was induced in any way to change its position by reason of the alleged fraud.

The evidence in support of the claim of the respondent and, so far as the evidence before us goes, proves that he, by virtue of his taking over the administration of the assets, stands on no higher ground than that of the bank itself.

And if the evidence of such officers as had the duty at various times of examining the bank's assets is to be considered at all, it falls very far short of maintaining any such pretension as set up. Indeed, on the contrary, it shews, for the most part, that the result would have been the same.

And, if the suggestion in respondent's factum that Moore was only the examiner and not the Commissioner is worth considering, we have no evidence of that officer who was then the superior of Moore.

In short, despite what counsel sets up that the burden of proof is on the appellant, I submit it clearly is upon him pleading any defence to prove it, and this has not been done, or pretended to have been done, by anything presented in this case.

To render the contention, if possible, more absurd, this note was given before the statute law was changed, and it was in 1917, to render it more drastic, and there is no pretence that it

was retroactive, so far as the evidence goes. The reference in same and in respondent's factum to Remington's Code are not very helpful as these books are not available.

Indeed we have cases cited to us from American authorities, in other jurisdictions than Washington State, which are of no more binding force on the Washington Courts than they would be on us.

We are asked to extend the law of estoppel *in pais* beyond anything sworn to be the law of Washington, and far beyond anything in our own law, in a way that we should not for a moment countenance.

The conduct of the appellant may have been the result of crass stupidity, or of deliberate fraud, but that is, I must respectfully submit, no reason for our departing from the principle of the law, which is to take the law of a foreign state from the sworn evidence of expert witnesses testifying thereto, and so far as that is not established thereby relying upon our own law.

To confuse the duty towards the party to the contract with that due to someone else is as yet no part of our law and is not proven to be the law of Washington.

The case cited by counsel for respondent of *Smith* v. *Kay* (1859), 7 H.L.Cas. 750, at p. 770, 11 E.R. 299, 30 L.J. (Ch.) 45, is in no way applicable to what is in question herein. That was, indeed, the converse of this case. Indeed it suggests rather the thought that the fraud in question herein was one joined in by the bank, if not wholly the product of the bank, and hence suggests another remedy for the kind of fraud involved herein than can be afforded in such cases as this.

The joint effort of the bank and the appellant to deceive, may have laid a foundation for an action of deceit but that would not help here where only the neat question of the proper application of the doctrine of estoppel *in pais* is all that should concern us.

The appeal should be allowed with costs throughout.

DUFF, J.:—It is not disputed that the plaintiff must fail if the right of recovery depends upon the rules of the law of British Columbia. It is, therefore, incumbent upon him to prove the law of the State of Washington. This he must prove as matter of fact by the evidence of persons who are experts in that law. These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and

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construe the passages cited for itself in order to arrive at a satisfactory conclusion. *Nelson* v. *Bridport* (1845), 8 Beav. 527, 50 E.R. 207, 10 Jur. 871; *Bremer* v. *Freeman* (1857), 10 Moo. P.C. 306, 14 E.R. 508; *Di Sora* v. *Phillipps* (1863), 10 H.L. Cas. 624, 11 E.R. 1168, 33 L.J. (Ch.) 129; *Concha* v. *Murrieta* (1889), 40 Ch. D. 543, 60 L.T. 798; *Rice* v. *Gunn* (1884), 4 O.R. 579.

In *Bremer* v. *Freeman, supra*, Lord Wensleydale's judgment delivered on behalf of the Privy Council included a most searching examination of the French authorities bearing upon the point of French law in dispute. (See 14 E.R. at p. 526 *et seq.*)

I think applying these principles the trial Judge, Macdonald, J., was entitled to examine the authorities upon which he relied (29 B.C.R. 323). The decision in *Moore* v. *Kildall, supra*, was based upon more than one ground and the substantive grounds upon which the Court proceeded in pronouncing the judgment was that the note sued upon, having been given for the express purpose of enabling the officials of the bank to present a false appearance of assets, the plaintiff was, representing as he did the interests of the creditors, entitled to insist as against the defendant that the instrument sued upon was an enforceable obligation. The Court cited with approval and relied on a passage quoted from a decision of the Supreme Court of Illinois in the case of *Golden* v. *Cervenka* (1917), 116 N.E. Rep. 273, at p. 281. That passage in full is in the following words:—

"Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the examiner and enable the bank to continue business, although the circumstances may have been such that the bank itself could not have collected the securities, it has been held that the receiver, representing the creditors, could maintain the action and the makers were estopped, upon the insolvency of the bank to allege want of consideration. *Hurd* v. *Kelly* (1879), 78 N.Y. 588, 34 Am. Rep. 567; *Best* v. *Thiel* (1879), 79 N.Y. 15; *Sickles* v. *Herold* (1896), 149 N.Y. 332, 43 N.E. Rep. 852, affirming 36 N.Y. Supp. 488; *State Bank of Pittsburg* v. *Kirk* (1907), 216 Pa. 452, 65 Atl. 932; *Peoples' Bank of California* v. *Stroud* (1909), 223 Pa. 33; *Dominion Trust Co.* v. *Ridall* (1915), 249 Pa. 122, 94 Atl. 464; *Lyons* v. *Benney* (1911), 230 Pa. 117, 79 Atl. 250, 34 L.R.A. (N.S.) 105. In one such case *Lyons* v. *Benney, supra*, the defence was set up by an affidavit which the Court held insufficient, saying:—"The substance of this affidavit of defence is that the appellant made and delivered his note to the bank in furtherance of a scheme to deceive the bank examiner, under a

promise made to him by the bank that he would not be held liable upon the obligation. He agreed that it should appear as one of the assets of the institution for the purpose of deceiving those whose duty it was to examine them, and he now sets up the defence that, as it was to serve no other purpose, it is to be regarded as a worthless piece of paper under this agreement with the bank . . . . So this appellant was a party to a scheme of the officers of the bank to enable them to make a deceptive and fraudulent shewing of assets, and as the fraud was perpetrated upon the creditors, now represented by the bank's receiver, he can maintain an action on the note for their benefit . . . Neither the law nor good conscience can sanction the contention of the defendant that he ought to be permitted to take advantage of the fraudulent agreement between him and the bank to which its creditors were not parties and for whom the receiver sues."

One of the decisions mentioned in this passage, *Lyons* v. *Benney*, is referred to by the trial Judge, (29 B.C.R. 323), a decision of the Supreme Court of Pennsylvania, and that Court in that case cited and relied upon the following passage from the judgment of Ross, C.J., delivered in *Pauly* v. *O'Brien* (1895), 69 Fed. Rep. 460 in the Circuit Court of California. In his judgment, Ross, C.J., says at pp. 461-2:—

"If, however, this was not really the case, but that in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same, for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice to leave him bound who has bound himself. It will never do for the Courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice-president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and

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purely voluntary, but which enabled the bank officers to make a deceptive, and, therefore, fraudulent, shewing of assets? Obviously nothing. There will be judgment for the plaintiff for the amount due upon the note sued upon, according to its terms, with costs."

The law as laid down in this passage cited from the judgment of Ross, J., delivered in 1895 (69 Fed. Rep. at pp. 461-462), and in that cited from the judgment of Dunn, J., speaking on behalf of the Supreme Court of Illinois, in 1917 (116 N.E. Rep. at p. 281) appears from the evidence given in this case to be a law of the State of Washington.

Mr. Craig in a very able argument contended that the oral witnesses who spoke as to the law of the State of Washington deposed to the effect that the liability of the defendant, if it existed at all, arose from the application of the general principle of estoppel *in pais*; being conditioned, consequently, by the existence of the constituents of estoppel including a change of position on part of the party relying upon the estoppel brought about in consequence of the conduct of the other party. I think if Mr. Craig's minor premise is sound, namely, that the rule invoked by the plaintiff does rest upon a strict application of the doctrine of estoppel as recognised in the law of the State of Washington as well as in the English law his conclusions, necessarily, follow. But, in truth, this premise is much more doubtful; the cause of action and the only cause of action vested in the plaintiff is the bank's cause of action, to that he succeeds by force of the statute and if the principles of the common law were to be applied, it is quite plain that nothing done by the defendant with the concurrence of the bank could, consistently with such principles, preclude the defendant from resisting the bank's claim.

The rule expounded in the authorities already referred to is a rule resting on broader and deeper principles. The statutory custodian of the property of the insolvent corporation while he succeeds to the assets of the corporation does so, primarily, in the interest of the creditors and (although in the first instance his right to the assets is not the right of the creditors but the right of the corporation in liquidation), the legal relations of the corporation undergo some alteration by reason of the change of status involved in its statutory dissolution and the rule above mentioned has been established as a rule of policy, a rule required in such circumstances by justice and convenience. A person who has participated in an attempt on the part of officials of the corporation to present a false appearance of prosperity, and for that purpose has been content to represent himself as a debtor of the company, is not permitted to deny the existence in law of this liability; but this rule is a substantive rule of law, it

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is not a mere rule of evidence. It is analogous to the rule by which a person improperly placed on the list of shareholders of a joint stock company and entitled, therefore, to have his name removed must act promptly. If he fail to act promptly he will be denied relief and in winding up proceedings will be compelled to pay for the shares; because it is conclusively presumed against him that the presence of his name has added to the credit of the company.

The appeal should be dismissed with costs.

ANGLIN, J.:—If the plaintiff, in order to succeed, were obliged to establish the facts necessary to make a case of estoppel against the defendant, including proof of prejudice ascribable to the defendant's conduct, I should be of the opinion that such a case was not made out. But the evidence in the record establishes to my satisfaction that it is a rule of substantive law in the State of Washington that "one giving a note as 'live paper' to make an appearance of assets so as to deceive the bank examiner is estopped, on the insolvency of the bank, to allege want of consideration." *Moore* v. *Kildall*, 191 Pac. Rep. 394; *Barto* v. *Nix* (1896), 46 Pac. Rep. 1033; *Skagit State Bank* v. *Moody* (1915), 150 Pac. Rep. 425. That is undoubtedly what the defendant did in the present case.

Other cases cited at Bar and in the judgment delivered in the Court of Appeal (67 D.L.R. 248), indicate that a similar rule obtains in other American jurisdictions. *Lyons* v. *Benney* 79 Atl. Rep. 250; *Pauly* v. *O'Brien* 69 Fed. Rep. 460; *Golden* v. *Cerceuka* 116 N.E. Rep. 273, at p. 281.

The judgment holding the defendant liable was in my opinion right and should be upheld.

BRODEUR, J.:—The action is on a promissory note and is instituted by the bank commissioner of the State of Washington. In 1914, the defendant Allen, who was then living in the United States, gave an accommodation note to the Northern Bank & Trust Co. for the purpose of making an appearance of assets so as to deceive the bank examiner. The Northern Bank & Trust Co., in spite of these misrepresentations as to its assets, had, a few years later, to be put into the hands of the bank commissioner of the State who, according to the laws of the State of Washington, proceeded to the liquidation of the affairs of the bank. He found among the assets Allen's promissory note; and as Allen is now living in British Columbia he is sued before the Courts of this Province by the bank examiner for the payment of this note. His defence is that there was a total failure of consideration. The case has to be decided by the laws of the State of Washington where the note was signed and the liability was incurred.

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There is no doubt that no consideration was given. But it is contended by the bank commissioner Hay that, according to the laws of the State of Washington a note given in similar circumstances can be sued upon by the official liquidator of the commissioner.

This note was evidently given for a fraudulent purpose viz. for the purpose of shewing in the bank returns assets which did not in reality exist and also for the purpose of inducing the public to deposit their moneys in the bank. Very severe laws have been passed in that State in order to put an end to such fraudulent transactions; and the jurisprudence is to the effect that the bank commissioner could sue on these notes though they were originally given without consideration.

In the case of *Golden* v. *Cervanka*, 116 N.E. Rep. 273, at p. 281, the Supreme Court of Illinois, where similar legislation exists, decided that: "Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets so as to deceive the examiner and enable the bank to continue business although the circumstances may have been such that the bank itself could not have collected the securities, it has been held that the receiver representing the creditors could maintain the action and the makers were estopped upon the insolvency of the bank to allege want of consideration."

In two cases of *Lyons* v. *Benney* 79 Atl. Rep. 250, and *Pauly* v. *O'Brien*, 69 Fed. Rep. 460, the principle of law which has been enunciated is that the giving of such notes is a fraud upon the creditors of the bank.

A decision of the Appellate Division of the Supreme Court of Washington in 1920 is to the same effect. It was held in the case of *Moore* v. *Kildall*, 191 Pac. Rep. 394, that "one giving a note as live paper" to make an appearance of assets so as to deceive the bank examiners is estopped on the insolvency of the bank to allege want of consideration.

It is contended by the defendant that the prejudice which is essential to constitute a case of estoppel has not been proved in this case.

We have, in this case, facts which are absolutely similar to those that were in issue in the *Moore* v. *Kildall* case and there is no doubt, according to my opinion, that if Allen was still living in the State of Washington and had been sued there he would have been condemned to pay the note. We have then here to apply the same principles of law and to render the same decision as should have been rendered there, and even if our general notions as to the application of the rule of estoppel are violated in some respects, we have to disregard these notions and apply the law as it is enunciated in the Washington decisions.

I consider that the appellant has been legally condemned to pay his note and his appeal should be dismissed with costs.

MIGNAULT, J.:—There is no difficulty here as to facts. The defendant appellant, without consideration, signed at the request of one Phillipps, then president of the Northern Bank & Trust Co. of Seattle, State of Washington, a note for $10,000 in favour of the said bank, and a year later, at the request of one Collier, who had replaced Phillipps as president of the bank he signed a renewal note for a like amount, receiving from Phillipps and, subsequently, from Collier a written acknowledgement that there was to be no liability under the note and its renewal. This note was given to the Bank to create a false appearance of assets and so deceive the State bank examiner and prevent the closing up of the bank.

The law to be applied is that of the State of Washington, proved by expert witnesses. The respondent, the bank commissioner of that State, is entitled to sue on this note. He represents the bank and its creditors. The vital question is whether in a suit by the bank commissioner, acting on behalf of the creditors of the insolvent bank as well as of the bank itself, the appellant is estopped from setting up the collateral agreement with the bank that he should not be liable on this note.

I think, according to the evidence made of the law of estoppel in force in the State of Washington, and under the decisions cited by the trial Judge, (29 B.C.R. 323), who was referred to them by the expert witness called by the appellant for a statement of the law governing estoppel in the State of Washington, that the appellant is estopped from raising the defence of non-liability or want of consideration against the respondent.

My only doubt, at the hearing, was whether prejudice to the creditors, necessary for estoppel, had been shewn. But I think, on consideration that prejudice must be assumed, for to allow an insolvent bank to continue in business by a shew of fictitious assets is certainly prejudicial to all who deal with the bank and acquire rights against it. It may well be that had the appellant not given his note, the bank might have been allowed by the bank examiner to remain open for a further period, but that is merely a surmise, and too much reliance must not be placed on the statement of Moore, one of the bank examiners, that he thinks he would not have done more than he did had the appellant's note not been exhibited to him. But the intention, to which the appellant weakly allowed himself to become a party, was unquestionably to deceive the State bank examiner, and, under these circumstances, the decisions which, in the State of Washington, are accepted as the law and which apply to such

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a case the doctrine of estoppel, are consonant with the true principles of justice and fair dealing, and I think they fully support the judgment appealed from.

The appeal should be dismissed with costs.

Appeal dismissed.

Re GUMP.

Ontario Supreme Court in Bankruptcy, Orde, J. October 15, 1921.

BANKRUPTCY (§IV—40)—INTERIM RECEIVER—ASSIGNMENT—PETITION FOR RECEIVING ORDER—MEETING OF CREDITORS—EXPENSES OF INTERIM RECEIVER—INSUFFICIENT ASSETS—BANKRUPTCY ACT—SEC. 5.

The expenses of an interim receiver who has been superseded by an assignee, owing to a voluntary assignment, shall have priority over all other expenses in the administration.

[*Re Auto Experts Ltd.* (1921), 59 D.L.R. 294, referred to. See Annotations 53 D.L.R. 135, 59 D.L.R. 1.]

APPLICATION by Richard Tew, an authorised trustee under the Bankruptcy Act, for an order directing another authorised trustee, to pay the applicant's costs and other expenses in connection with his appointment as interim receiver of the property of Craig J. Gump, an insolvent debtor, under sec. 5 of the Act.

A. L. Fleming, for Richard Tew.
G. N. Shaver, for N. L. Martin.

ORDE, J.:—This is a case which, like that of *Re Auto Experts* (1921), 59 D.L.R. 294, 49 O.L.R. 256, shews how important it is for authorised trustees to obtain an indemnity from the creditors under secs. 15 (5) and 27 (*b*) of the Bankruptcy Act, in all cases where there is any doubt as to the value of the estate, before proceeding with its administration.

In the present case, one of the creditors of Craig J. Gump, who was carrying on the business of the Arlington Hotel, filed a petition in bankruptcy; and, pending the hearing of the application, Richard Tew, an authorised trustee, was appointed interim receiver of the property, under sec. 5.

Before the hearing of the petition, the insolvent made a voluntary assignment under the Act to N. L. Martin, an authorised trustee. At a meeting of the creditors, a resolution was passed in favour of the winding-up of the estate under the voluntary assignment, rather than by way of a receiving order, and Martin was confirmed as trustee.

Acting under the authority given by sub-sec. 6 of sec. 4, I dismissed the petition for a receiving order, and allowed the

winding-up to proceed under the voluntary assignment, and I also ordered that out of the assets of the estate which should come to the hands of the authorised trustee, N. L. Martin, he should pay to the petitioner its costs of the petition and of certain orders which had already been made, and of the appeal therefrom, and also that the fees of the interim receiver should be paid by Martin as trustee, out of the assets of the estate, as fees and expenses of the administration, in priority to debts.

The order was silent as to any priority in the payment of the interim receiver's fees and costs, but this was wholly due to the fact that it was not in the contemplation of any one at that time that the assets might prove insufficient for the payment of all the fees and expenses.

Under the direction of the inspectors of the estate, Martin, as trustee, carried on the business of the hotel for some time. Owing to the claim of the landlord, the continuation of the business ultimately resulted in the failure to realise sufficient out of the assets to pay all the costs and expenses of administration.

Tew now applies for an order directing Martin to pay his costs and other expenses. Martin resists this, on the ground that he is already out of pocket, and should not be called upon to pay anything more, and his counsel relies upon *Ex p. Browne* (1881), 29 W.R. 921.

In that case it was held that the receiver who had been appointed to take possession of the debtor's property, but who had afterwards handed over the property to the trustee in the bankruptcy, had no lien for his costs and expenses. The application was based upon the contention that the trustee had mismanaged the estate, and the Court held that no one could attack the trustee upon any such ground except the creditors.

It was suggested here that Martin had mismanaged the estate; but, without having examined the case above mentioned, I refused to listen to any such argument from counsel on behalf of the interim receiver, for the very same reason as that laid down in the case of *Ex p. Browne*.

I cannot, however, look upon the case of *Ex p. Browne* as having any other application to the circumstances of the present case. Here Tew, as interim receiver, takes over the property and incurs expense, all in good faith. Through no fault of his own, but merely because of the wishes of the creditors, the administration is handed over to Martin. Had it been contemplated at that time that there was any possibility of a deficiency of assets, I should certainly have made it a condition of my order that Tew's fees and expenses should have priority over all other expenses in the administration. Tew had it in his power, had

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he continued the administration, to protect himself by getting an indemnity from the creditors. Martin had it in his power to protect himself by doing so, and he knew that some expenses had already been incurred. It would be a deplorable thing if, under such circumstances, a trustee should be permitted to consider that the costs already incurred by his predecessor in the trust should be paid last.

Unless it could have been shewn that the gross amount realised out of the assets was insufficient to pay Tew, then I am of the opinion that Tew's fees and expenses constitute in effect a first charge upon the assets, in priority to other fees and expenses in the administration thereof.

I must accordingly order that Martin shall forthwith pay the fees, costs, and expenses to which Tew and the petitioning creditor are entitled under the terms of my order of the 18th February last. So far as the costs of this application are concerned, I think justice will be served by making no order as to them.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, McKay and Turgeon, JJ.A. May 29, 1922.

APPEAL (§IC—25)—FROM SUMMARY CONVICTION—AFFIDAVIT OF MERITS REQUIRED UNDER TEMPERANCE ACT, R.S.S. 1920, CH. 194, SEC. 74.

The affidavit of merits required from the defendant as a condition of the right of appeal under the Temperance Act, R.S.S. 1920, ch. 194, sec. 74, upon a charge of unlawfully selling liquor is sufficient if it negatives the commission of the offence whether by the defendant himself or by his agent, servant, or employee, or any other person with his knowledge or consent.

CASE stated by MacDonald, J., for the opinion of the Court:—

"The above named Ernest Bolton had been convicted by a Justice of the Peace for unlawfully selling liquor contrary to the provisions of the Saskatchewan Temperance Act. He appealed, and the appeal came on for hearing before me at the sittings of the Court begun at Melville on March 21st last.

Attached hereto is a copy of the affidavit of merits produced.

Counsel for the Director of Prosecutions objected that the same did not satisfy the requirements of section 74 of the Saskatchewan Temperance Act, in that it did not negative the commission of the offence by the agent, servant or employee of the accused, or by any other person with his knowledge or consent.

Following a number of unreported decisions on the point, I sustained the objection and dismissed the appeal.

The question reserved for the opinion of the Court of Appeal is:—

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Does the affidavit satisfy the requirements of said section?"

The section of the Act in question (R.S.S. 1920, ch. 194) is in the following terms:—

"74. No appeal shall lie from a conviction for any violation or contravention of any of the provisions of this Act unless the party appealing shall, within the time limited for giving notice of such appeal, deposit with the justice who tried the cause, an affidavit that he did not by himself or by his agent, servant or employee or any other person with his knowledge or consent commit the offence charged in the information; and such affidavit shall negative the charge in the terms used in the conviction; and shall further negative the commission of the offence by the agent, servant or employee of the accused or any other person with his knowledge or consent; which affidavit shall be transmitted with the conviction to the court to which the appeal is given."

T. A. Lynd, for appellant.

W. D. Graham, for Director of Prosecutions.

HAULTAIN, C.J.S.:—The affidavit deposited by the appellant contains the following paragraphs:—

"2. That I did not by myself, or my agent, servant or employee or by any other person with my knowledge or consent, on or about the 17th day of December, A.D. 1921, unlawfully sell liquor contrary to the provisions of the Saskatchewan Temperance Act.

3. That I did not by myself, or my agent, servant or employee, or by any other person with my knowledge or consent, commit the offence charged in the information herein.

4. That I did not by myself, or my agent, servant or employee, or by any other person with my knowledge or consent, commit the offence of which I was on the 10th day of January, A.D. 1922, convicted by T. G. Morrison, a Justice under the Saskatchewan Temperance Act, namely, that I did on or about the 17th day of December, A.D. 1921, unlawfully sell liquor contrary to the provisions of the Saskatchewan Temperance Act; and I did not, either by myself or my agent, servant or employee, or by any other person with my knowledge or consent, in any way commit the offence of which I have been convicted."

Paragraphs 2 and 3 of the affidavit clearly comply with the provisions of the section relating to "the offence charged in the information."

The next requirement is that the affidavit "shall negative the charge in the terms used in the conviction," that is, shall nega-

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tive the charge so far as the appellant himself is concerned. This is expressly done in para. 4 of the affidavit.

The section further requires that the affidavit shall "further negative the commission of the offence by the agent, servant or employee of the accused or any other person with his knowledge or consent." The words "the offence must refer to the offence as described in the conviction, and the appellant having negatived the charge in the terms used in the conviction, or in other words, having negatived the commission by himself of the offence as described in the conviction, must further negative the commission of that offence by his agent, servant or employee or by any other person with his knowledge or consent.

Both these things the appellant has done in para. 4 of the affidavit.

The affidavit, in my opinion, satisfies all the requirements of the Act, and the question submitted should be answered in the affirmative.

LAMONT, J.A.:—I concur in the conclusion of the Chief Justice. The objection to the affidavit is, that the accused has not negatived the commission of the offence by his agent, servant or employee. The offence charged was that the accused himself had unlawfully sold liquor. Of this offence he was convicted. To be entitled to appeal, the Act requires the accused to deposit an affidavit stating that he did not by himself, his agent, etc., commit the offence charged in the information. He must also negative the charge in the terms used in the conviction. The section then goes on to say:—

"And shall further negative the commission of the offence by *the* agent, servant or employee of the accused or any other person with his knowledge or consent."

Counsel for the prosecution contended that to comply with this requirement of the Act the accused in his affidavit must state that his agent, servant, or employee did not commit the offence. The question is, what agent is here referred to and what offence has to be negatived? If the accused should be a large employer, and has, say, 50 employees under him, is he required to swear that not one of these 50 employees has committed the offence? The statute to my mind does not seem to contemplate that, because it says, "*the* agent, servant or employee." It does not say "all" the agents, servants or employees, and the fact that the statute says "*the* agent, etc.," seems to me to indicate that it applies to a case where the conviction is that the accused by his agent (naming him) unlaw-

fully sold liquor. Then again, what is the offence that is referred to? Is it merely the unlawful sale of liquor, or is it the unlawful sale by the accused? In my opinion it is clearly the last. The offence referred to as applicable to this case is the particular sale for which the accused is convicted, and what he must negative is that his agent, servant or employee made that unlawful sale. Where the offence charged is that the accused himself made an unlawful sale, and he swears that he did not by his agent, servant or employee commit the offence charged, he has, in my opinion, complied with the requirement of the statute. In my opinion the affidavit was sufficient.

McKAY, J.A. (dissenting):—MacDonald, J. states the following case for the opinion of this Court:—[See *ante* p. 204].

The section of the Act referred to is as follows:—[See *ante* p. 205].

It is to be noted that this section requires that the affidavit shall contain a denial of the commission of the offence charged in the information, and of the charge in the terms used in the conviction, by the appellant himself or by his agent etc.

I will repeat these clauses of the section:—

1. "That he" (the appellant) "did not by himself or by his agent, servant or employee or any other person with his knowledge or consent, commit the offence charged in the information;" 2. "and such affidavit shall negative the charge in the terms used in the conviction;"

In negativing the commission of the above offences (that is, the offence charged in the information, and the one for which appellant is convicted) by the appellant, that would, in my opinion include negativing the commission thereof by the agent, etc., yet the section goes on to say:—3. "and shall further negative the commission of the offence by the agent, servant or employee of the accused or any other person with his knowledge or consent;"

Apparently, from the wording of the section, what the Legislature had in mind was, that the affidavit should expressly deny that the appellant committed the offence in any of the ways above set out, and, in addition thereto, it should expressly deny that the agent, etc., committed the offence of which the appellant was convicted, and not leave the denial of the commission of the offence by the agent, etc., to the denial included in the paragraphs of the affidavit containing the denial of the commission by the appellant. The Legislature required that, in addition to that denial, there should be a more formal or direct

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denial that the agent, etc., did not commit the offence.

The material paragraphs of the affidavit of the appellant are as follows:—[See judgment of Haultain, C.J.S. *ante* p. 205].

None of these paragraphs formally or directly negative the commission of the offence charged in the conviction, by the agent of the appellant. They all assert that "I," the appellant, "did not by myself or my agent, etc."

In my opinion, in addition to that form or negativing the commission of the offence by the agent, etc., the Act requires that the affidavit should formally and directly say "my agent, etc., did not commit the offence," or "no agent of mine, etc., committed the offence."

It is to be noted that the affidavit required by sec. 76, in cases of *certiorari* proceedings where only the offence for which the appellant is convicted is to be negatived, after denying the commission of the offence by the appellant by himself or by his agent, etc., is further required to negative the commission of the offence by the agent, etc.

I would answer the question submitted in the negative.

TURGEON, J.A. concurred with the Chief Justice.

Answer in the affirmative.

BANK OF MONTREAL v. HUESTON.

Ontario Supreme Court, Mowat, J. February 7, 1922.

BANKS (§ VIII—160)—BANK ACT 1913 (CAN.) CH. 9, SEC. 88—CONSTRUCTION—LEASE OF CHATTELS TO SECURE OVERDUE DEBT—VALIDITY AS AGAINST OTHER CREDITORS.

A lease by a flax manufacturing company, of all the goods and chattels upon the premises where the flax business is carried on, made to a bank to secure advances already made in connection with the flax manufacturing business, and upon the security of which the bank advances further moneys for operating expenses, is beyond the powers given by the Bank Act, 1913 (Can.) ch. 9, sec. 88, and is invalid as against other creditors.

[See Annotation 46 D.L.R. 311.]

AN interpleader issue, tried by MOWAT, J., without a jury.

R. S. Robertson, K.C., for the plaintiffs.

A. E. Parkinson, for the defendant.

MOWAT, J.:—The property in dispute consists of two Cleveland tractors seized by the Sheriff of Perth under a writ of *fieri facias* issued by the defendant as execution creditor, against A. L. McCredie and A. L. McCredie, Ltd.

The Bank of Montreal claim ownership, at the time of the seizure, under a "lease," in writing, and under seal, of the tractors from A. L. McCredie and Dominion Flax, Limited; and

the novel and interesting point is thus presented as to whether a bank, under such a form of transfer, can acquire a security and a preference as against other creditors.

Ordinarily, a bank is confined to the powers given by the Bank Act as regards its powers to obtain security for its loans and advances, and up to the present time no case has arisen where a lease of personal property has been invoked as a security.

The Bank Act 1913 (Can.) ch. 9, under the power "Banking and Commerce," made invasions upon the rights of the Provinces under the power "Property and Civil Rights," and contentions regarding these two powers have been settled by a series of cases in which the respective rights of Dominion and Provinces have been sharply contested, and the Bank Act must be viewed in the light of these contests and judicial interpretations. An element which cannot well be ignored also is the fact that the Bank Act has been subject to periodic revision to adapt it to the commercial requirements of the Dominion as they have developed. It is a matter of common knowledge that, as a new Bank Act is introduced decennially, it has been referred to a special parliamentary committee where the banks, represented by powerful and influential representatives and by forceful counsel, contest sharply with those who constitute themselves representatives of the "people" as to whether further privileges and methods of security shall be granted. The last result of such a contest is found in the Bank Act, 1913 (Can.) ch. 9, which does not extend, in any material way, the powers of taking security formerly possessed, namely, by warehouse receipt or bill of lading, or the acquirement of the product of agriculture, and other natural resources, and of manufactured goods, wares and merchandise, under sec. 88 and its schedule "C," together with a taking of a mortgage as further security for past advances or indebtedness.

The rights of a bank have been closely scrutinised by the Courts, so that its transactions may be kept strictly within the Act, and I know of no instance where it has been attempted to obtain further security than the Act allows by means of loans on personal property of a debtor.

In *Ontario Bank* v. *McAllister* (1910), 43 Can. S.C.R. 338, by a narrow judicial majority, it was decided that a bank could take over a lease of real property as part of a going concern out of which it was making legitimate efforts to satisfy its loan; but that was a matter of implication and liberal judicial interpretation of the Act, and differs vastly from the lease in question here, which definitely expresses itself to be made by way of security. See also *Ball and Whieldon* v. *Royal Bank of Canada* (1915), 26

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The lease recites; (a) that the bank has already advanced large sums to the lessors in connection with their flax manufacturing business, and has acquired security therefor (i.e., under the Bank Act, sec. 88); (b) that to complete the manufacture of the goods the expenditure of further sums of money is required; (c) that the bank is willing to advance such further moneys only if the lessors will grant it a lease of their "horses, wagons, harness, automobiles, trucks, tools, implements, machinery, other than fixed tractors, and generally all the goods and chattels upon the premises where the flax business is carried on."

The lease has, therefore, been executed on the terms specified as from its date, January 18, 1921, "until final completion of the manufacture and shipment of the goods."

This lease, the local bank manager says, was taken for the purposes of security and to enable the bank to operate the business; but the inference to be taken from the evidence is that the bank did not actually operate the flax business, but left the leased articles with the company for that purpose, and the lease was taken by way of security only; and, after it had obtained this supposed security, the bank advanced further moneys for operating expenses, thereby increasing its advances from $87,449 to $93,408.

The bank might have taken a chattel mortgage upon the goods enumerated in the lease as further security for its overdue debt, and being thus further secured might have then made advances for further operating expenses; but either the flax company did not care to give such a chattel mortgage or the bank did not care to take such, and perhaps for both reasons no such security was given. A bill of sale might have been taken, and the requirements of the Bills of Sale and Chattel Mortgage Act R.S.O. 1914, ch. 135, been complied with, so that the transfer would have been notice to other creditors. But, by adopting the device of taking a lease, the main reason for requiring notice to the public by filing a document with the County Court Clerk is defeated. The flax company, with a secret lease of all its personal property to one creditor, the bank, would be enabled to obtain credit from others to whom a search for encumbrances in the proper office would have been of no avail.

The words chosen to be the operative words in the lease are "demise and lease," which words apply to a lease of real estate. There can, properly, be no such lease made of personal property, because personal property has not the qualities of tenure, such as reversion or remainder, and the lessees of personal property acquire the whole of the property without limitation or equity

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of redemption remaining in the lessor. Such a lease is more in the nature of a pledge which can be retransferred when the debt is paid.

It was argued that the lease, in any event, was void for uncertainty as to term; *Marshall* v. *Berridge* (1881), 19 Ch. D. 233; *Mitchell* v. *Mortgage Co. of Canada* (1919), 48 D.L.R. 420, 59 Can. S.C.R. 90; but it is not necessary to decide that point, if, as I find, the lease is invalid as exceeding the limits of the Bank Act.

It is to be observed, in addition, that the Bank Act confines the bank to dealing in gold and silver coin and bullion, and to discounting and lending money upon the security of bills of exchange and other negotiable securities, and engaging in and carrying on such business generally as appertains to the business of banking; and prohibits the bank from dealing in, buying or selling or bartering goods, wares and merchandise, or engaging in any trade or business. If the bank itself were using the leased goods to conduct a flax business, it would be a breach of the Bank Act, and would thus void the security. A bank manager may harrow the feelings of his customer and plough into his financial statements, but for neither of these operations is a tractor necessary.

It is also to be observed that a bank, under sec. 141, is under a heavy penalty should it acquire a security except for discount made contemporaneously or under written promise to provide such, and this is an additional reason why the bank should be held strictly to its powers under the Act.

The claim of the bank, therefore, to be the owner of the tractors at the time of seizure by the execution creditor fails, and the issue is decided in favour of the execution creditor, the defendant, who will have his costs of the interpleader application and of the issue.

Judgment accordingly.

Re MOOSE JAW ELECTION.

Saskatchewan Court of King's Bench, Embury and Mackenzie, JJ. October 6, 1922.

ELECTIONS (§ IV—92)—DOMINION CONTROVERTED ELECTION ACT—POWER OF COURT TO ADJOURN HEARING OF PETITION.

By sec. 11 of 1915 (Can.), ch. 13, amending sub-sec. 4 of sec. 38 of the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, the Court is given power to adjourn the trial of an election petition, on the day fixed for trial and after the petition has been called for trial and certain preliminary objections heard, but before any evidence has been heard.

ELECTIONS (§ II D—75)—CORRUPT PRACTICES—DOMINION ELECTIONS ACT 1920 (CAN.), CH. 46—FALSE RETURNS AND DECLARATIONS—OMIS-

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RE MOOSE JAW ELECTION.

EMBURY, J. MACKENZIE, J.

SION OF ACCOUNTS—ELECTION VOID—PENALTIES AND DISQUALIFICATIONS.

Failure on the part of a candidate for election to the Dominion Parliament, or his agent, to include accounts properly classed as election expenses in the return required by sec. 79 (1) (*a*) of the Dominion Elections Act, 1920 (Can.), ch. 46, and in knowingly making false returns of election expenses and in making false declarations verifying such false returns, are corrupt practices within the meaning of sec. 79 (9) and void the election and make the parties in fault liable to the penalties and disqualifications provided by the Act.

PETITION of qualified electors to avoid the election of the member returned as member for the Dominion Parliament for the electoral District of Moose Jaw. Election declared to be void.

H. E. Sampson, K.C., *W. M. Rose*, and *J. W. Corman*, for petitioners.

C. E. Gregory, K.C., and *N. R. Craig*, for respondent.

EMBURY and MACKENZIE, JJ.:—Upon the petition of Hugh Yake, of 881 Seventh Avenue, N.W., in the city of Moose Jaw, in the Province of Saskatchewan, farmer; Alexander Zess, of 882 Fifth Avenue, N.W., in the city of Moose Jaw aforesaid, farmer; James Richard Harvey, of 1190 Wolfe Avenue, in the city of Moose Jaw aforesaid, dairyman; and Warren McBride, of 1104 First Avenue, N.E., in the city of Moose Jaw aforesaid, rancher, to avoid the election of one Robert Milton Johnson, returned as a member to serve in the House of Commons for the electoral district of Moose Jaw,—we, John F. L. Embury and Phillip Edward Mackenzie, two of the Justices of His Majesty's Court of King's Bench for the Province of Saskatchewan duly appointed to try such petition, after sitting for the trial of the said petition on the 5th, 25th and 26th days of September, 1922, and after hearing the evidence adduced by the petitioners and the respondent respectively, and the argument of their counsel, and having with their consent postponed until this day our determination, make the following findings and determination:

On the 25th day of September, before any evidence was taken, counsel for the respondent objected that we were without jurisdiction to proceed further, on the ground that we had no power to adjourn the trial as we did from the 5th and 22nd of September to a later date. Power to adjourn the trial from time to time is given by sec. 11 of 1915 (Can.) ch. 13, amending sub-sec. 4 of the Dominion Controverted Elections Act R.S.C. 1906, ch. 7; and counsel's argument was that such power must be exercised at the trial itself, but that we had undertaken to exercise it before trial, because we had directed such adjournments after he had made his preliminary objections but before we had heard any evidence, which he contended was essential to trial. It is to be noted that counsel's preliminary objections were made before

us on the day fixed for trial, namely September 5, and after the petition herein had been called for trial. We do not think it was the intention of Parliament to give any such narrow interpretation to the word "trial" as that put forward as it occurs in the above enactment, since by the same statute it abolished the pre-trial disposition of preliminary objections, and so rendered it necessary to raise all questions to the proceedings at the time appointed for trial. In any event, we think that counsel for the respondent has precluded himself from taking such an objection, since our action by which such adjournments were rendered necessary was induced by the assurance of said counsel—doubtless given in good faith—that he had exhausted the legislation on the subject of our jurisdiction, and that no statutes existed other than those he cited to us,—an assurance which was shortly afterwards found to be incorrect. We, therefore, decline to take cognizance of said objection.

At a nomination of candidates caused by the returning officer of the electoral district of Moose Jaw, held at the city of Moose Jaw on November 22, 1921, pursuant to writ of election received by him in that behalf, for the purpose of nominating candidates of whom one should be elected a member to serve in the House of Commons for the said electoral district, the respondent Robert M. Johnson was nominated as the candidate of that political party commonly known as the Progressive Party.

At the said nomination, two other candidates were also nominated. An election was accordingly held on December 6, 1921. As a result of such election, the respondent was, by return dated December 15, 1921, certified by the said returning officer as having received the majority of the votes lawfully given thereat. Such majority numbered 929 more than were given for his next opponent.

The petitioners, who are duly qualified voters of the said electoral district and of the proper status to submit the said petition, now seek to avoid the said election.

The prayer of their petition may be considered as containing two requests: 1. That the election be declared void. 2. That the respondent be disqualified.

1. Dealing with the prayer for the avoidance of the election; reasons are advanced as follows: (A). That the agents of the respondent were guilty of an illegal practice in paying election expenses other than through the official agent. (B). That both the official agent and the respondent were guilty of corrupt practices in making a false return of election expenses. The falsity of the return consisting in—(aa) The alleging in the return that certain election expenses were paid under the author-

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ity (or through) the official agent, when as a fact they were not. (bb) The failure to shew as election expenses two certain payments of expenses, properly to be classified as election expenses, made by the respondent through the official agent.

Dealing first with reason (A) above: The evidence showed that the respondent's official agent on such election was one Frank McRitchie. Part of the funds upon which the respondent relied to defray the expenses of his election campaign were in the hands of a body known as "The New National Policy Political Association." Part of the business of this association was to organise and finance the Progressive Party, to which the respondent belonged. For this purpose, the said association had a central committee at Regina, and a local committee in each electoral district. Of the funds collected by each local committee 75% was allotted for local expenses, and the remaining 25% was allotted to the central committee for general purposes.

During the election in question, the chairman of the local committee of the said association for the electoral district of Moose Jaw was one Thomas Teare, and the secretary was one E. A. Devlin.

Funds for the expenses of the respondent's election were sent by the central committee to the said Devlin and by him deposited in a bank at Viceroy. Such funds could only be withdrawn from the said bank on cheques signed by himself and the said Teare.

A meeting of the said local committee was held at Moose Jaw upon November 28, 1921, at which Teare and Devlin and the respondent and one Salisbury were present. We may here state that Teare and Devlin, called for the petitioner, impressed us as reliable witnesses. We cannot express ourselves as favourably respecting the respondent. We have, therefore, felt constrained in each instance to give effect to the testimony of Teare and Devlin as against that of the respondent where their evidence conflicts. Moreover it is to be remarked that the official agent, McRitchie, who no doubt could have given valuable testimony regarding the payments in question, was present in court during the trial but was not called by the respondent to meet the case made out by the evidence of Teare and Devlin. To our minds this is very significant.

To recur to the above meeting: certain accounts for election expenses were produced by the said Salisbury, which, after being approved by all present, including the respondent, were paid by cheques then and there issued by Teare and Devlin against the funds under their control. The payees of such cheques as were put in evidence, as well as the services rendered therefor so far as the evidence shews, were as follows:—

(1) M. Finn, $140, for rent of rooms; (2) K. Rappelle, $48, for sundry accounts incurred on the respondent's behalf at Assiniboia; (3) W. E. Salisbury, $231.71, for remuneration and disbursements incurred by him as secretary of the Moose Jaw committee; (4) J. S. Pearce, $64, for services of band; (5) Moose Jaw Times, $346.40, for printing and advertising; (6) Quality Press, $13.50, for printing posters; (7) H. Hanna, $20, for heating room; (8) Bank of Nova Scotia, $302.50; (9) Burt & Smith, $16; (10) E. A. Devlin, $100, for secretary's salary; (11) Y.M.C.A., $35, for rent of hall.

It is clear that the payment of these accounts was never authorised by the official agent, although in the course of preparing his return of election expenses he did express his approval of said accounts by notation thereon.

Accordingly, our conclusion must be that the above payments were not made by or through him within the meaning of sec. 78, sub-sec. 4 of the Dominion Elections Act 1920 (Can.), ch. 46, hereinafter set forth.

Further, there were two accounts paid by the official agent and not set out in the return as follows:—Paris Cafe, for refreshments, $20; J. S. Pearce, for services of a band, $68.

The moneys for payment of each of these accounts were supplied to the official agent by the respondent. The accounts, however, which in our judgment were properly to be classed as election expenses, were not included in the return.

We, therefore, find that said two payments were not included in the official agent's return as required by sec. 79, sub-sec. (1) (a) of the Dominion Elections Act 1920 (Can.) ch. 46, hereinafter set forth.

It also appeared that the said two payments were not made within 50 days after the date on which the respondent was declared elected, so that we must find that he and his official agent are also guilty in this respect of an illegal practice within the meaning of sub-sec. 9 of sec. 78 of the Dominion Elections Act.

Dealing next with reason (B) (aa), that the respondent and his official agent were guilty of corrupt practice by making a false return of election expenses: this allegation is based on the description in said return of the receipt by the official agent of the sum of $1,351.05 from the New National Party Political Association as having been "by paying bills authorised by myself and by cash direct," since it includes the eleven payments above set forth which, we have already found, were not paid by or through the official agent. The evidence shows that the respondent and his official agent are equally responsible for the wording

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of the above description in the return. The evidence convinces us that when the respondent and his official agent inserted the above description in the return, they did so for the express purpose of inducing the belief that the payments referred to had in every instance been paid by or through the official agent within the meaning of the Dominion Elections Act—when they knew such not to be the fact.

We accordingly find that in making their respective declarations verifying the correctness of the said return, respondent and his official agent each knowingly made a false declaration in respect of the above payments not made by or through said official agent and that they are each guilty of a corrupt practice within the meaning of sub-sec. 9 of sec. 79 of the Dominion Elections Act.

Coming finally to reason (B) (bb), which is based on the failure of the official agent and the respondent to shew in the return the payments made—to Pearce, for band account, $68; and to Paris Cafe, for refreshments, $20—the reasons given by the respondent for not including these items in the return as election expenses struck us as unsatisfactory and unconvincing. He made the payments through his official agent, and it is impossible for us to believe that he expressed his true and honest conviction when he deposed that he considered them to be personal and not election expenses.

We must also attribute to the official agent (from whom no explanation has been forthcoming) the same knowledge as that held by the respondent himself.

We, therefore, find that, when the respondent and his official agent stated in their respective declarations that no payments had been made except those in the return, and that the respondent had paid said official agent $677 and no more to defray the subsequent election expenses, respondent and his official agent each knowingly made a false declaration, and are each guilty of a corrupt practice within the meaning of sub-sec. 9 of sec. 79 of the Dominion Elections Act.

2. Dealing with the second heading, which seeks the disqualification of the respondent, we wish merely to reaffirm what we have already stated with regard to the matters referred to under subdivisions (B) (aa) and (B) (bb) of our first heading.

It will be convenient now to refer to the statutory enactments relating to the questions raised by the petition. The obligations of the candidate to pay all election expenses by or through his official agent is imposed by sec. 78, subsec. 3 of the Dominion Elections Act 1920 (Can.) ch. 46, as follows:—

"3. Subject to the subsequent provisions of this section no

payment and no advance or deposit shall be made before, during or after an election by a candidate or by any agent on behalf of a candidate or by any other person, in respect of any expenses incurred on account of or in respect of the conduct or management of such election, otherwise than by or through the official agent, and all money provided by any person other than the candidate for any expenses incurred on account of or in respect of the conduct or management of the election, whether as contribution, gift, loan, advance, deposit or otherwise, shall be paid to the official agent and not otherwise, provided that this subsection shall not be deemed to apply to payment:—

(a) by a candidate, out of his own money for his personal expenses to an aggregate amount not exceeding five hundred dollars; or

(b) by any person, out of his own money, for any small expense legally incurred by him, if no part of the sum so paid is repaid to him."

The consequences which are to follow the breach of the above obligation are set forth in sec. 78, sub-sec. 4 and in sub-sec. 9, as follows:—

"(4) Every person who makes any payment, advance or deposit in contravention of the immediately preceding sub-section, or pays in contravention thereof any money so provided as aforesaid is guilty of an illegal practice and of an offence against this Act, punishable on summary conviction as in this Act provided.

(9) All expenses incurred by or on behalf of a candidate on account of or in respect of the conduct or management of an election shall be paid within fifty days after the day on which the candidate returned was declared elected, and not otherwise; and, subject to such exception as may be allowed in pursuance of this Act, an official agent who makes a payment in contravention of this provision is guilty of an illegal practice and of an offence against this Act punishable on summary conviction as in this Act provided."

The provisions regarding the official agent's return and its contents are to be found in sec. 79 of the Dominion Elections Act, as follows:—

"79. (1) Within two months after the candidate returned has been declared elected, the official agent of every candidate shall transmit to the returning officer a true signed return substantially in the Form No. 48 (in this Act referred to as a return respecting election expenses) containing detailed statements as respects that candidate of,—

(a) all payments made by the official agent, together with all

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the bills and receipts (which bills and receipts are in this Act included in the expression 'return respecting election expense');

(2) The return so transmitted shall include all bills and vouchers relative thereto and be accompanied by a declaration made by the official agent before a notary public or a justice of the peace in the Form No. 49 (which declaration is in this Act referred to as a declaration respecting election expenses).

(3) At the same time that the official agent transmits the said return, or within seven days afterwards, the candidate shall transmit or cause to be transmitted to the returning officer a declaration made by the candidate before a notary public or a justice of the peace, in the Form No. 50 or in the Form No. 51 (which declaration is in this Act referred to as a declaration respecting election expenses)."

The penalty attached to a wilful infraction of these provisions is set forth in said sec. 79, sub-sec. 9, as follows:—

"(9) If any candidate or official agent knowingly makes a false declaration respecting election expenses he is guilty of a corrupt practice and of an indictable offence against this Act punishable as in this Act provided."

The duties laid upon this Court in dealing with the above matters are to be found in the Dominion Controverted Elections Act R.S.C. 1906, ch. 7, sec. 51, as amended by 1921 (Can.) ch. 7, sec. 4, as follows:—

"51. If it is found by the report of the trial judges that any corrupt practice has been committed by a candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, or that any illegal practice has been committed by a candidate or by his official agent or by any other agent of the candidate with the actual knowledge and consent of the candidate, the elections of such candidate if he has been elected, shall be void."

Also in the Dominion Controverted Elections Act, sec. 55, as amended by 1921 (Can.) ch. 7, sec. 9, as follows:—

"55. If, on the trial of an election petition, it is proved that any corrupt or illegal practice has been committed by or with the actual knowledge and consent of a candidate at an election, or if such candidate is convicted before any competent court of bribery or undue influence, he shall be held guilty of corrupt or illegal practices and his election, if he has been elected, shall be void."

Before the conclusion of his argument, counsel for the respondent made application to us to extend to his client the benefit of the provisions of sec. 56(A) of the Dominion Controverted Elections Act as amended by 1921 (Can.) ch. 7, sec. 7, in the event of our finding him guilty of illegal practices herein. Since we

have found the respondent guilty of such practices, in the matter of failing to make certain payments through his official agent, and again by reason of the latter's omission from his return of the payments made to J. S. Pearce and the Paris Cafe, and by making them after the expiration of 50 days from the date of the election return, it becomes necessary for us to consider said application.

Section 56(A) reads as follows:—

"56A. Where, on application made in the proceedings on an election petition or otherwise, it is shown to the Court or to the trial Judges by sufficient evidence,—

(a) that any act or omission of any candidate at any election, or of his official agent, or of any other agent or person, constitutes an illegal practice, but

(b) that such act or omission arose from inadvertence, or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith, and,

(c) that such notice of the application has been given as to the Court or the trial Judges seems fit; and it seems to the Court to be just that the candidate, the said official agent and the other agent and person, or any of them, should not be subject to any of the consequences of the said act or omission, the Court or the trial Judges may make order and declaration accordingly, and thereupon such candidate, agent or person shall not be subject to any of the consequences of the said act or omission."

We do not see, however, that we can extend the benefit of this section to the respondent in the present circumstances, primarily because we do not think that he has satisfied the onus cast upon him of proving his good faith. We are of the opinion, however, that Teare and Devlin should not be subject to any of the consequences of their connection with the illegal practices in question, since the same arose from their inadvertence and not from any want of good faith. Counsel for the respondent conceded that the benefit of sec. 56A above could not be invoked by his client in respect of any corrupt as distinguished from illegal practices of which he might as here be found guilty.

Counsel for the respondent urged us, when dealing with the petition, to take in consideration the large majority by which the electors had returned his client in the said election. Such a request appeals strongly to our sympathies. It is, however, impossible for us to give effect to it, because the unqualified provisions of the statute quoted above leave us no option in the matter. And, in any event, the Court could never, in the public interest, consider it to be a light or trivial matter that the

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respondent should have made false statements in a return purporting to be verified by his statutory declaration, which carries the sanction of an oath.

Our determination, therefore, is that the election of the said respondent was void. The petitioners' costs must be defrayed by the respondent.

Judgment accordingly

REX v. TREMBLAY.

Quebec Sessions of the Peace, Choquette, J. September 25, 1922.

PLEADING (§ III D—332)—CRIMINAL OFFENCE—PLEA OF NOT GUILTY—SUFFICIENCY OF AS COVERING PRESCRIPTION—CR. CODE R.S.C. 1906, CH. 146, SEC. 1140.

A plea of not guilty, from a criminal point of view is general, and it is for the Crown to prove the charge, as well in fact as in law, and a plea of not guilty also comprises prescription, and if prescription is acquired the defendant should have the full benefit of it.

TRIAL of an accused on a charge of seduction. Dismissed on the ground that the complaint was prescribed.

CHOQUETTE, J.:—The defendant who is of age is charged with having, in the course of the Spring of 1921, criminally and illegally seduced under promise of marriage Marie-Louise Lachance, then less than 18 years of age, being of chaste character.

After preliminary investigation, the defendant elected a speedy trial, and the evidence being closed on both sides, on September 6, 1922, his attorney moved for the dismissal of the complaint, alleging that, even on its face, it was prescribed because it asserted that the crime was committed during the Spring of 1921, and that it was only sworn to on July 10, 1922, and the defendant only put under arrest on the 14th day of the same month, and that according to sec. 1140 (C) (5) of the Cr. Code, such a crime is prescribed by 1 year.

The Crown then moved to amend the complaint and indictment by substituting, in accordance with the evidence adduced, the words: "the first days of August 1921" to those of: "in the course of the spring of 1921."

Defendant's attorney objected to this amendment alleging that this petition being only made on September 6, 1922, even supposing that it would have been before prescription began, it was now too late, because on September 6, 1922, the charge was also prescribed, seeing that the proof showed that the crime, if crime ant was also prescribed.

The parties submitted the case without citing any authority, there was, was committed on the 5th or 6th of August, 1921, and that on September 6, 1922, the right to proceed against defend-

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the defendant relying absolutely on the text alone of the above mentioned sec. 1140, adding that the law was worth more than authorities, however weighty they might be, and he is right.

If the petition to amend had been presented before August 5, 1922, I would have granted it by ordering the prisoner to appear again, such as was decided in the cases reported in *Reg.* v. *Hawthorne* (1899), 2 Can. Cr. Cas. 468; *Rex* v. *O'Connor* (1912), 3 D.L.R. 23, 20 Can. Cr. Cas. 75, 21 O.W.R. 691; and particularly *Veronnean* v. *The King* (1916), 33 D.L.R. 68, 54 Can. S.C.R. 7, 27 Can. Cr. Cas. 211.

Though specially relying on sec. 1140 of the Cr. Code, I have, however, examined the opinions of the different Judges in the above mentioned cases, and they confirm my opinion that the objection raised by the defendant should be maintained.

The Crown prosecutors have argued that the defendant having appeared and pleaded not guilty, without specially invoking prescription, has thereby renounced his right to raise it now.

This argument is untenable; a plea of not guilty, from the criminal point of view, is general, and it is for the Crown to prove the charge, as well in fact as in law, and a plea of not guilty also comprises prescription, and if prescription is acquired, the defendant should have the full benefit of it.

In this case, the defendant may boast of having gone scot-free as I am forced to apply the law and thereby refuse the amendment and dismiss the complaint because it is prescribed.

Judgment accordingly.

REX v. SAFRUK.

Alberta Supreme Court, Walsh, J. September 29, 1922.

JUSTICE OF THE PEACE (§ III—14)—POLICE MAGISTRATES AND JUSTICES OF THE PEACE ACT, 1906 (ALTA.) CH. 13, SEC. 3—APPLICATION AND CONSTRUCTION—JURISDICTION OF PROVINCIAL MAGISTRATE—INTOXICATING LIQUOR CASES.

Section 3 of the Act Respecting Police Magistrates and Justices of the Peace 1906 (Alta.), ch. 13, does not apply to Police Magistrates, and the appointment of a Police Magistrate in and for the Province of Alberta, does not revoke and cancel a prior one as a Police Magistrate for the Province of Alberta with jurisdiction in and for the City of Edmonton, but is supplementary to it, so that such magistrate is Police Magistrate not only for the City of Edmonton, but also for the Province of Alberta. A Provincial Magistrate has jurisdiction to make a conviction under the Alberta Liquor Act, and the fact that such Magistrate is wrongly described as a Police Magistrate for the City of Edmonton will not invalidate such conviction.

INDICTMENT, INFORMATION AND COMPLAINT (§ IV—70) — INTOXICATING LIQUOR—CONVICTION—BIAS OR PREJUDICE OF MAGISTRATE.

The bias or prejudice which warrants an Appellate Court in quashing a conviction by a Magistrate is one of a substantial character, either pecuniary or growing out of relationship or interest or otherwise which makes it improper for the Magistrate to embark upon the enquiry at

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all, and not one which simply develops as the case proceeds as a result, whether rightly or wrongly of the Magistrate's growing conviction of the defendant's guilt.

THE applicant being convicted for that she did unlawfully keep intoxicating liquor for sale contrary to the provisions of the Liquor Act 1916 (Alta.) ch. 4, moves to quash the conviction on two grounds, namely (1) lack of jurisdiction and (2) bias or prejudice in the convicting Magistrate.

H. A. Mackie, K.C., for applicant.

J. C. F. Bown, K.C., *contra*.

WALSH, J.:—The conviction was made by Emily F. Murphy, who is described in the body of it and beneath her signature at the foot of it as "a police magistrate for the city of Edmonton." The fact is that on the 13th of June, 1916, she was appointed "a Police Magistrate for the Province of Alberta with jurisdiction in and for the City of Edmonton" and on July 30, 1917, she was appointed a Police Magistrate in and for the Province of Alberta. The contention of the applicant is that this later commission abrogated the earlier one so that upon its issue Mrs. Murphy ceased to be a Police Magistrate for the City of Edmonton and became instead a Provincial one and, therefore, this conviction by her in a capacity which she does not possess, was made absolutely without jurisdiction.

The argument as to the effect of the second commission is based upon sec. 3 of the Act Respecting Police Magistrates and Justices of the Peace 1906 (Alta.), ch. 13.

"Whenever a new commission of the peace shall be issued all and such like former commissions shall become absolutely revoked and cancelled; and nothing in this Act contained shall prevent the re-appointment of any justice of the peace named in such former commission if the Lieutenant-Governor in Council shall think fit."

I do not think that this section applies to a Police Magistrate. Section 1 of the Act (repealed 1908 (Alta.), ch. 20, sec. 10), gives the Lieutenant-Governor in Council power to appoint one or more Police Magistrates for the Province and to remove, supersede or dispense with any or all of them. This section exhausts, in my opinion, the power of appointing and removing Police Magistrates. Section 2 authorises the appointment of Justices of the Peace. There is no provision in the Act except that found in sec. 3 for the revocation or cancellation of such appointments. The expression "commission of the peace" is one that in common use applies to the appointment of Justices and this idea is confirmed by the provision for the re-appointment of any Justice of the Peace named in it. Following immediately as it does the

section authorising their appointment, with express authority elsewhere conferred for ending the office of a Police Magistrate and none but this for cancelling that of a Justice and having regard to its wording, I think that sec. 3 relates only to Justices of the Peace. In my opinion, therefore, the second commission to this Magistrate did not revoke her first one but is supplementary to it, so that she is Police Magistrate not only for the City of Edmonton but also for the Province of Alberta.

Apart entirely from this she had, under her second commission, jurisdiction as a Provincial Police Magistrate to make this conviction and I think that even if she was wrongly described in it as a Police Magistrate for the City of Edmonton, this misdescription would not render void this conviction which in another capacity she had the power to make.

This leaves for consideration only the question of bias or prejudice. It is not suggested that the Magistrate had any personal feeling against the defendant, or any personal interest in the outcome of this prosecution, except that it is said that, because she is paid by the Province a salary for the services which she performs as Police Magistrate, her retention of this office may fairly be said to be conditional upon satisfactory financial results accruing from her administration of it. It would take something more, however, than the mere assertion of counsel, and that is all that I have in this case, to convince me or to justify me in holding that such a corrupt state of affairs as this argument suggests prevail in this Province. It is an argument which, if given effect to against this Magistrate, must be of equal weight against every other Police Magistrate in the Province, except the two gentlemen named in sec. 15 of the Act, (see amendment 1915 (Alta.), ch. 2, sec. 12), in every case involving the imposition of a fine from which the Province benefits.

Outside of this the charge of bias and prejudice rests in the attitude of mind displayed by the Magistrate through the course of the trial as disclosed by the record of the proceedings and her finding the accused guilty of the charge preferred against her upon evidence which it is said entirely fails to justify the conviction. The Appellate Division has recently held in *Rex* v. *Picariello* (1922), 68 D.L.R. 574, 37 Can. Cr. Cas. 285, that although since *Rex* v. *Nat Bell Liquors Ltd.*, 65 D.L.R. 1, [1922] 2 A.C. 128, 37 Can. Cr. Cas. 129, the Court on *Certiorari* cannot examine the depositions to ascertain whether or not there was any evidence upon which the accused could have been properly convicted, there is nothing in that decision which prohibits their examination for other purposes. Under this authority, I have felt it my duty to read the record of the proceedings be-

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fore the Police Magistrate on the hearing of this complaint in order that I might satisfy myself whether or not this charge of bias and prejudice is well founded. The result is to leave me quite convinced that this ground of objection must also fail.

I will summarise as briefly as possible the incidents relied upon by Mr. Mackie in support of his charge of bias and prejudice, outside of those relating to the lack of evidence to justify the conviction. (a) He objected to evidence proving that men had been seen on the days in question going into the house in which the defendant lived quite sober and coming out drunk, but no attention was paid to his objection and the Magistrate allowed this evidence to be given and later on repeated. (b) When he was endeavouring in cross-examination to show that the defendant was a working woman who had not lost a day from her employment in months, the Magistrate interjected the remark that "it doesn't make any difference if she works 24 hours out of the 24." (c) He called witnesses to disprove the evidence of crown witnesses that they had from a certain location seen the defendant at the spot where the liquor was found and the Magistrate interfered in his examination of one of them with a view to confusing and discrediting the witness and at the close of the cross-examination of the other took him in hand and plied him with questions which plainly shewed that she disbelieved him and indicated her opinion that he gave this evidence dishonestly because of his friendship for the defendant. (d) The Magistrate interrupted the cross-examination by prosecuting counsel of another defence witness and took the cross-examination into her own hands. (e) The Magistrate interfered in his effort to prove by one of his witnesses that one Dohaniuk had "planted" the whiskey in question and that he had been given immunity by the police in order that the case against the defendant might be established and she endeavoured to prevent this evidence from going in and it was only after repeated argument that he was allowed to proceed with it. (f) Dohaniuk was not called as a witness either for the prosecution or defence but before the defence was closed Mr. Mackie, to quote from his affidavit, "challenged the Court and the Crown to call Dohaniuk and put him in the box as a witness for the Crown and yet the Magistrate sat and heard without calling the said Dohaniuk who was in Court." (g) He has asked her for a copy of her notes of the evidence as distinguished from the reporter's transcribed copy of the depositions and she has refused to give it.

I should think that it requires but the stating of most of these grounds to shew how impossible it is to give to them the effect for which Mr. Mackie contends. Grounds (a) (b) (f) and (g)

are of this class. I cannot see anything in any of them which even calls for comment. The other grounds are of a different character. They all relate to the interference by the Magistrate in the examination or cross-examination of witnesses and the imputing of dishonest motives to one of them. I have always as a Judge of this Court maintained my right to ask a witness, at any time, any relevant question that I find necessary to enable me to properly understand the evidence or to give it its proper weight, and I would, therefore, be very slow to criticise a magistrate who does the same thing. It would be going too far to hold that because the form of a question thus put or the manner or time of putting it does not strike one as being quite what it should have been, the magistrate was actuated by an improper motive in putting it. Surely a judicial officer who doubts the honesty of a witness has a right to apply all proper tests for the solving of those doubts and if he is thereby confirmed in them to say so without laying himself open to the charge of being actuated in so doing by bias or prejudice against the party on whose behalf this witness was called.

If the Magistrate displayed prejudice in respect of the matters thus complained of it is a prejudice which, so far as the record shews, developed during the course of the trial, and evidently as a result of the impression of the defendant's guilt made upon her mind by the evidence, an impression which grew as the case proceeded, and to which she, perhaps imprudently, gave expression before the conclusion of the trial. This is not the kind of bias or prejudice which, under the authorities, justifies the quashing of a conviction.

Mr. Mackie endeavoured to place before me the record of the proceedings that had taken place in the prosecution of another woman before this Magistrate, but I refused to listen to it. What he complained of against the Magistrate in that case may have been very pertinent in an enquiry into her fitness for this office, but by no stretch of my judicial discretion could I properly look at it to help me in deciding whether or not the conviction which I am now considering was founded in the bias or prejudice of this same Magistrate.

Although I would have hesitated very long before convicting the defendant on the evidence that was before the Magistrate, I think that there was some evidence to justify the conviction and so the argument made in support of the charge of prejudice that there was none must fail.

In Crankshaw's Criminal Code 1915, pp. 812-819, are gathered the authorities on the question of disqualifying interest, bias or partiality. I have been quite unable to find either there

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or anywhere else any judgment which would justify me in quashing this conviction on such allegations of bias as are here made. The bias which disqualifies is one of a substantial character, either pecuniary or growing out of relationship or interest or otherwise, which makes it improper for the Magistrate to embark upon the enquiry at all and not one which simply develops as the case proceeds as a result, whether rightly or wrongly, of the Magistrate's growing conviction of the defendant's guilt.

The motion is dismissed with costs.

Motion dismissed.

GAGNIER v. LEBLANC.

Quebec Court of King's Bench, Appeal Side, Greenshields, Guerin and Allard, JJ. October 25, 1921.

ALTERATIONS OF INSTRUMENTS (§ II B—10)—ACCOMMODATION NOTE MADE PAYABLE TO FIRM—FIRM SUCCEEDED BY LIMITED COMPANY—ADDITION OF WORD "LIMITED" AFTER PAYEE'S NAME—RIGHTS OF HOLDER IN DUE COURSE FOR VALUE—BILLS OF EXCHANGE ACT, R.S.C. 1906, CH. 119, SEC. 57.

The addition in a promissory note of the word "limited" after the name of the firm to which the note is made payable, the firm having ceased to exist and having been succeeded by a limited company, is not a material alteration which affects the rights of a subsequent holder in due course for value.

APPEAL from the Quebec Superior Court in an action based on a promissory note. Affirmed.

The action is based on a note for $100 dated April 28, 1916, payable 2 months after date to the order of O. Létourneau and Co. Limited, signed by J. A. Leblanc and endorsed before maturity to the Hochelaga Bank and subsequently to the plaintiff.

The defendant pleads that he signed the note for accommodation and received no consideration; that it was materially altered by adding the word "Limited" after the words "O. Létourneau and Co." so that neither the Hochelaga Bank nor the plaintiff was a holder in due course.

The judgment appealed from is as follows:

"Considering that the evidence shews that when the note which forms the basis of the action was signed, the firm known as O. Létourneau and Co. had been dissolved for more than a year and no longer had any legal existence; that the said firm had been replaced by O. Létourneau and Co. Limited, duly incorporated and registered; that it has also been proved that the said note was endorsed to the Hochelaga Bank before maturity in the ordinary course of business and that value was given for the said note; that the Court does not consider itself obliged to admit the testimony of the defendant as to the alleged alteration of the note sued upon, after it was signed, by adding the word

"Limited" which appears on the face of the said note; also that such alteration, even if made, would not be a material alteration which might increase or diminish the rights and obligations of the defendant; that the Hochelaga Bank was a holder in due course of the said note and that in that case the alleged alteration, even if it had been made, was not an apparent alteration, seeing the nature thereof and the form of the note, and that therefore it had the right to accept and negotiate it, enforce payment and transfer it, as it did, to the defendant, and to claim payment from the defendant by virtue of sec. 145 of the Bills of Exchange Act; in fact, that the note without the word "Limited" would have been a bill given to a non-existent person, since the firm known as O. Létourneau and Co. had been dissolved, and that in the circumstances, by sec. 21 (5) of the Bills of Exchange Act R.S.C. 1906, ch. 119, it could and can be considered as being payable to bearer; dismisses the defendant's opposition to judgment, maintains the contestation of the said opposition to judgment and the said judgment with costs incurred on the said contestation of the opposition."

L. J. Lefebvre, for plaintiff.

Laflamme, Mitchell and Callaghan, for defendant.

GREENSHIELDS, J.:—The note sued upon is dated April 28, 1916. It would appear that the firm known as O. Létourneau et Cie was not in existence on the date of the signing of the note. Before that time there had been incorporated a company known as "O. Létourneau et Cie, Limitée," of which Odilion Létourneau was the president. There is no doubt the proof shews that on the date of the signing of the note in question that company was in legal existence. After the note was signed and delivered to O. Létourneau, he endorsed the note as president of the company, O. Létourneau & Co. Ltd., presented the same at the Hochelaga Bank, and the same was discounted by the bank and the proceeds of the discount placed to the credit of the current account of O. Létourneau & Co. Ltd. From and after that date, which was before the due date of the note, the Hochelaga Bank was the holder in due course of the bill for value. The bank became the holder in due course within the definition or description contained in sec. 56 of the Bills of Exchange Act, R.S.C. 1906, ch. 119. The good faith of the bank is not questioned, nor is it questioned that the bank gave value, and there is no suggestion that the bank had notice of any defect in the title of the person who negotiated it.

Under these circumstances, unless the bank's right to recover is destroyed the defendant would be liable towards the bank. The bank parted with the possession and ownership of the note

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to the plaintiff. The plaintiff's title is the title of the bank.

Section 57 of the Bills of Exchange Act provides:—

"A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor, and all parties to the bill prior to that holder."

This provision of our Bills of Exchange Act is a reproduction of the provision in the Imperial Statute governing Bills of Exchange, 1882 (Imp.), ch. 61, and it is uniformly held that only the person who has been a party to a fraud or illegality will be precluded from acquiring all the rights and privileges of a holder in due course.

At the time of the trial O. Létourneau was dead. The defendant is the only witness who testifies to the alteration. I have very grave doubts as to the accuracy of his statement. As I have already said, O. Létourneau et Cie as such did not exist. Apparently, when it did exist printed forms of promissory notes had been used. When the company of O. Létourneau et Co. Ltd. came into existence, taking over the business of O. Létourneau et Company, it would be the most natural thing to make use of these promissory notes, adding what the law enjoins, the word "Limited," and this they did with a rubber stamp.

There was in the Hochelaga Bank a current account in the name of O. Létourneau et Cie, Ltée. When the note in question was presented to the bank for discount there certainly was nothing on its face to arouse any suspicion. There was no apparent alteration.

GUERIN, J.:—When the defendant Leblanc signed the note in April, 1916, there was no such firm as O. Létourneau et Cie. Leblanc, therefore, when he signed this note in favour of O. Létourneau et Cie, made as payee a fictitious or non-existing person. Under sec. 21 (5) of the Bills of Exchange Act, R.S.C. 1906, ch. 119, this note so signed could be treated as payable to bearer. Made in the form that it was, the note which Leblanc signed was handed to O. Létourneau personally and Leblanc says that it was an accommodation note for which he received in return from Létourneau his own note for $100, which is dated April 28, 1916. It is the same date as that of the note now sued on in this case. Létourneau, therefore, became owner of the note which Leblanc gave him, to the order of O. Létourneau et Cie, a fictitious or non-existing person.

Being in possession of this note of $100 as an accommodation note, Létourneau could make no use of it as such accommodation unless he raised money on the value of the note. Under the cir-

cumstances, it would be reasonable to say that O. Létourneau had a right to make use of this note in the manner which he apparently did. He added "Limitée" to the name of the new firm of which he was president; the note was then endorsed by Létourneau et Cie. Limitée, O. Létourneau, president, and was discounted by the Hochelaga Bank.

The plaintiff obtained this note from the Hochelaga Bank after maturity and with all the equities which might attach to this note, but the bank was in legal possession, it had been properly endorsed by the firm of O. Létourneau et Cie, Limitée, and Gagnier, the president plaintiff, is now in enjoyment of all the rights of the bank as the owner of this note.

I do not see any reason to change the judgment, and I am of opinion that the same should be confirmed with costs.

ALLARD, J.:—We have to decide: (1) if the opposant's note was altered after it was signed and delivered by inserting the word "Limited" after the words "O. Létourneau and Co."; (2) if this alteration is material; (3) if it is apparent; and (4) if, in case the alteration was not apparent, that defect could be set up against the plaintiff as a holder for value.

As to the first question, I do not think there was any alteration. Leblanc swears it was an accommodation note that he signed. He must, therefore, have signed it for the accommodation of some existing person. Now at that time, O. Létourneau & Co. was not in existence. That firm had been replaced by "O. Létourneau Limited," and if Leblanc wished to assist and accommodate Létourneau, he should have done so by signing a note to the order of his existing company and not to the order of the firm which had ceased to exist. I wish to believe and I do believe that Mr. Leblanc was in good faith. He may not have noticed the word "Limited" in the body of the note, and may have been deceived and led into error by the fact that the note was drawn and signed on a printed form which had been used by the old firm "O. Létourneau & Co." And despite the statement of the said defendant-opposant, I believe, as did the Judge of the Superior Court, that the evidence contradicts him.

The note was, therefore, not altered, in my opinion; but even if it was, the alteration was not apparent and the Hochelaga Bank, from whom the plaintiff derives his rights, became a holder in due course. The said bank discounted the note before maturity. It discounted it for value. The sum obtained by discounting the note was placed to the credit of O. Létourneau Limited. The plaintiff derived his title from the said bank and has the same rights as it had.

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He is also a holder in due course, whether he acquired the note for value or not.

My solution of the foregoing questions makes it unnecessary to consider the fourth. For these reasons I would confirm the judgment *a quo* with costs.

MARATZEAR v. C.P.R.

Quebec Court of Review, Demers, Panneton and de Lorimier, JJ. June 12, 1920.

HOMICIDE (§III—22)—JUSTIFICATION OF FORCE TO CAPTURE CULPRIT FLEEING FROM ARREST—FATAL SHOOTING OF CULPRIT FOUND STEALING FROM RAILWAY CAR AT NIGHT—ACTION BY WIDOW AGAINST RAILWAY COMPANY FOR ACT OF PEACE OFFICER ASSIGNED TO PROTECT RAILWAY PROPERTY DISMISSED—CR. CODE SEC. 41.

Sec. 41 of the Criminal Code which justifies force in making an arrest for crime applies to bar a civil action by a relative for damages for causing the death of the deceased by shooting if it appears that the shooting was by a peace officer employed to protect railway property in efforts to capture the deceased found in the act of stealing from a railway car and subject to arrest without warrant for the offence, and that the officer made reasonable effort to capture the deceased without shooting him during his flight from arrest.

APPEAL from the Superior Court, Tellier, J. Affirmed.

R. Stanley Weir, K.C., for appellant.

Meredith, Holden & Co., for respondent.

DE LORIMIER, J.:—Thefts of merchandise had been occurring for some time from the cars of the company, defendant, between Viger Station and Mile End. Two constables, O'Connell and Bailey, the former specially sworn according to law, were charged with investigating the matter.

On November 22, 1918, they hid between two cars on one of the defendant's trains which was leaving Viger Station. Between Hochelaga and Mile End, the constables saw two persons enter one of the cars of the train and noticed that bales of merchandise were immediately afterwards thrown out upon the ground. The thieves afterwards jumped from the cars, whereupon the constables, who had been watching all their movements, began to chase them, calling to them to stop. The marauders paid no attention to these warnings which merely had the effect of making them run faster, so that they gained ground on the officers. Realizing that he was about to lose his prey, Constable O'Connell fired a revolver shot in the air in the hope of moderating their speed, but the fugitives continued to run. O'Connell fired a second shot near the ground and the bullet ricochetted and hit the plaintiff's husband bringing him to the ground. He shewed fight and the constables were obliged to handcuff him. He was taken to a police station where it was discovered that he was seriously wounded. He died the follow-

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ing day, whence the present action.

The Judge of the Court of first instance dismissed the action on the ground that the plaintiff's husband had been caught red handed in the act of committing theft and was subject to arrest without a warrant; that O'Connell was a duly qualified constable and was by law authorised to resort to violence under the circumstances in order to ensure the arrest of the fugitives

The law which applies is art. 41 of the Criminal Code, which reads as follows:—

"Every peace officer proceeding lawfully to arrest with or without a warrant, any person for any offence for which the offender may be arrested without warrant, and everyone assisting in such arrest, is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner."

The evidence shews very clearly that the plaintiff's husband was a thief operating by night; that he did everything in his power to avoid arrest and that, if the police officer had not shot him, he would have escaped. The constable acted as the law requires in the circumstances. We find that the Judge in the Court of first instance made a sound decision and we see no reason for modifying his judgment. He did not pronounce upon the other ground of defence: namely, that the defendant was not responsible for the acts of a peace officer, since he found the first ground sufficient. He was right.

We confirm the judgment *a quo* with costs of both Courts.

Judgment confirmed and action dismissed.

DEVANEY v. McNAB.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. October 7, 1921.

EASEMENTS (§III—32)—RIGHT OF WAY—SALE OF PROPERTY ADJOINING—ERECTION OF BUILDING—FIRE ESCAPES ON BUILDING OVERHANGING RIGHT OF WAY—SUBSTANTIAL INTERFERENCE WITH—INJUNCTION.

The purchaser of property adjoining a right of way conveyed by the grantor for valuable consideration,, will not be allowed, by the erection of structures on the wall of a building erected on such property, to cut down and substantially interfere with the beneficial use of the right so granted.

APPEAL from the the judgment of Rose, J. Reversed.

The judgment appealed from is as follows:—

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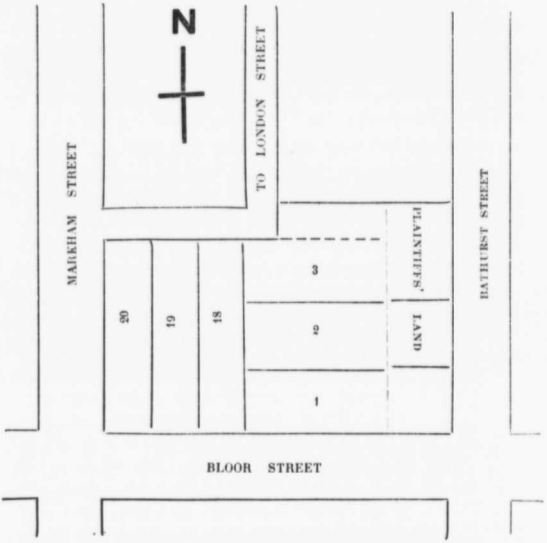
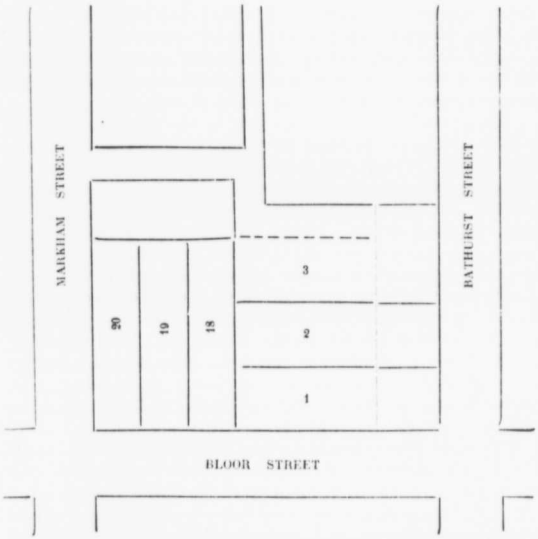
DEVANEY v. MCNAB.

The dominant tenement is a piece of land at the north-west corner of Bloor and Bathurst streets in Toronto, 50 feet in width measured along Bloor street and 150 feet in depth measured along Bathurst street. John Albert Devaney bought it in 1891 from the owners of lots 1, 2, and 3, according to registered plan No. 219, a copy of a portion of which is set out below; and he bought with it "a right of way at all times and for all purposes in, over, and upon the northerly 20 feet of lot number 3," extending from the westerly limit of the land conveyed to him westerly to the lane shewn on the registered plan. On the copy of a portion of the plan I have indi-



cated by broken lines the westerly limit of the land conveyed to Devaney, and the southerly portion of the land over which he was granted a right of way:—

At a later time, the public lane running east and west shewn on plan 129 was closed, and there was substituted for it a lane a little farther north, and at the same time the southerly portion of the lane running north to London street was widened from 15 feet to 25 feet as shewn in the sketch on the next page:—



In Devaney's lifetime, the building at the corner of Bloor and Bathurst streets was used as an hotel. It extended northerly from Bloor street not more than 100 feet; north of it, and fronting on Bathurst street, was a frame stable or barn used in connection with the hotel; and the principal purpose in securing the right of way or in stipulating for a right of way 20 feet wide was to insure an access to this stable for loads of hay, etc., coming down the public lane from London street or from Markham street.

John Albert Devaney died in 1906. After his death, Mrs. Devaney carried on the hotel business for a time, but finally the hotel was given up, and the ground-floor of the hotel building is now occupied by a chemist, the upper floors being let to various tenants.

Some years ago, the executors deemed it wise to pull down the barn and erect on the portion of their land lying north of what was formerly the hotel building three shops, with apartments over them, fronting on Bathurst street. These cover not only the space formerly occupied by the barn but also a vacant space that there was to the north of the barn. At the rear of

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them is a concrete platform, and west of that is a pathway 5 feet in width, which the executors bought from the owners of the land lying to the west of the dominant tenement, as a passageway for the use of the tenants of their Bloor street premises, in bringing goods in from the lane over the right of way.

The defendant has recently purchased the westerly 50 feet of lots 1, 2, and 3, and has erected a brick theatre fronting on Bloor street. The northern wall of this theatre coincides with the southern limits of the public lane and of the westerly part of the land over which the plaintiffs have their right of way. On this northern wall the defendant has put two iron fire-escapes, one, which is not here in question, overhanging the public lane, and the other, which forms the subject of dispute in this action, overhanging the land over which the right of way exists. This fire-escape projects some 3 feet 4½ inches from the wall. The platform itself is 7 feet from the ground, but it is supported by struts, which at their lower end where they join the wall are only some 5 feet above the ground. From the platform to the ground is an iron ladder, which is about one foot north of the wall.

The right of way is now used by the plaintiffs in bringing in fuel for the heating of the apartments over the Bathurst street shops, and it is used by the tenants of the Bathurst street apartments in bringing in their furniture. It is also used to some extent by the tenants of the plaintiffs' Bloor street shops and apartments. It is not suggested that any one using it has heretofore been put to the least inconvenience by the presence of the fire-escape: waggons coming in from the lane seem to proceed along the middle of the strip of land over which there is the right of way, and, so proceeding, there is not the least chance of coming in contact with the fire-escape. The plaintiffs, however, suggest that in the future there may be difficulty. Mrs. Devaney owns in her own right the 50 feet of lots 1, 2, and 3, lying between the executors' 50 feet and the defendant's 50 feet. The building on her property fronts on Bloor street and is a shallow building. The northern part of her land is not built upon, and there is no fence along the south limit of so much of her land as is subject to the plaintiffs' easement. The result is that vehicles which come through the lane and along the right of way are generally turned on Mrs. Devaney's property and are then backed against the platform at the rear of the Bathurst street buildings, and are then in a position to regain the lane on their outward journey without making auy further turn; and what is suggested is, that if and when Mrs. Devaney builds on her land, and so blocks the land which is at present used as a

turning ground, vehicles will have to turn in the public lane and back along the right of way strip on their inward journey, and it is suggested that, backing along the right of way strip, they may not steer as straight a course as they do at present, and may scrape along the fire-escape, which is at a height less than the height of the top of a high van. It is also suggested that, if two very large vans were to try to pass each other immediately north of the fire-escape, there might be difficulty; and, finally, the plaintiffs say that they may some day decide to tear down the northerly one of their Bathurst street buildings, and open a way through from Bathurst street, so as to make a continuous passageway from Markham street or London street by way of the lane, the right of way strip, and the new passageway to Bathurst street; and they say that, while they have not been hurt as yet, they desire to protect themselves against the possibility of interference in the future with their full enjoyment of the right of way. Perhaps I ought to have noted in passing that at one time while Mrs. Devaney was carrying on the hotel business she had gates across the westerly end of the strip of land over which the right of way exists. These gates were on posts which projected some distance into the 20 feet, and therefore considerably reduced the actual width of the way; and yet no one suggests that they caused any inconvenience.

The suggestions of future inconvenience seem to me to be far-fetched. They are not like the suggestions which Stirling, J., had to consider in *Sketchley* v. *Berger* (1893), 59 L.T.R. 754, and which led him to conclude that there was a substantial interference with the plaintiff's easement. On the contrary—the rule being as stated by Stirling, J., "that there is a difference between a grant of a way over a defined portion of land and a grant of the soil itself. In the latter case any interference with the soil gives rise to an action for trespass; in the former an action does not lie unless there is a substantial interference with the easement granted"—I have reached the conclusion that the action does not lie in this case. I think there is no interference with the easement granted, or, to use the language of Cockburn, C.J., in *Hutton* v. *Hamboro* (1860), 2 F. & F. 218: "practically and substantially the right of way can be exercised as conveniently as before," and the plaintiffs have lost nothing by the alteration made by the defendant.

Obviously it is not a case for damages, because the plaintiffs have not suffered any loss; and it is not a case for an injunction, because it is, to say the least of it, highly improbable that they ever will be inconvenienced in the slightest degree by the fire-escape. They say they ought to have an injunction because it is

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possible that, in some one of the ways which I have mentioned or in some other way, they may in the future suffer some inconvenience, and that when the inconvenience does arise they may be held to have lost by acquiescence their right to object. It seems to me, however, that, the plaintiffs having brought this action, there is not the slightest danger of its being held that they have acquiesced in any interference with the right of way, unless and until, the fire-escape proving to be an interference, they desist from objecting. An injunction which will harm the defendant ought not to be granted for the sake merely of protecting the plaintiffs against some future interference with the exercise of their right of way, which they apprehend but which it is difficult to believe will ever take place.

The action must be dismissed with costs.

R. U. McPherson, K.C., for the appellants.

R. S. Robertson, K.C., for respondent.

MIDDLETON, J.:—The facts in this case are simple. simple. The plaintiffs are the owners of a piece of land on the north side of Bloor street at the corner of Bathurst street, having a frontage on Bloor street of 50 feet, and a depth on Bathurst street of 150 feet. Towards the north their property has a width of 65 feet as against 50 feet frontage. The plaintiffs have also by grant a right of way "at all times and for all purposes in common with all other persons entitled thereto in over and upon the northerly 20 feet" of lot number 3. This 20-foot strip extends westerly from the plaintiffs' property to a public lane running north and south.

The defendant owns 50 feet of land fronting on Bloor street and extending northerly to this lane. Upon this he erected a motion picture theatre, covering the entire lot. He also erected a fire-escape projecting over the right of way 3 feet 4½ inches, and a ladder projecting about a foot. This fire-escape is 7 feet 6 inches above the surface of the ground, but it is supported on iron brackets sloping from the outer edge to the wall of the building.

The plaintiffs' action is for a declaration that this is an obstruction of their right of way, and for an order for its removal.

The learned trial Judge has taken the view that this is not such a substantial interference with the plaintiffs' right of way as to justify the granting of any relief, and has dismissed the action with costs.

There is no question as to the existence and extent of the plaintiffs' right. The defendant claims title under the plaintiffs' grantor by a junior conveyance.

At the time of the bringing of this action, and up to the trial, it was not shewn that the structure complained of actually

caused any inconvenience to the plaintiffs, as the unobstructed portion of the 20 feet was sufficient to meet their requirements.

I am unable to agree with the view taken by the learned trial Judge. It is well settled that the rights of the parties must be determined according to the true construction of the grant (see *United Land Co.* v. *Great Eastern R.W. Co.* (1875), L.R. 10 Ch. 586); and it is to be observed that the grant here is in the widest possible terms. It follows, I think, that the grantor must not derogate in any way from his grant. Where the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears to me to be almost impossible to say that there is not a real and substantial interference with the right conveyed.

I quite agree with the opinion expressed in several cases that the Court is not called upon to interfere where that which is done is some small and insubstantial thing which does not in truth and in substance affect the beneficial use of the right granted; but, where the plaintiff's right depends upon the terms of a written grant, it ought not to be easy for the grantor to cut down the full extent of the privilege which for valuable consideration he has conveyed.

In each case it appears to me that it must be regarded as a question of fact, and upon the undisputed state of affairs here I can come to no other conclusion than that this structure is a substantial interference with the plaintiffs' right. I rely on *Sketchley* v. *Berger*, 59 L.T.R. 754; *Clifford* v. *Hoare* (1874), L.R. 9 C.P. 362.

I am also of opinion that, where the structure complained of is permanent in its nature, there is a real danger that the plaintiff, if he does not assert his rights, and acquiesces in its continuance, may be taken to have abandoned his right to complain, and to have so acquiesced in the thing complained of as to prevent him from hereafter asserting his rights. It is not necessary to enter upon a discussion of this question at length, for in my view the plaintiffs' right is clear.

The judgment should be so framed as to give the defendant 3 months in which to remove that which is complained of.

RIDDELL, J., agreed with MIDDLETON, J.

LENNOX, J.:—I agree in the reasoning and conclusions of my brother Middleton.

MEREDITH, C.J.C.P.:—The right which the plaintiffs have is

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Meredith, C.J.C.P.

only a right of way; in all other respect the land is, as between the parties to this action, owned by the defendant, who has all other rights of ownership in and over it, including a way into the rest of his land adjoining it.

But the right which the plaintiffs have is a right of way over the strip of land 20 feet in width; not a right of way over a strip 16 or 17 in width; so that if the effect of that which is complained of is to reduce the right of way in width 3 or 4 feet, so that it is made one over a strip of land not 20 feet but only 16 or 17 in width, the plaintiffs ought to have a good cause of action, whether 16 or 17 feet, or none at all, is sufficient for their present uses, or is not; and it is admitted that, if that be so—if the right is so reduced—the plaintiffs have a good cause of action.

It has been proved, and indeed is self-evident, that for all conveyances, or loads, over 7 ft. 6 in. in height, the 20-foot right of way is permanently reduced by the width of the "fire-escape" platform complained of, that is, 3 ft. 4½ in.; just as effectually, and more harmfully, reduced as and than if the space covered by the platform were built upon with bricks and mortar from the ground up to the roof of the building to which the fire-escape is attached: and accordingly the plaintiffs have a good cause of action.

But, if that were not so, if the question were merely whether the plaintiffs' right of access to their land over the land in question is substantially obstructed by the structure in question, regardless of any specified width of the land over which the way existed, it could not, in my judgment, be well found that it is not.

The way into this way is also narrow, and the turn into it, at right angles, is more or less difficult according to size and character of the vehicle being driven; quite difficult enough at the full width of 20 feet with a large horse-drawn furniture-van, for instance; and still more difficult when more than one conveyance is at the turn, or in the short way, at the one time: and there must be always some danger in driving in or out in the dark—danger of the top of the conveyance or load striking against the projecting platform or its bracket supports.

And there is no reason, or excuse, that I can imagine, why any danger, or inconvenience, or narrowing of the way, should exist: the platform could, no doubt, be placed a little higher and be supported, if need be, from above instead of from below; or, if that should be inconvenient, it could, quite as well, be supported from above and made to fold up against the building when not in use.

It is not a sufficient answer, to such an action as this, merely to say that the plaintiff has had no need to exercise his right, or has hitherto suffered no injury or inconvenience in exercising it; it is his right to exercise it fully whenever he sees fit and to have any obstruction to such a reasonable exercise of it removed: he is not bound to submit to it and actually suffer from it before the defendant can be compelled to remove it.

I am in favour of allowing the appeal, and of compelling the defendant to abate the obstruction, in any way that he may see fit; and of allowing him 3 calendar months' time in which to do so effectually. The appellants to have their costs throughout.

LATCHFORD, J.:—I think this appeal should be allowed. The case relied on by the defendant, *Clifford* v. *Hoare*, L.R. 9 C.P. 362, decided on a special case, appears to state the law applicable to an infringement of a right of way, but the facts of the present case are materially different.

There the action was for breach by a grantor of a covenant that he had not been a party or privy to anything whereby a right of way conveyed to the plaintiff over a road to be constructed of a width of not less than 40 feet should be impeached, charged, or incumbered in title, estate, or otherwise. He had previously joined in a conveyance of adjacent lands, authorising the grantee to erect a portico over the footpath forming a part of the right of way, provided the designs were submitted to and approved by the grantors or one of them. The designs were so submitted and approved. The portico, which projected from the first floor at a height of 16 feet from the ground, was supported by pillars which extended 2 feet into the right of way and along it for a distance of 5 feet. The material point considered was, whether there had been an interference with the right of way granted to the plaintiff. If this was decided adversely to the defendant, he would have been held liable upon his covenant. Coleridge, C.J., said (p. 370) that, construing the deeds according to the intention of the parties as expressed therein, the Court gathered from the language of the deed to the plaintiff that the intention was to grant to him as an easement the reasonable use and enjoyment of a right of way, and that it was not suggested that the plaintiff had not such reasonable use and enjoyment. "Upon the statements in the special case, it does not appear that the plaintiff has not got in the fullest sense that which the deed purported to convey to him. If so, it follows that this action . . . cannot be sustained." Brett, J., considered that there had been no substantial interference with

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the plaintiff's reasonable use of the easement granted to him, and said (p. 371) that the plaintiff's rights had not been infringed at all, adding (pp. 371, 372): "I would wish to guard myself from being understood to say that we should be justified in disregarding an interference with a right because the damage is inappreciable. Generally speaking, any interference with a *right*, however small, creates a cause of action."

While any appreciable obstruction of a highway is actionable, the obstruction of a private right of way is, upon later authority, not actionable unless there is a real, substantial interference with the enjoyment of it—*per* Cozens-Hardy, M.R., in *Pettey* v. *Parsons*, [1914] 2 Ch. 653, 662.

In the present case there is a real and very substantial interference with the plaintiffs' enjoyment of the narrow right of way—far more real and substantial than in the English cases cited. That is why I think the appeal should be allowed. A reasonable time should be given to the defendant to remove the obstructions.

Appeal allowed.

McKILLOP v. HICK and McCORVIE.

Alberta Supreme Court Appellate Division, Stuart, Beck and Clarke, JJ.A. September 30, 1922.

CONTRACTS (§ II D—170)—AGREEMENT FOR JOINT PURCHASE OF REAL PROPERTY BY THREE PERSONS—ONE PURCHASER BUYING OUT INTEREST OF ONE OF THE OTHERS—PARTITION BETWEEN REMAINING TWO—SALE OF ONE OF THE LOTS—LIABILITY OF PERSON SELLING OUT INTEREST UNDER ORIGINAL AGREEMENT.

Where three persons together agree to purchase two lots, each contributing an equal amount of the purchase price, and after two payments have been made, two of them make a verbal agreement whereby one agrees to purchase the interest of the other, and to pay him therefor the amount paid by him on the original agreement, and the person acquiring the interest subsequently enters into another agreement with the other original purchaser, whereby they agree to partition the lots between them, nothing being said about the payment of the balance of the purchase price under the original agreement, the Court will assume that each would pay one-half, and the person who sold out his one-third interest, and made no further payments, having considered himself and having been considered by the others to have transferred his entire interest to them, and not having claimed nor been paid any share of the profit on the sale of one of the lots, cannot be held liable under the original agreement for his share of the balance due on the other lot.

APPEAL by one of the defendants from the judgment of Walsh, J., in an action for contribution. Reversed.

The facts of the case are fully set out in the judgment of Clarke, J.A.

A. G. Virtue, for appellant.

A. E. Dunlop, K.C., for respondent.

STUART, J.A.:—I do not think that the mere fact that McKillop was aware that McCorvie had sold out his interest to Hick would suffice to destroy McKillop's right to contribution as against McCorvie. This would not be disputed by anyone. And I think we can go further and say also that the fact that McKillop, being aware of the deal between Hick and McCorvie, had made a bargain with Hick, whom he knew to be fully entitled to the remaining interest over and above his own, as to a partition of the property would not, of itself, destroy the right to contribution as long as that bargain did not put it out of McKillop's power to give to McCordie the rights which were necessarily correlative to the duty to contribute, viz., the share in the property which he was originally intended to have.

But what McKillop did here quite clearly has prevented him from giving McCorvie his originally intended undivided one-third interest in the two one acre plots.

The only real difficulty about the matter in my mind arises from the question whether McCorvie should not be taken to have assented to McKillop's action. But McKillop knew that McCorvie had parted with all his substantial interest in the property, so far as benefits to be deserved therefrom were concerned. He must, therefore, have known that McCorvie was joining in the signature to the documents for formality only. If, at the time McKillop got McCorvie to sign, it was intended that McCorvie's obligations to his original co-purchasers were continuing, then his interest in the benefits to be derived from the property must also have been intended and understood as continuing. But McKillop's actions clearly pointed to the contrary. He clearly considered that McCorvie had no interest or concern in what happened to lot 5. That could only be the case if his obligations to his co-purchasers had ceased as well. The assignment of 1915 clearly removed all McCorvie's interest in lot 5 and must have removed as well his obligation to contribute to the purchase price. But the original obligation of contribution related to a single purchase agreement covering the two lots. That obligation was never by agreement reduced or divided proportionately so as to remain with respect to lot 2. Therefore, I think it must be treated as having disappeared entirely.

I would allow the appeal with costs and dismiss the action as against McCorvie with costs.

BECK, J.A.:—I agree with the opinions expressed by my brothers STUART and CLARKE, JJ.A.

CLARKE, J.A.:—By agreement in writing dated February 19, 1912, the plaintiff and the two defendants agreed to purchase

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Clarke, J.A.

from W. C. Ives, lots 2 and 5 in a certain subdivision in Lethbridge for the sum of $6,000, payable as follows: $900 down; $600 on May 19, 1912, and the balance of $4,500 on February 19, 1917, with interest.

The two first payments amounting to $1,500, were made, each of the purchasers contributing his one-third share of $500. The lots contained one acre each and were of about the same value. I judge they were purchased as a speculation.

Early in October, 1912, the defendant Hick verbally agreed to purchase the interest of his co-defendant McCorvie and to pay therefor $500, the amount which had been paid by McCorvie on the original agreement. A promissory note was given for the amount and afterwards paid. Hick was to take the place of McCorvie in the transaction so that he would, upon payment of the purchase money, become entitled to a two-thirds undivided interest in the land and he became chargeable as between him and McCorvie with payment of two-thirds of the unpaid balance of purchase money.

The plaintiff was not a party to this transaction but in the opinion of the trial Judge he was informed of it by Hick. This is denied by the plaintiff but it is difficult to understand his subsequent conduct if such were not the fact. It is positively sworn to by Hick and I treat it as an established fact.

Afterwards, and shortly before August 1, 1913, the plaintiff and Hick, without reference to McCorvie, verbally agreed to partition the two lots between them, the plaintiff taking lot 5 and Hick lot 2. Nothing was said about the payment of the balance of purchase money under the original agreement but it would seem to follow that each would pay one-half, perhaps with some allowance to Hick for the $500 paid by McCorvie and recouped to him by Hick.

The plaintiff says his understanding was that Hick was taking lot 2 on behalf of himself and McCorvie but I think he is mistaken in this. Certainly, Hick had no authority from McCorvie who was not mentioned in the transaction—and he having disposed of his interest to Hick to the plaintiff's knowledge, I can see no ground for any such understanding. McCorvie was informed of the transaction between the other two, and thereafter made no further payments and considered he was out of it. About August 1, 1913, the plaintiff having taken possession of lot 5, sold it to Cameron and others for $3,600, through a real estate agent, and he was informed by the agent that he could also sell lot 2. All three apparently joined in the written agreement for the sale of lot 5 to Cameron *et al* and executed the necessary papers to enable the transfer of lot 5 to be made by Ives direct to

Cameron *et al*, but this was done merely as a matter of formality It was common ground throughout that the lot belonged to plaintiff on whose behalf the sale was made and he appropriated the purchase money other than what he paid on the Ives agreement to his own purposes. The plaintiff was compelled to pay to Ives not only the balance of purchase money which appertained to lot 5 but also that which appertained to lot 2. Upon completing the payments, he procured a transfer from Ives of lot 2 to the three original purchasers in 1920 (the transfer of lot 5 having been made in 1916 to Cameron *et al*) but the transfer was not registered and it does not appear that McCorvie accepted it or in any way recognized it. It was stated during the argument that the lot had gone to the city for taxes.

This action is to recover from each defendant one-third of all the sums paid by the plaintiff in respect of both lots. Hick did not defend. The question for determination is whether or not, in view of the facts stated, McCorvie is liable to contribute. The trial Judge found that he was, but required the plaintiff to credit the amounts received by him as purchase money for lot 5. I find myself unable to agree with this result, which seems to me to have the effect of setting aside the arrangement whereby the plaintiff became the owner of lot 5. I see no ground for interfering with that arrangement.

If McCorvie is still liable to contribute, then it is only fair that he should have the benefit of that credit, but, in my opinion, he is not liable to contribute, by reason of the dealings between the plaintiff and Hick. He cannot on payment receive the interest in lot 5 which he would be entitled to but for such dealings. He never agreed to remain liable and have an interest in lot 2 only. I do not think it is an answer to say now that he can share in the profits on the sale of lot 5.

But for the partition of the lots it may well be that both of them would have been sold for sufficient to meet the original purchase price and it would, I think, be unfair to McCorvie at this late date to compel him to contribute to the loss which under the arrangement made by the plaintiff with Hick should fall upon the latter.

The right to contribution is founded on principles of equity and natural justice and is not, in my opinion, available under the circumstances of this case, where its exercise would work an injustice.

I would, therefore, allow the appeal and dismiss the action as against McCorvie, both with costs to be taxed under column 3.

Appeal allowed.

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ROSA v. MOUNT ROYAL TUNNEL AND TERMINAL Co. AND C. N. R. Co.*

Quebec King's Bench, Lamothe, C.J., Martin, Greenshields, Dorion and Bernier, JJ. February 22, 1922.

RAILWAYS (§ VII—140)—CANADIAN NATIONAL RAILWAY COMPANY—ACQUISITION BY GOVERNMENT—INCORPORATION OF BY 1919 (CAN.), CH. 13—RIGHT TO SUE AND BE SUED IN ORDINARY ACTION.

By Dominion statute, 1919, ch. 13, the Canadian National Railway Company was created as a corporation with a distinct existence and capable of suing and being sued before the Courts in an ordinary action. Where the plaintiff first sued the Canadian National Railways, and during the trial asked for and was given leave to replace this name by the "Canadian National Railway Company" and the proceedings were continued, no exception being taken to the form, and judgment being rendered against the railway, the Appellate Court will not entertain an objection that no company exists bearing the name it was given in the action, there being no possibility of error as to the identity of the defendant.

APPEAL by the Canadian National Railway Company (one of the defendants) from the trial judgment in an action for damages for the death of the plaintiff's son, while working in the Mount Royal Tunnel. Affirmed.

The facts of the case are as follows:—

Respondent sued the appellants in damages for the death of her son while working in the Mount Royal tunnel. The jury awarded a fraction of the sum claimed.

During the trial, after the presiding Judge had made his address, counsel for the Canadian National R. Co. raised the objection that the Judge "did not charge that there is no evidence of the existence of a corporation called the Canadian National Railway Company."

The Superior Court condemned each of the appellants to pay half the sum awarded.

The question of law is whether the "Canadian National Railway Company," the name used to designate the Federal Government railways, is a corporation with a distinct existence and capable of suing and being sued before the Courts in an ordinary action.

D. C. Robertson, K.C., for Mount Royal Terminal Co.

Perron, Taschereau, Rinfret, Vallée & Genest for Canadian National Railways.

Monty, Duranleau, Ross and Angers, for respondent.

LAMOTHE, C.J.:—A question was discussed at the hearing which was not raised before the Court of first instance. Is the "Canadian National Railway Company, Limited" an existing

[*Appeal to Supreme Court of Canada pending.]

corporation? The Government railways are generally designated as "Canadian National Railways." This is the name used in the present action. During the trial the plaintiff asked and was given leave to replace the name by the words "Canadian National Railway Company," and the proceedings were continued. No exception to the form was made. It has not been alleged, therefore, that the new name was that of a company which was not in the case. In fact there has been no change of defendants. The original summons of "The Canadian National Railway Company" has not been renewed or changed; and as this question was not discussed at the trial we should not entertain it in appeal. I would confirm the judgment.

MARTIN, J.:—With respect to the other appellant, a preliminary objection was raised before this Court that this company had no legal existence and it was urged that in virtue of the Order in Council of December 20, 1918, that the name under which the appellant was impleaded in the first instance was merely a collective or descriptive title of the railway system and not its corporative title, and the use of such a title was a mere matter of convenience or reference and did not create a new legal corporate entity or affect in any manner whatsoever the legal status or the rights and obligations of the individual corporations collectively so denoted.

Whatever may have been the effect of this Order in Council, by the Act, 1919 (Can.), ch. 13, assented to on June 6, a company was incorporated under the name of Canadian National Railway Company, one of the constituent companies being the railway in question, and although pending amalgamation or other consolidation of the lines of railway under government control, the use of this collective or descriptive designation of Canadian National Railways was continued, but after the enactment of this statute, even though the constituent railway companies retained their corporate existence, the company appellant was incorporated as a company under the name of Canadian National Railway Company.

The remarks reported in Hansard, (Can. H. of Com.) of the member of the Government having charge of this legislation to which we are referred, clearly indicate this as being the effect of such incorporation that the company can sue or be sued, and while citations from Hansard are not binding, they are at least illuminating, and I hold that this preliminary objection made by the appellant railway company cannot prevail.

Section 15 of the Act 1919 (Can.), ch. 13, says:—

"Actions, suits or other proceedings by or against the company in respect of its undertaking or in respect of the operation or

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management of the Canadian Government Railways, may, in the name of the company, without a fiat, be brought in, and may be heard by any Judge or Judges of any Court of competent jurisdiction in Canada."

And the Honourable Mr. Meighen in Hansard of 1919, vol. 2, p. 1697, said:—

"In one sentence, it makes the new corporation liable at law and vests in the new corporation the rights at law of a corporation rather than put it in the position of the Crown. A man now to sue in respect to anything done to him on the Intercolonial must have a fiat. Hereafter he can sue the Canadian National Railway Company without a fiat."

GREENSHIELDS, J.:—With respect to the other appellant, the Canadian National R. Co. A preliminary objection was raised by this appellant, that there was no proof made that this appellant owned the engine that caused the death of the respondent's son, or employed the men who were operating that engine. The statement was even made that this appellant had no existence. I must admit that some embarrassment was caused to me at the argument, but a subsequent consideration and examination of the statutes and orders in council have caused the difficulty to have disappeared.

The Government of Canada became the owner of certain lines of railway. It proceeded to incorporate a company by statute 1919 (Can.), ch. 13. It may be true that after the enactment of this statute the different railway companies, the property of which had been acquired by the Government, retained their corporate existence, but in explanation of the enactment the authors or law makers say that the company appellant, after its creation under the statute, could sue and be sued with respect to all obligations or undertakings of the different railway companies, the property of which the Government had acquired. The member of the Government stated that the incorporation of the company appellant relieved a person having claims against any of the companies from obtaining a fiat, a proceeding by way of petition of right, or before the Exchequer Court. I have no doubt whatever that the appellant, the Canadian National R. Co., is properly impleaded in the present case.

DORION, J.:—The respondent sues for damages resulting from the death of her son who was killed in the tunnel driven under the mountain at Montreal for the use of the appellant, the "Canadian National Railway Company." The latter claims that no company exists bearing the name it was given in the action.

This question cannot be considered in the present appeal. Indeed the respondent first sued the "Canadian National Rail-

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ways," who appeared by attorney and contested the action on the merits in conjunction with the other appellant. The respondent later obtained permission to amend the writ and to change the appellant's name to "Canadian National Railway Company." The same attorney continued to act for the appellants and no exception to the form was made. There is, therefore, a company which recognised itself as indicated by the designation used by the respondent, and there is no possibility of error as to the identity of the appellant. There is only—perhaps—inaccuracy in the name, an informality which was not invoked by the railway company. If the company had invoked that informality it would have been obliged to use its proper name, which would have been a matter of some difficulty, even for it.

BERNIER, J. (dissenting):—Before giving my opinion on the merits of the verdict as to responsibility and damages, I shall first take up a very important point raised in the factum of the "Canadian National Railway Company." The attorney for "Canadian National Railways" or "Canadian National Railway Company" denies the existence of the latter company and alleges that nothing can justify the jury in returning a verdict against it. He alleges that in his plea he denied all the allegations of the action which could affect the latter, that the plaintiff has made no proof whatever that the locomotive which struck Moriconi was the property of the "Canadian National Railway Company," or that the crew in charge of that locomotive was composed of employees of the "Canadian National Railway Company." Now, says the learned attorney, the jury has held the appellant responsible for the accident by the following answer:

"Canadian National Railway Company" on account of the negligence of the engine crew in running on the wrong track.

What must we understand by "Canadian National Railways" and "Canadian National Railway Company?"

To answer this question some statutes and Orders in Council must be cited.

The Act 1910 (Can.), ch. 26, secs. 2 and 3, say:—

"2. Subject as hereinafter provided, any claim against His Majesty arising out of the operation of the Intercolonial Railway and not exceeding in amount the sum of two hundred dollars, for damages alleged to be caused by negligence, or made payable by statute, may be sued for and prosecuted by action, suit or other proceeding in any provincial court having jurisdiction to the said amount over like claims between subjects. 3. In any such action, suit or other proceeding His Majesty shall not be cited as defendant, but the process shall be issued against the officers appointed to manage the Intercolonial Railway, who shall be cited

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by the name and description of the 'Government Railways Managing Board', and such process may be served upon any member of the said board or upon any officer of the Government Railways. . . "

By the Act 1913 (Can.), ch. 20, sec. 1, the amount for which an action could be taken in the manner provided in the Act cited above was increased to $500. By the Act 1916 (Can.), ch. 17, it was declared that the provisions of the first Act, amended, should be applied and their scope extended to include all claims arising out of the operation of all the railways, their branches and extensions, as well as the ferries connected therewith, under the control and administration of the Minister of Railways and Canals. This extension was so complete as to include claims arising out of the operation of the Intercolonial Railway.

An Order in Council was passed in November, 1918, in the interests of economy and efficiency in the administration and operation of the Canadian Government Railways and the system known as the "Canadian Northern Railway System." It was decided that the board of directors of the government railways should be that of the "Canadian Northern Railway System."

On December 30, 1918, a new Order in Council was passed to the following effect:

". . . Directing the directors to use as a collective or descriptive designation the name 'Canadian National Railways' in lieu of the names 'Canadian Northern Railway System' and 'Canadian Government Railways'; provided that deeds, leases, agreements and documents of all kinds requiring execution under seal shall continue to be drawn and executed under the respective corporate names of the corporations (including the Crown), owning or entitled to the properties affected thereby, and that nothing in this Order shall be taken to restrict or enlarge or otherwise affect the liability of such respective corporations for any of their respective acts or omissions, the corporate entity in each case being preserved and the rights and liabilities remaining the same as heretofore, notwithstanding the use of the collective or descriptive designation herein ordered."

An Act was passed June 6, 1919, incorporating a company to operate the Government railways under the name of "Canadian Northern Railways." Section 1 of this Act, 1919 (Can.), ch. 13, says:—

"1. The Governor in Council may nominate such persons as may be deemed expedient, not less than five, nor more than fifteen, to be directors of the company hereby incorporated, and upon such nomination being made, the persons so nominated, and their successors, and such other persons as may from time

to time be nominated by the Governor in Council as directors, shall be and are hereby incorporated as a company, under the name of 'Canadian National Railway Company', hereinafter called 'the company'. No stock ownership shall be necessary to qualify a director."

By sec. 4, the head office of the company is fixed at whatever place in Canada the Governor in Council may from time to time designate. Sections 7 and 8 provide that the first directors may make by-laws and appoint an executive committee of the Board of Directors. By virtue of sec. 10, all the railways belonging to the Canadian Government and all the lines of the "Canadian Northern" are subject to the provisions of the Act. Two schedules to this Act expressly mention the names of all the lines of this last named company. By sec. 15 (1.), all actions, suits or other proceedings may be brought against the company without a fiat. Any valid defence on behalf of any of the various corporations (including His Majesty) may be made by the company, and such proceedings may be brought before the Court which would have jurisdiction in similar matters between individuals. Section 24 says:—

24. "Pending amalgamation or other consolidation of the lines of railway or works under its control, the company may, in respect of the operation of its lines of railway or the lines of railway of the Canadian Northern System or the Canadian Government Railways, use the name 'Canadian National Railways' as a collective or descriptive designation of all lines of railway or railway works under its control, without, however, affecting the rights or liabilities of any of the respective corporations (including His Majesty) for any of their respective acts or omissions."

See also sec. 14.

No Order in Council seems to have been passed under secs. 1 and 4, 7, 8 and 11 of the above mentioned statute. The building destined to contain the company's offices has been erected and still exists, but the mind which should have given it life, the Board of Management, has never been created. It is a body without mind or life. An Order in Council appointing at least 5 and not more than 15 directors would have given life and existence to the company; but no such Order in Council has ever been passed and the company does not therefore exist.

As regards the "Canadian National Railways," we have seen by the extracts I have quoted from an Order in Council dated December 20, 1918, that this name did not create a definite legal company. The Order in Council merely empowers the Board of Management of the Government railways and of the "Canadian Northern" to use this one expression to designate the roads under

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its control. It is distinctly stated that nothing in this Order in Council shall be taken to restrict, increase or otherwise affect the responsibility of any proprietor of one or more of these roads as regards their responsibility for any act or omission on their part. Each of the owners retained its legal entity as regards its rights and obligations notwithstanding the employment of this collective or descriptive name "Canadian National Railways." Now the action was first brought against the "Canadian Northern Railway Company" and later on this name was changed to "Canadian National Railway Company." The verdict went against the company designated under this latter name. If no company exists under that name, a verdict against it cannot touch any of the companies of the "Great Northern System" or of the Government. In that case no corporation would have been legally summoned and none would be before the Court and capable of being condemned.

Viewed from another angle, if the verdict had been rendered against "Canadian National Railways," the effect would have been the same and that for the same reasons. The evidence shews that the engine which struck the victim bore the name "Canadian National Railways." That would lead one to believe that the engine belonged to the Government railways. But this name or these words do not designate any legal corporation, any corporate entity. They designate the railways belonging to the Government or to His Majesty. Now in this case no action, no claim in damages, could be taken before the Courts of this Province by direct suit against His Majesty, who is owner of the railways belonging to his Government.

The only method of procedure would be by way of petition of right before the Exchequer Court of Canada. So there was lack of jurisdiction on the part of the Court of first instance and the verdict rendered against "Canadian National Railways," or "Canadian National Railway Company" is absolutely illegal and null.

I am of opinion that this Court is obliged to take cognisance of this lack of jurisdiction.

The attorney for the respondent argued that the "Canadian Northern Railway Company" was a *de facto* corporation.

I am not of that opinion. Such *de facto* corporations exist in England and have done so for a great number of years. The date of their incorporation has been lost sight of, but they have always been known to the public as corporations. There may be others of whose existence I am not aware.

I cannot maintain the appeal as regards the "Canadian National Railway Company" for the reasons which I have men-

tioned and would quash the verdict as regards that appellant.

Appeal dismissed.

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REX v. MACDONALD.

Alberta Supreme Court, Appellate Division, Stuart, and Beck, JJ.A. Simmons, J. ad hoc, Hyndman and Clarke, JJ.A. April 28, 1922.

APPEAL (§IC—25)—STATED CASE—NO STATED CASE BY JUSTICES IF SPECIAL ACT GIVES NO RIGHT OF APPEAL—LIQUOR ACT 1916 (ALTA.) CH. 4 AND AMENDMENTS.

A proceeding by way of a stated case by Justices is a form of appeal and in cases in which any appeal is prohibited under the Liquor Act, 1916 (Alta.) ch. 4 and amendments, there is no jurisdiction to hear a case stated by a magistrate on a point of law.

Case stated by a magistrate.

Frank Ford, K.C., for defendant.

R. A. Smith, for the prosecution.

STUART, J.A.:—It seems to me to be clear that the Legislature of the province has enacted that all Justices of the Peace shall be the final Judges both of law and of fact under the Liquor Act 1916, (Alta.) ch. 4, insofar as ordinary citizens are concerned unless, as provided by the amendment passed only at the last session, the accused has in fact been sent to jail. Neither a Judge of the Supreme Court nor this Appellate Division has now any power of interference in any shape, manner or form except as to jurisdiction. The Act says that there shall be no appeal except in the case of vendors or druggists, as accused, or in all cases, by the prosecution. Does this mean that there shall be no such thing as a stated case? It seems to be well settled that a stated case is a form of appeal. Keeping in view the obvious purpose of the Act to make it impossible for an ordinary person to get rid of the decision of the Justice of the Peace when given against him I think we ought to give to the expression "appeal" the full meaning of which it is capable, and which has in general been attributed to it in cases under, and in the words of, the Criminal Code whose provisions are made generally applicable to proceedings under provincial statutes. In this view there is no need to refer to the special provisions of sec. 769 of the Code. We have no jurisdiction in my opinion to entertain this stated case and the application should be dismissed without costs.

BECK, J.A.:—The Magistrates Act, ch. 13 of 1906 (Alta.) as amended by ch. 4 of 1918, sec. 25, enacts that:—

"8. Except as otherwise specially provided, the provisions of *The Criminal Code* of Canada as amended from time to time respecting summary convictions and proceedings relating thereto shall apply in respect to all convictions or orders made or to be made by justices of the peace and police magistrates

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under any law or regulation in force in the province or under municipal by-laws."

The effect of this general enactment is to introduce among other provisions sec. 750 to 769 relating to appeals properly so-called and to stated cases. Section 750 is prefaced by the words:—"Unless it is otherwise provided in the special Act." These words obviously necessarily refer to special Acts (i.e. Acts other than the Criminal Code) passed by the Dominion Parliament. Consequently when this procedure was introduced into the Provincial field, these introductory words, inasmuch as they could have no possible application to Provincial matters in the sense which they have in the Code, were not introduced but are to be wholly disregarded. This being so I think the words "by any special Act" occurring in sec. 769 are also to be wholly disregarded. The result is that where there is no right of appeal in the ordinary sense there is no right to state a case.

The legislation to which I have referred is of a quite general character and is probably not in itself open to criticism. Nevertheless I have struggled to give some other interpretation by reason of the result of this interpretation permitting effect to be given to the injustices of the Liquor Act, which, first, puts overwhelming presumption of guilt against the accused and then prohibits an appeal by the accused, though giving one to the prosecution, and to which has now been added the further injustice of making an accused liable to conviction though the act with which he is charged was "done, suffered or permitted inadvertently or without guilty intent or without guilty knowledge."

The appeal of the accused must be dismissed. I would give no costs.

SIMMONS, J. and HYNDMAN, J.A., concurred with CLARKE, J.A.

CLARKE, J.A.:—This is a case stated by Primrose, Police Magistrate at Edmonton, on the application of the defendant for the opinion of the Court as to whether he, having determined that the defendant is guilty of the offence charged, would be right in convicting him. The charge is for keeping liquor for sale contrary to the Liquor Act and the evidence satisfies the magistrate that beer of the prohibited strength was kept on the defendant's premises (the Selkirk Hotel in Edmonton) without the knowledge of the defendant or of the bar tender or any other employee of the defendant and against his express commands which were known to the bar tender. This raises the important question of the applicability of the doctrine of *mens*

rea to offences against the "Liquor Act." I would think it desirable that this important question should be settled by some competent tribunal so as to furnish a precedent and guide to Justices of the Peace in their administration of the Act, as well as to others who may be affected, but unfortunately for the magistrate as well as for the defendant, we are met on the threshold with the fatal objection that there is no authority which enables the magistrate to state a case for the opinion of the Court in prosecutions under the Liquor Act, for offences in respect of which there is no appeal.

Authority for stating a case in respect of summary convictions is contained in sec. 761 of the Criminal Code but it is subject to the qualification in sec. 769 sub-sec. 2.

"Where by any special Act it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken to have a case stated or signed as aforesaid in any case to which such provision as to appeal in such special Act applies."

The Liquor Act provides that, with some exceptions, which do not include the charge here in question, the conviction of the magistrate shall be final and conclusive and against such conviction there shall be no appeal.

There is considerable authority for the view that a proceeding by way of stated case under sec. 761 of the Code is one form of appeal from a conviction. Power is given to the Court, on hearing the case, to affirm, reverse or modify the conviction. Certainly a conviction cannot be final if it can be set aside in a proceeding which brings it into question whatever name such proceeding bears. See *Reg.* v. *Simpson* (1896), 28 O.R. 231; *Zeats* v. *Johnston* (1910), 3 S.L.R. 364; *R.* v. *Weinfield* (1919), 47 D.L.R. 85, 14 Alta. L.R. 572, 31 Can. Cr. Cas. 163.

My conclusion is that the sections of the Criminal Code which relate to a stated case do not apply to cases under the Liquor Act where there is no appeal. Section 8 of the Act respecting Police Magistrates and Justices of the Peace makes the provisions of the Criminal Code applicable "except as otherwise specially provided." I think here it is otherwise specially provided, and even if sec. 761 of the Criminal Code is applicable, sec. 769 (2) must also be applicable. The words "special Act" therein mentioned being referable to the Provincial Act, which provides that there shall be no appeal which in this case is the Liquor Act.

I would quash the appeal, no costs.

Appeal by stated case quashed.

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HOUGH v. BELLERIVE.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. October 9, 1922.

AUTOMOBILES (§ III—205)—COLLISION BETWEEN MOTOR CARS ON HIGHWAY —STATUTORY DUTY IMPOSED BY 1911-12 (ALTA.), CH. 5, SEC. 3 (1) —VIOLATION—ONUS OF PROOF.

In an action for damages to a motor vehicle caused by collision with another motor vehicle on a highway, there being no fault attributable to either party with respect to the rate of speed or the lights on the cars, the liability depending upon the observance or violation of the duty cast by sec. 3 (1) of the Highways Act, 1911-12 (Alta.), ch. 5, upon persons meeting upon a highway the onus is upon the plaintiff to establish that the defendant at the time of the collision was encroaching upon the plaintiff's half of the road; the road being the part of the highway appropriated to vehicular traffic.

[See note following.]

APPEAL by the plaintiff from the judgment at the trial of an action in which both parties claimed damages from the other for damage to their cars in collision on the highway. The trial Judge dismissed both claims. Appeal allowed.

Abbott & McLaughlin, for appellant.

Landry & Landry, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—About 7 o'clock in the evening on October 23, 1921, the plaintiff and defendant, who were travelling in opposite directions, met on the highway between Morinville and St. Albert about a mile north of the latter place. Each was driving an automobile, the plaintiff going south and the defendant going north. Their cars came into collision resulting in damage to both cars for which each blames the other and each claims damages from the other. The trial Judge dismissed both claims. The plaintiff only appeals.

I accept the finding of the trial Judge that no fault is attributable to either party with respect to the rate of speed or the lights on the cars, and that the liability of one or the other depends upon his observance or violation of the duty cast by law upon persons meeting upon a highway.

Section 3 (1) of the Highways Act, 1911-12 (Alta.), ch. 5, provides as follows: "If a person travelling or being upon a highway in charge of a motor vehicle or of a vehicle drawn by one or more horses, or one or more other animals, meets another motor vehicle or a vehicle drawn as aforesaid, he shall turn out to the right from the centre of the road, allowing to the motor vehicle or vehicle so met one-half of the road."

The parties have treated the "road" as that part of the highway appropriated to vehicular traffic which is, I think, the correct view. The road in question had a width of approximately

22 feet, the most accurate measurement giving it as 21 feet 1 inch, so that each was entitled to a fraction more than 10½ feet. In order to succeed the burden was on the plaintiff to establish that the defendant at the time of the collision was encroaching upon the plaintiff's half, being the westerly half of the road.

The trial Judge in his reasons for judgment says:—"It seems to me that having regard to the fact that both cars were so near the centre of the travelled road after the accident, that I could not reasonably find which was on the wrong side at the moment of impact, especially in view of the peculiar nature of the collision of the cars."

After a careful examination of the evidence I am satisfied that the collision took place on the plaintiff's half of the road and from the nature of the injuries to the cars, I think that the defendant, who had been travelling, according to his evidence, about in the centre of the road, about a foot from the centre on the east side of the road, must have turned his wheel to the left, resulting in his left front wheel colliding with the plaintiff's left front wheel, which was broken off, letting down the front axle of the plaintiff's car which made a scratch along the road, indicating where the plaintiff's car was travelling.

The evidence of the plaintiff and the witnesses who were in the car with him is that the plaintiff was always on his own half of the road and that he turned to the outer side of the road in order to pass the defendant with safety. The undoubted position of the scratch made by the end of the axle supports the plaintiff's view, but what finally determines my conclusion is the evidence of the defendant himself. In his examination in chief he drew a sketch on which he marked, amongst other marks, the letter 'X' and gave this evidence:

"Q. And you met by a point indicated by the dot 'X' on the west side of the road? A. Yes. Q. On the west side of the road, what distance? A. On the scratch, on the west side of the road like that. Q. The scratch is on the west side of the road at what distance? A. About a foot from the centre, I measured exactly." (Scratch referred to marked "X")".

On cross-examination he gave this evidence:—"Q. Well, Mr. Bellerive, you put in a little sketch there. You say the collision was about 1 foot west of the centre line? A. It is where his car dropped; Mr. Hough's car. Q. Yes, you say that was about 1 foot west of the centre line? A. Yes, west. Q. Now the other witnesses say it was two or three feet. Might they be right? What is this point 'X' there? What is that? A. There is a scratch going west—no, going east. Q. Of your car? A. No. Hough's car. Q. But I do not know yet what that 'X' is. A.

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The car dropped there. Q. Whose car? Your car? A. No, Mr. Hough's."

And later on he was asked:—"Q. Then what is this 'X' down here, what is this 'X'?

The Court: The 'X' is where his left hind wheels were when he righted his car. His car was thrown over on the side."

And just at the close of the cross-examination:—"Q. I am not satisfied yet with what that 'X' means. What is the 'X' mark? A. It is when the other gentleman's wheel broke, it scratched the land there."

I think the trial Judge was confused as indicated by the above interjection, for it is quite plain by reference to the sketch that the "X" is west of the centre line and has no reference to the position of the defendant's car when it stopped, which is otherwise shown on the sketch. The defendant says his car went 12 or 14 feet after the collision at point "X", and I rather think this confusion is the reason for the Judge's difficulty in arriving at a conclusion as to which side of the centre the collision occurred. I would judge from all the evidence that the point where the wheels came together was fully 2 feet west of the centre of the road, and, if so, the defendant had no right to be where he was. I have no doubt the lights were dazzling to the eyes. My own experience tells me how difficult it is when approaching a lighted car at close distance to tell your whereabouts with reference to the other car and to the road, but that is a risk both parties must take and makes the duty to keep well on one's own side most imperative. When the defendant first saw the plaintiff approaching, while at a considerable distance away, he would have acted more wisely if he had then taken the right hand side of his half of the road instead of continuing along the centre or close to it.

Finding, as I do, that the plaintiff was observing the law of the road, I see nothing in the evidence that would suggest to him that the defendant would not pass on his proper side, so that no question of contributory negligence arises.

I think the plaintiff is entitled to recover from the defendant $138, with costs of the action and appeal, and would so decide.

Judgment for plaintiff.

NOTE.

NEGLIGENCE BY DRIVER OF MOTOR CAR IN NOT KEEPING TO THE PROPER SIDE OF THE ROAD.

The statutory rule of the road in Alberta requiring drivers of vehicles when they meet to "turn to the right" does not imply that a driver of an automobile should always be on the right side of the road, but simply requires the driver to turn to the right in

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a reasonable and seasonable time to avoid collision: *Thomas* v. *Ward* (1913), 11 D.L.R. 231, 7 Alta. L.R. 79. This case also held that the driver of an automobile is not guilty of contributory negligence where, on approaching another automobile coming towards him on the wrong side of the road and having reasonable ground to believe that there was not ample room for him to pass the approaching vehicle on his right side of the road, turns to his left, though it turned out to be the wrong course to adopt, because a collision resulted, where it appears that the driver's embarrassment was due solely to the action of the approaching automobile in adhering too long to the wrong side of the road without turning to the right of the road seasonably: and that notwithstanding the negligence of plaintiff in driving an automobile down a hill at an excessive rate of speed, recovery for injuries incurred through a collision with defendant's automobile will not be barred where the real cause of the accident was the negligence of the defendant in being on the wrong side of the road without excuse, and not turning out as soon as he should have done and not allowing the plaintiff ample room to pass him.

In the absence of statutory provision and of proof of any regulation of the Lieutenant-Governor in Council under sub-sec. 3 of sec. 20 of the Motor Vehicles Act (Alta.), or of any municipal by-law, the act of a defendant in driving to the left of the centre line of a street is not negligence *per se*, even though the rule of the road in this country is, as the Court is entitled to recognise without proof, to keep to the right: *Osborne* v. *Landis* (Alta.) (1916), 34 W.L.R. 118.

The fact that a carter leaves his horse and wagon standing obliquely across a street in such a way as to block up more than half of its width, in violation of a municipal by-law, does not exonerate from all liability an automobile driver who imprudently causes a collision by passing at any risk rather than stopping and requesting room to pass. In such case it is contributory negligence. *Wayagamack Pulp & Paper Co.* v. *Girard*, 27 Que. K.B. 101, affirming the Court of Review and reversing the Superior Court, 51 Que. S.C. 317.

When the primary cause of an automobile collision was the defendant's violation of the rules of the road (Nova Scotia stats. 1914), by running on the wrong side of the road when approaching an intersection, and cutting the corner at that intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff (who was originally on the proper side of the cross street) had swerved, in the emergency, to the wrong side of

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the cross street in an attempt to avoid the collision: *Bain* v. *Fuller* (1916), 29 D.L.R. 113, affirmed 51 N.S.R. 55.

IMPERIAL GRAIN & MILLING Co. v. SLOBINSKY BROS. & SONS.

Manitoba King's Bench, Adamson, J. August 3, 1922.

SALE (§ IIIA—51)—OF GOODS—WRITTEN CONTRACT—TRADE USAGE OR COURSE OF DEALING—EVIDENCE OF—ADMISSIBILITY—USAGE ALLOWING PURCHASER TO OBTAIN DELIVERY OF PART OF GOODS BEFORE TIME MENTIONED IN CONTRACT—DEFAULT OF SELLER IN NOT TENDERING BALANCE—SPECIFIC PERFORMANCE—CONTRACT WITHIN SALES OF GOODS ACT, R.S.M. 1913, CH. 174—DEFAULT—VERBAL OFFER TO ALLOW COMPLETION—RIGHTS AND LIABILITIES OF PARTIES.

In commercial transactions, evidence of a trade usage or course of dealing not inconsistent with the specific terms of a written contract is admissible to annex incidents to the contract with respect to which it is silent and such contracts are considered to have been made subject to the recognised practices of the particular trade or business, but where the time for the delivery is of the essence of the contract the fact that a trade usage has enabled the buyer to obtain delivery of a part of the goods prior to the date mentioned in the contract for delivery does not relieve the seller from tendering the balance of the goods within the time conditioned in the contract when it becomes apparent the buyers are not ordering in order to hold the buyers to their contract, and where the seller does not do this he cannot succeed in an action for specific performance or damages, being himself in default.

Where the contract is within the Sales of Goods Act, R.S.M. 1913, ch. 174, if either party has made default in delivery or acceptance, a subsequent verbal agreement to allow him to complete is not binding and he cannot sue either on the original contract, not being ready and willing to perform it, or on the later agreement, since it is not in writing.

[See note following; also (1922), 66 D.L.R. 765.]

ACTION for specific performance of a contract for the sale and delivery of goods, or for damages for breach of contract. Dismissed. Counterclaim for damages also dismissed.

A. E. Hoskin, K.C., and *P. J. Montague*, for plaintiff.

M. J. Finkelstein, and *C. E. Finkelstein*, for defendants.

ADAMSON, J.:—The plaintiffs are a rice importing and milling concern with headquarters and mills at Vancouver in British Columbia. The defendants are wholesale grocers at Winnipeg in Manitoba. On November 6, 1919, a verbal order for 25 tons of "Elephant and Flag Rice Assorted," was given by the defendants through Scott-Bathgate, who were the plaintiff's brokers in Winnipeg. Later the plaintiffs (hereinafter called the sellers) prepared a written contract on their own form, which they executed and sent to their brokers for execution by the defendants (hereinafter called the buyers). This agreement, though the arrangement was made early in November, 1919, is dated January 16, 1920, and was executed by the buyers some time shortly after that date. The agreement was in part as follows:—

"The vendors agree to sell and the purchasers agree to buy

the following goods upon terms and conditions as to payment and delivery as herein set forth:—

Quantity	Quality	Price per 100 gross	F.O.B. mill	Shipment from Vancouver not later than
25 tons	Elephant	$10.25	Basis 100 lb. bags	April 30/20
assorted rices	Flag	10.10	Basis 100 lb. bags	April 30/20

Terms and conditions on back.

Jan. 16th, 1920.

[signatures]"

Another agreement was made, dated February 2, 1920, on the same form for 25 tons "flag" at $12.85 for "shipment from Vancouver not later than June 30, 1920." This agreement also had a clause, as follows: "Packing in 50's $2 per ton higher, or 10 cents per 100 higher."

The following shipments were made:—

April 17, 1920:

50 bags Flag of 100 lbs. each, 2½ tons. 100 bags Flag of 50 lbs. each, 2½ tons; for which buyers were billed and for which they paid $1,015. This shipment was allocated by the sellers to the first contract, that is, the one dated January 16, 1920.

June 4, 1920: 300 bags of Elephant 100 lbs. each, 15 tons; 200 bags of Elephant 50 lbs. each, 5 tons. The buyers were billed with this and paid $4,660 for same. One-half of this shipment was allocated by the sellers to each of the contracts.

These are the only shipments made within the time specified for delivery in the two contracts.

On August 9, 1920, the buyers received from the sellers: 60 bags of Elephant 100 lbs., 3 tons, and 80 bags of Elephant 50 lbs., 2½ tons. The buyers paid $1,139 for this shipment, and the sellers allocated three tons to the contract January 16, 1920, and two and one-half tons to the contract of February 2, 1920.

On September 9, 1920, the buyers also received from the sellers, after order: 60 bags Flag 100 lbs., 3 tons; 80 bags Flag 50 lbs., 2 tons. The buyers paid $1,151.50 for this shipment and the sellers charged half of this shipment to each contract.

The sellers allege breach of contract and claim specific performance or damages for non-receipt of 4½ tons of rice under the contract January 16, 1920, and 10½ tons under the contract of February 2, 1920. The buyers state that they were unable to get rice under the contracts in November and December, 1919, and January and February, 1920, and counterclaim for consequent damages as well as for damages for non-delivery under earlier similar contracts.

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The sellers ask for payment in full for the undelivered rice and storage, and interest, in other words, they ask for specific performance of the contract. In my judgment this is not a case for specific performance which is only granted where damages are inadequate. Damages are not inadequate here. Moreover, in cases where title to goods has not passed, as here, the seller's only remedy is damages: *Boswell* v. *Kilborn* (1862), 15 Moo. P.C. 309, 15 E.R. 511.

The sellers pleaded "custom of the trade" to explain and change the meaning of the term "shipment from Vancouver not later than" in each of the contracts. Counsel for the buyers objected to such evidence on the ground that it was an attempt to vary or add to the contract.

The question of the admissibility of this evidence was gone into by Galt, J., on an application for a commission to take evidence to change the meaning of the clear words of the contract: (1922), 66 D.L.R. 765, 32 Man. L.R. 91. At the trial the plaintiffs were allowed to amend the statement of claim, setting up a usage of the trade and course of dealing. The evidence was admitted subject to objection.

The evidence was not evidence of a custom but rather a usage of the trade or course of dealing between the parties in the light of which these contracts were made. It is settled law that in commercial transactions, evidence of a usage (not inconsistent with those expressed) is admissible to annex incidents to a written contract with respect to which such contract is silent, and such contracts are considered to have been made subject to the recognised practices of the particular trade or business, provided they do not interfere with its specific terms: 10 Hals. p. 261, sec. 483; *Hutton* v. *Warren* (1836), 1 M. & W. 466, *per* Parke, B., at p. 475, 150 E.R. 517, at p. 521; *Gulf Line* v. *Laycock* (1901), 7 Com. Cas. 1, *per* Kennedy, J., at p. 4; and Phipson on Evidence, 6th ed., 1921, p. 105. Evidence to complete a contract by shewing an established course of dealing between the parties may be admitted in some cases: *Pontifex* v. *Hartley* (1893), 62 L.J. (Q.B.) 196, 4 R. 245.

I think the evidence was properly admitted on the amended pleadings.

What was the usage of the trade or the course of dealing between the parties in regard to the shipment of rice? I find that it is a usage of the yards and in this case there was also a course of dealing between the parties which gave the buyers the right to order out the brands of rice required, at such times, and in such quantities and packages from the time of the making of the contracts to the dates mentioned for delivery. It was their

right to order out the rice but if they did not do so it did not relieve the sellers from shipping when it became apparent that the buyers were not ordering, if they wished to hold the buyers to the contracts. To hold that the usage did so relieve the sellers from shipping would be to vary the contract, and this the usage does not do even if it were permissible.

The usage in my judgment goes no further than to annex certain incidents to the contracts during their currency or perhaps within a reasonable time after.

The difficulty is that the communications were all verbal. Hopkins of Scott-Bathgate, who were sellers' agents at Winnipeg, had conversations with Moses Slobinsky. Most of the conversations took place some time ago and neither party is very clear as to what occurred. Indeed it is not to be wondered at that they are not clear now as the evidence shews they were not clear at the time. Hopkins was a traveller and wanted commissions and further orders from the buyers and avoided urging claims and issues which might have been unpleasant and lead to a severance of his connection with the buyers. The buyers may have thought even to January 10, 1921, that they were bound by the contracts. If the buyers were no longer bound by the contracts according to their proper legal interpretation the fact that they thought they were will not make them liable. In any event, they did not wish to force the sellers to take any course under the agreements. It is not to be wondered at then that Hopkins and the defendants did not have any clear understanding either during the currency of the agreements or subsequently.

From November, 1919, when the arrangement was really made, to the middle of February, 1920, there was a scarcity of rice, at least of the quality or brands described in the contracts. Undoubtedly, the buyers asked for shipments over this period and such shipments were not made. The buyers could, at that time, have cancelled the agreements, or they could have gone into the market and bought and made the sellers pay the cost over the contract price. They did not do either of these things but forbore exercising their rights for the convenience of the plaintiffs. I do not think that they can now be heard to complain, as they did not then put the sellers in default.

The buyers ordered out, and the sellers shipped rice on April 17, 1920, and June 4, 1920. The dates by which delivery was to be made according to the agreements, i.e., April 30, 1920, and June 30, 1920, were then allowed to pass without any agreement being made in regard to the undelivered quantities and without anything being done by either of the parties in regard thereto. When each contract was expiring or within a reasonable time

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thereafter the sellers could have (and if they wished to put the buyers in default should have) shipped according to the agreement. The usage could not prevent that. They did not do so and they did not forbear at the request of the buyers. The fact that the buyers did not order out according to the usage I do not interpret as a request to the sellers not to ship according to contract. As already stated this would be a variation of an express term of the contract by the usage. The usage does not and could not do that. If the sellers wished to stand on the contracts they should have put the buyers in default by shipping as provided in the contracts.

Were the contracts then in existence or had they been mutually abandoned or relinquished, say in July? Was there a new contract which the plaintiffs could sue on?

In answer to the first question, *Doner* v. *Western Can. Flour Mills Co.* (1917), 41 D.L.R. 476, 41 O.L.R. 503, seems conclusive. In this case Hodgins, J.A., at p. 492, says:—

"I think that under a contract such as the present one, the duty of the seller is to tender, if he wishes to put the buyer in default. The flour was of three qualities, but the relative amounts were specified, and it was quite possible to have made up a shipment of 410 bags in the proportions mentioned and to have tendered it to the buyers. No doubt, the buyers would be expected to send an order, as they were using the flour and knew their requirements."

And again at pp. 492-493, he says:—

"But in this case, for all that appears, there was no damage: no tender was made by the sellers, and no request by the buyers, and so the foundation for damages is missing. No case in made indicating that further time for extended delivery was in contemplation of the parties. Hence these instalment deliveries, by reason of the fact that neither party put himself in a position to claim or force later delivery or damages, must be treated on the present record, as relinquished by both parties."

The times set for delivery was of the essence of these agreements; *Hartley* v. *Hymans*, [1920] 3 K.B. 475, 36 Times L.R. 805; *Jackson* v. *Co-operative Freezing Co.*, [1922] N.Z. L.R. 2. The "essential juristic result" of non-delivery by the seller where time is of the essence is stated by McCardie, J., in *Hartley* v. *Hymans*, *supra*, at p. 484, as follows:—

"Now, if time for delivery be of the essence of the contract, as in the present case, it follows that a vendor who has failed to deliver within the stipulated period cannot *primâ facie* call upon the buyer to accept delivery after that period has expired. He has himself failed to fulfil the bargain and the buyer can plead

the seller's default and assert that he was not ready and willing to carry out his contract. That this is so seems clear. It is, I take it, the essential juristic result when time is of the essence of the contract."

These are contracts within the Sale of Goods Act, R.S.M. 1913, ch. 174, and must be in writing.

Benjamin on Sale, 6th ed., p. 794, cites *Plevins* v. *Downing* (1876), 1 C.P.D. 220, for the following propositions:—

"If, without some arrangement come to within the contract time, either party has made default in delivery or acceptance, a subsequent verbal agreement to allow him to complete the contract is not binding, and he cannot sue either on the original contract, not being ready and willing to perform it, or on the later agreement, since it is not in writing."

This statement was cited with approval by the Court of Appeal of New Zealand in *Jackson* v. *Co-Operative Freezing Co., supra.* I think this applicable to the facts in this case and should be followed.

In *Panoutsos* v. *Raymond Hadley Corp'n. of New York*, [1917] 2 K.B. 473; *Hartley* v. *Hymans, supra*; *Bonner-Worth Co.* v. *Geddes Bros.* (1921), 64 D.L.R. 257, at p. 259, 50 O.L.R. 196, there was writing or a request and arrangement during the currency of the contract.

Sierichs v. *Hughes* (1918), 43 D.L.R. 297, 42 O.L.R. 608, was a case for the sale of flour to be delivered in quantities each month to be taken out by the time fixed in the original agreement which was in writing. In this case it was held by the Ontario Court of Appeal that oral evidence was not by reason of the Statute of Frauds admissible to show a variation of the written contract, and that if there was an agreement to postpone it was ineffective because not in writing. *Williams* v. *Moss' Empires Ltd.*, [1915] 3 K.B. 242, was followed. In this case Shearman, J., at p. 247, after citing a number of cases states the law as follows:—

"That whenever the parties vary a material term of an existing contract they are in effect entering into a new contract, the terms of which must be looked at in their entirety, and if the new contract is one which is required to be in writing but is not in writing, then it must be wholly disregarded and the parties are relegated to their rights under the original contract."

Do the subsequent occurrences make it possible to enforce the original contracts or create a new enforceable contract? As stated there was a shipment of rice by the sellers to the buyers' order on August 9, 1920, and another on September 9, 1920. The sellers allege these to be deliveries under the contracts sued on.

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The buyers say that there was nothing said in regard to that and say they were separate contracts. There was no dispute about the August 9 shipment, but when the sellers claimed for storage and billed the buyers at the price in one of the contracts, for September 9 shipment, the buyers objected. The sellers then waived their alleged right to charge storage and there was an adjustment of the price, though in settling the price the contracts were referred to. At this time the contracts were not insisted on. Later in December when the buyers ordered rice again they refused to accept shipment when they learned that the sellers wanted payment at the contract price. The buyers have shown that they purchased rice from others for the same trade in July and August, 1920, to the extent of $1,400, some at a higher price and some at a somewhat lower price. It is inconceivable that they would have done this if there had been *consensus ad idem* for an extension, or a new contract. I must find as a fact that these subsequent shipments were separate contracts.

Mr. Hoskin relied upon *Hartley* v. *Hymans, supra.* In that case there was writing. Here there is none, except the invoices of the sellers, which are not signed by, or binding on, the buyers, and a letter written by " Finkelstein, Levinson & Co., solicitors, &c.," to the sellers, which reads as follows:—

"We have been consulted by Slobinsky Bros. & Sons of this city and on their behalf we hereby notify you that in view of the fact that you have not fulfilled your part of the contract entered into for the supply of 25 tons of Flag the said contract is hereby cancelled."

Is this writing a contract within the statute or an admission by the solicitors? Mr. Finkelstein at the trial admitted that it was their letter and did not object to its being put in as evidence. However, no authority for the solicitors to make or vary an agreement was proven and it was not an admission during the litigation or so far as is shown after the solicitors were retained for the suit. I cannot see that this letter changes the legal aspect: Taylor on Evidence, 11th ed. vol. 1, pp. 530-1.

The sellers cannot succeed on the original contracts inasmuch as they did not ship the rice within the times specified in the agreement, or within a reasonable time thereafter, and they did not fail to ship at the buyer's request. Neither can they rely upon subsequent conversation and conduct as that would constitute a new contract which was by parol only. I follow *Plevins* v. *Downing, supra*; *Sierichs* v. *Hughes, supra,* and *Williams* v. *Moss' Empires Ltd., supra.*

Even if there had been an extension, I am of the opinion that

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the definite refusal of the buyers in September, 1920, and again in October, amounted to a repudiation and that the current market price at that time would be the price to be considered in arriving at damages. The evidence of plaintiffs' witness Hopkins is to the effect that the price of rice did not drop until October and then it was only rice for January delivery that dropped. I accept this as correct.

The buyers gave the sellers another order in December. This was shipped but the buyers refused to take delivery. The sellers sold this rice, presumably as Winnipeg Spot rice and they did not show what they sold that rice for or that there was any loss on the shipment.

I am satisfied that if the sellers had shipped the rice within the time provided in the contracts, or a reasonable time thereafter, or even if it had been shipped as late as September, that it could have been sold for immediate delivery without a loss.

The buyers counterclaim for $5,000 for damages for non-delivery by the sellers of specifications under the two contracts sued on and other earlier similar agreements. No particulars of the damage is given. The defendant Moses Slobinsky when cross-examined could remember nothing as to times or quantities and in many instances the persons to whom he gave such orders. The Court cannot find damages on such evidence.

The buyers were short of rice and were compelled to refuse orders to a very considerable extent in January and February, 1920.

They voluntarily forbore exercising their legal rights under the agreements. As already stated they could then have cancelled these agreements or gone into the market and bought rice and made the plaintiffs pay the difference. They did not do this. They made no claim until this action was launched. In these circumstances, I do not think there is any foundation for their claim for damages.

The action will be dismissed with costs and the counterclaim is also dismissed with costs.

Judgment accordingly.

NOTE.

ADMISSIBILITY OF PAROL EVIDENCE AS TO TRADE USAGE OR CUSTOM, TO CONSTRUE A WRITTEN DOCUMENT.

Usage may be relied upon to shew the sense in which an expression found in a written contract is used in a particular trade, and a usage consistent with a written contract may be introduced into it, as both parties being aware of it may be supposed to intend that it shall form part of their bargain. But to let in

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verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principle and has been forbidden as often as the attempt has been made (per Lord Campbell, C.J., in *Hall* v. *Janson* (1855), 4 El. & Bl. 500, 119 E.R. 183 at 186). But where although the language is ambiguous the custom itself is uncertain the writing must be construed strictly acording to its literal terms. *In re Stroud* (1849), 8 C.B. 502, 137 E.R. 604.

In *Smith* v. *Wilson* (1832), 3 B. & Ad. 728, 110 E.R. 266, evidence was held admissible to shew that by the custom of the country where a lease of a rabbit warren was made the word "thousand" as applied to rabbits meant twelve hundred. And in *Wigglesworth* v. *Dallison* (1779), 1 Doug. 201, 99 E.R. 132, evidence was admitted of a custom that tenants were entitled to the way-going crop after the expiration of their terms, also where words in a contract have more than one meaning extrinsic evidence is admissable of the usage or course of trade where the contract is made or where it is to take effect. Thus in *Gorrissen* v. *Perrin*, (1857), 2 C.B. (N.S.) 681, 140 E.R. 583 evidence was held admissible to shew that the word "bale" meant a bale having a definite weight. Also in *Bottomley* v. *Forbes* (1838), 5 Bing. (N.C.) 121, 132 E.R. 1051, extrinsic evidence was admitted in construing a charter party as to the custom of measuring goods, by weight at the place of shipment.

And in *Lucas* v. *Bristow* (1858), El. Bl. & El. 907, 120 E.R. 747, oral evidence was held admissible to shew, in a contract for the sale of "50 tons best palm oil" that according to mercantile usage the contract was satisfied if the oil delivered contained a substantial portion of "best" oil.

But in *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 C. & J. 244, it was held that a custom could not prevail over the express words of the document and in *Cutter* v. *Powell* (1795), 2 Sm. L.C. 1, (3 R.R. 185) an express contract by the parties precluded any implied contract, notwithstanding any custom or usage in the trade. And in *Kirchner* v. *Venus* (1859), 12 Moo. P.C. 361, 14 E.R. 948, no trade usage is binding on a party unless he knew or under the circumstances should have known of its existence and contracted with reference to it. But the mere habit of affixing a special meaning to words in one class of contracts cannot amount to a custom of trade so as to control a written agreement. *Abbott* v. *Bates* (1875), 45 L.J. (C.P.) 117, 24 W.R. 101.

In *Millard* v. *Bailey* (1866), L.R. 1 Eq. 378, in construing a bequest of "the remaining shares" evidence was not admitted

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to show that the testator was in the habit of treating and intended to treat the shares as double shares. Sir W. Page Wood, V.-C., saying at p. 382: "I must take things to be as I find them and I cannot allow particular expressions said to have been used by this testatrix to prevail where they are not the general language universally applicable to the particular subject-matter."

And see *Grant* v. *Grant* (1870), L.R. 5 C.P. 726, where the testator devised property to "My nephew Joseph Grant" and it appeared that the testator's brother had a son Joseph Grant, and that the brother of the testator's wife also had a son of the same name, the Court held that the description "my nephew" was applicable to both Joseph Grants, and that a latent ambiguity was therefore disclosed and that parol evidence was admissible to shew which Joseph Grant was meant by the testator.

See also *Halifax Automobile Co.* v. *Redden* (1913), 15 D.L.R. 34, 48 N.S.R. 20, where it was held that although a written agreement for the sale of goods, without any ambiguity, and complete under the Statute of Frauds, cannot ordinarily be varied or added to by parol evidence, trade terms in such agreement as an automobile "fully equipped" may be explained by parol evidence.

REX v. SCHULTZ.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

PERJURY OFFENCES (§II—20)—WILFULLY MAKING FALSE STATUTORY DECLARATION—NECESSITY FOR FORMAL DECLARATION IN PRESENCE OF COMMISSIONER FOR OATHS, NOTARY PUBLIC OR OTHER FUNCTIONARY—CANADA EVIDENCE ACT, R.S.C. 1906, CH. 145, SEC. 36—CR. CODE SEC. 172.

The offence under Cr. Code sec. 172 of making a false statutory declaration in the form provided by the Canada Evidence Act is not proved where the declarant signed the document in the form of a statutory declaration in the absence of the commissioner for oaths and afterwards asked the latter to complete it, but did not at any time make before the commissioner any formal declaration of the truth of the signed statement.

Crown Case reserved by Bigelow, J., upon a conviction for wilfully making a false declaration.

T. A. Lynd, for appellant, defendant.

H. E. Sampson, K.C., for the Crown.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The following case is stated by Bigelow, J., for the opinion of the Court:—

"On April 18th, 1922, at Kindersley the prisoner was charged under section 172 of the Criminal Code with perjury by wilfully making a false declaration. The declaration was made by

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the prisoner for the purpose of obtaining a provisional certificate under the Steam Boilers Act, R.S.S. 1920 ch. 177, sec. 41, which certificate was issued to the prisoner in accordance with his application.

The evidence is that the prisoner filled up the paper, "P 2," put it on the desk of the commissioner for oaths, and asked the commissioner to complete it, and that the commissioner afterwards completed it by signing his name in the proper place.

I instructed the jury that this is a declaration under section 172. The jury found the prisoner guilty and I have suspended sentence until June 20th, 1922, pending a reserved case.

The question for the Court of Appeal is, whether the document "P 2" is a declaration under section 172 of the Criminal Code?

Attached hereto is the evidence and the charge to the jury.

The indictment and the document "P 2" should also be before the Court of Appeal. I wrote to the Local Registrar several days ago for these documents in order that I might prepare the reserved case, but he has neglected to send them to me, so I am preparing the case as it is in order that the prisoner may get the case before the ensuing sittings of the Court of Appeal, and I have today made an order and sent it to the solicitor for the prisoner ordering the Local Registrar to transmit the papers to the Court of Appeal."

The evidence taken at the trial, which is made part of the stated case, makes it quite clear that the declaration was filled in and signed by the accused and then left by him on the desk of the commissioner for oaths, who was not present at the time. The accused later on met the commissioner outside, and informed him that he had left a paper on his desk and requested him to complete it. The statement was neither subscribed nor declared to in the presence of or before the commissioner. Section 36 of the Canada Evidence Act R.S.C. 1906, ch. 145, is in the following terms:—

"36. Any judge, notary public, justice of the peace, police magistrate, recorder, mayor or commissioner authorised to take affidavits to be used either in the provincial or Dominion courts, or any other functionary authorised by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in the form following, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:—

I, A.B., do solemnly declare that (*state the fact or facts de-*

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clared to), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act.

Declared before me at this
day of A.D. 19 ."

In view of the evidence in this case, I do not think that the document in question is a solemn declaration within the meaning of the Act. It cannot be said that it was made before the commissioner. The mere fact that it was signed by the accused does not make it a solemn declaration. The written statement by the commissioner that it was "declared before him," is not true. The essential requirement of the Act is not the signature of the declarant but his solemn declaration made before the commissioner. It will be noticed that the statutory form does not provide for the signature of the declarant. There is no prescribed form for the taking of a statutory declaration that I am aware of; but, on the analogy of an oath, there should be some form, such as making it in the first person, or having it administered by the commissioner in the second person. See *R.* v. *Phillips* (1908), 14 Can. Cr. Cas. 239; *R.* v. *Nier* (1915), 28 D.L.R. 373, 25 Can. Cr. Cas. 241, 9 Alta. L.R. 353. In any event, the declaration however made, must be made *before* the commissioner. *Reg.* v. *Lloyd* (1887), 19 Q.B.D. 213, 56 L.J. (M.C.) 119, 35 W.R. 653.

For the foregoing reasons I think that the ruling of the trial Judge was erroneous, and that the accused ought to have been acquitted and should, therefore, be discharged.

Appeal allowed.

SUTHERLAND v. STRAWBERRY VALLEY STOCK AND FARM PRODUCE Co.

Saskatchewan Court of King's Bench, Mackenzie, J. September 11, 1923.

COMPANIES (§ IV—35)—REMOVAL FROM REGISTER FOR NON-PAYMENT OF FEES—STATUS AS DEFENDANT IN ACTION.

Being struck from the register under sec. 32 of the Companies Act, R.S.S. 1920, ch. 76, for non-payment of fees does not result in the dissolution of an incorporated company or deprive it of its status as such to defend an action.

WRIT AND PROCESS (§ IIB—28)—SERVICE ON OFFICER OR AGENT OF COMPANY—ONLY PERSON COMPETENT FOR SERVICE IN JURISDICTION PLAINTIFF IN ACTION AGAINST COMPANY—PLAINTIFF FORWARDING WRIT TO PRESIDENT OF COMPANY BY MAIL—VALIDITY OF SERVICE.

Where the plaintiff in an action is an employee of the defendant company and the only person within the jurisdiction competent for service on the defendant company, he cannot become a medium for service on the defendant, notwithstanding that notice of the action is thereby brought to the knowledge of the company, and a default judgment

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founded on such service will be set aside.

[*Crawford* v. *Calville Ranching Co.* (1912), 6 D.L.R. 375, applied.]

APPEAL by defendant from the judgment of a local Master on an application to set aside the service of the writ of summons and default judgment signed against the defendant. Reversed.

D. C. Kyle, for appellant.

A. E. Bence, for respondent.

MACKENZIE, J.:—I find that the defendant has the necessary status to bring the within application since its failure to comply with sec. 32 of the Companies Act, R.S.S. 1920, ch. 76, while making it liable to penalty, does not result in its dissolution.

As to the service, my conclusion is that the same is bad. To my mind, the true principle to be adduced from *Crawford* v. *Calville Ranching Co.* (1912), 6 D.L.R. 375, is that a plaintiff cannot become a medium for service notwithstanding that notice of his action is thereby brought to the knowledge of the defendant; a pertinent expression of this principle is to be found in Rule 15. It was urged that as the writ was immediately forwarded by the plaintiff to the president of the defendant company the latter was in as good a position as if the plaintiff had not been interested. I cannot concede this, because during the 5 days while the writ was in the mail the plaintiff was precluded by her adverse interest from taking any steps she might otherwise have done towards exploiting the preparation and entry of a defence. It seems to me that the case should have been treated as one in which there was no one competent for service to be found within the jurisdiction and, therefore, service directed to the president without the jurisdiction, in which event the defendant would have had more than 20 rather than 15 actual days in which to appear.

As to the objection that the plaintiff has signed judgment for too much, I think that after giving the defendant such an order as is disclosed by her solicitor's letter dated December 16, 1921, she should have given credit for the sum of $50 in question before taking such a delicate proceeding as signing judgment by default. Indeed, I feel that I should hold that if plaintiff undertook to sign judgment with such haste on such service and without giving such credit, she did so at her peril. I, therefore, direct that such service and the judgment signed therein in default be set aside with costs to the defendant company both here and below.

Judgment accordingly.

SNAGPROOF LTD. v. BRODY.

Alta.

App. Div.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. October 13, 1922.

CONTRACTS (§V A—379)—SALES AND PURCHASE OF GOODS—ENTIRE CONTRACT—PURCHASER NOT OBJECTING TO DELIVERY IN TWO INSTALMENTS—SELLER REFUSING TO DELIVER SECOND PORTION UNTIL FIRST PORTION PAID FOR—PURCHASER REFUSING PAYMENT OF FIRST PORTION UNTIL ALL DELIVERED—REPUDIATION OF CONTRACT BY SELLER—RIGHT OF PURCHASER TO DAMAGES FOR BREACH—DATE OF BREACH—RIGHT OF SELLER TO LIEN ON GOODS NOT DELIVERED UNTIL PAID FOR PORTION DELIVERED.

Whereby a contract for the sale and purchase of goods the purchaser has the right to insist upon the delivery of the whole of the goods at one time, but makes no objection to the seller's method of delivering one-half of the goods at one time to be followed by the balance as soon as the seller can fill the order, the seller is not entitled to withhold delivery of the second portion until the first half is paid for, and the refusal of the purchaser to pay a balance due on the first shipment until the balance of the order has been shipped, is not a repudiation of the contract, but a letter from the seller to the purchaser in which he definitely refuses to ship the balance of the goods and advising the purchaser that he has instructed his lawyer to collect the amount due on the goods already delivered is a repudiation of the contract by the seller, and the date of the letter is the date of the breach, but there having been an earlier refusal to deliver when the seller could have done so, but did not, the purchaser is entitled to choose either of these dates as the date of refusal. The seller is not entitled to a lien on the undelivered goods for the amount remaining due on the portion delivered.

[*Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434, *Payzu, Ltd.* v. *Saunders*, [1919] 2 K.B. 581, applied; *Ex parte Chalmers* (1873), 8 Ch. App. 289, distinguished.]

APPEAL by the defendant from the trial judgment awarding the plaintiff $114 balance due on goods sold and delivered, and dismissing the defendant's counterclaim for damages for breach of contract. Reversed.

The facts of the case are fully set out in the judgments following:

H. A. Friedman, for appellant.

W. D. Craig, for respondent.

STUART, J.A.:—I concur entirely in the judgment of my brother Clarke and have nothing directly to add to it. But I wish to express the hope that there is nothing in the civil law of Quebec with respect to the sales of goods which led the plaintiff to adopt the attitude which it did adopt. We of course, in the absence of special pleading, have to apply the law of this *forum* even though, with regard to the particular contract, the foreign law would strictly be applicable if the question had been raised. Probably, however, the law is the same.

HYNDMAN, J.A., concurs with CLARKE, J.A.

CLARKE, J.A.:—The plaintiff is a company engaged in the manufacture of overalls and other articles of clothing at Beebe

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in the Province of Quebec, and the defendant is a merchant carrying on business at Edmonton and Wetaskiwin in this Province.

On May 22, 1919, the plaintiff's travelling salesman called upon the defendant and received a written order for a quantity of overalls, smocks and pants at prices aggregating $1,130. The order was signed by the salesman and the defendant but it is not disputed that the order was subject to the plaintiff's approval. The words "will send in sizes within a few days" appear in the order, meaning that the defendant would send them in to the plaintiff. There also appears at the top of the order the words: "Less 3% on receipt June 10" and at the bottom opposite the defendant's name the words, "Dis. 3% cash." Beyond what may be inferred from the foregoing words and the traveller's statement to the defendant that he could expect shipment in about 30 days, no time was fixed for delivery or for payment.

On June 3, 1919, plaintiff wrote to defendant, evidently after receiving the sizes from defendant: "We have your letter of the 26th. Your directions will be closely followed re sizes. There has been great advances in the cotton market the last few days, and prices on denims have been withdrawn so we do not know where we are at."

On June 28, 1919, plaintiff wrote to defendant: "We note in your valued order you ask for some boys' smocks. We did not have any call for these to amount to anything and stopped making them some time ago." These smocks formed a very small part of the order, their total price being $52.50 and the plaintiff apparently acquiesced in their exclusion from the order. No claim is made in respect of them.

On July 7, 1919, the plaintiff invoiced to the defendant a portion of the goods ordered amounting to $611.50 and these goods were received and accepted by the defendant about the end of the same month. The invoice refers to the order given to the traveller and the prices charged are in accordance with the written order given to him. It states: "Terms, net 60 days," and also "We do not pay freight. All sales are made free on board at Beebe. Our responsibility ceases when goods are delivered to transportation company and receipted in good order." No letter appears to have accompanied the invoice but the plaintiff made a draft upon the defendant for the amount of the invoice. The date of the draft is not stated nor is the date of its maturity but I infer it was payable about October 1.

On September 26, 1919, the plaintiff wrote defendant:—"Replying to your wire sent to-day we are doing all we can to fill

your valued order and think that sometime the first part of October we will be able to fill it. Thanking you for your patience in the matter."

The defendant did not accept the draft but instead sent the plaintiff $500 with the following letter dated October 6, 1919: "Your favour September 26 to hand. Enclosed please find $500 on a/c of goods received. I will pay the balance on Oct. 25. Trusting that you will send the balance of my order in the next few days."

The reason given by the defendant at the trial for not paying the full amount of the draft was that prices had gone up materially and the plaintiff had not shipped the balance of the goods and he stated that he was able and always ready and willing to pay the balance at any time if the plaintiff would ship the balance of his order. On the other hand, the plaintiff's managing-director in his evidence stated that it was his intention to split the order up into two parts, get paid for the first half first, and upon being paid to send the other half. He thought half the amount was enough to trust him at one time. This was not communicated to the defendant, the manager stating "that would not be policy, it would naturally displease him."

On November 4, 1919, the plaintiff wrote the defendant: "We are drawing on you for balance of your past due draft, and have added bank charges. Kindly attend to this balance as we are badly in need of the money."

On November 13, 1919, defendant wrote plaintiff: "Yours from 4th inst. to hand. When purchased goods from your representative I told him that I am going in the wholesale business, and what I have done. I sold the goods what I purchased from you, and my customers are demanding delivery, and while you are dealing with one I am to answer a doz. of my customers. I cannot see why you did not ship the balance of the goods till now, as it has put me in already quite bad with my customers. I am only too glad to pay my bills, but you must ship the goods to satisfy my customers."

On November 27, 1919, plaintiff wrote defendant: "Balance of your draft for goods shipped you last July and which you agreed to pay for Oct. 25th is returned this morning for us to pay for the third time. We are drawing a draft on you $114. . . . Your writing on the back of the draft that you will pay it when you get the rest of the goods has nothing whatever to do with it. We are doing all we possibly can to deliver our goods and our failure to do so is caused by people not delivering goods that we have bought, and is no reason why we should not be paid for goods shipped you last July." This was not a candid letter.

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The plaintiff's manager in his evidence, referring to this letter stated that the reason given in it was no reason whatever, that if he had paid for his goods he would have got the balance.

On January 30, 1920, plaintiff wrote defendant that the matter was being turned over to lawyers for suit, and adding: "We certainly have done enough business with you, and take it that you have with us, so we will go ahead and collect what you owe us and close the matter up, as this seems to be what you want done." I take this letter to be a repudiation by the plaintiff of its obligation to supply the balance of the goods and I think under all the circumstances its date may be taken by the defendant as the date of the plaintiff's breach of contract to deliver the balance of the goods.

On February 13, 1920, the plaintiff's solicitors made a demand upon the defendant for payment, to which the defendant's solicitors replied on February 24, specifying the goods still claimed by the defendant from the plaintiff and stating that as the goods have considerably advanced in price the defendant does not feel inclined to pay the balance until the plaintiff has filled its contract; that defendant is financially responsible and bears a good reputation and is labouring under the impression that the plaintiff does not intend to fill the balance of the order, and the letter concludes with this offer: "If your clients will ship these goods in accordance with their contract they will receive their money without any further delay, but if they do not do so, it is Mr. Brody's intention to set off this $114 against the loss that he will be put to by the increase in prices of the goods purchased from your clients and which they failed to deliver."

After a further exchange of letters between the solicitors, in which they both adhered to their previous contentions, action was commenced by the plaintiff to recover $114 as the balance due for goods supplied. The defendant by his defence admitted the plaintiff's claim and set up by way of set-off and counterclaim a claim for damages for breach of contract. The judgment dismissed the counterclaim and awarded the plaintiff $114 and from this judgment the defendant appeals.

I think the correspondence shews an acceptance by the plaintiff of the defendant's offer given to the travelling salesman and that there was a breach by the plaintiff of its agreement to deliver the whole order, entitling the defendant to damages unless he is excused by the failure of the defendant to pay for the portion of the goods delivered.

I regard the contract as entire. The defendant was entitled if he so desired to reject the partial delivery and insist upon delivery of the whole at one time. (Section 29 of the Sale of

Goods Ordinance C.O. 1915 (Alta.), ch. 39). He made no objection, however, to the plaintiff's method of delivery of part at one time to be followed by the delivery of the balance as soon as the plaintiff could fill it, upon the plaintiff's representation that it was doing all it could to fill the order. The defendant could perhaps have refused to pay anything until delivery of all the goods or refusal to deliver the balance, but in my view of the matter it is not necessary to decide that question.

A credit of 60 days was given for the portion of the goods delivered so that the plaintiff retained no lien on those goods, his claim in respect thereof being one simply of debt.

The plaintiff's contention is two-fold, viz.:—

1. That until payment in full for the goods delivered it was excused from the further performance of the contract on its part. 2. That it was entitled to a lien on the undelivered goods for the balance owing in respect of those delivered.

As to the first contention the refusal to pay can only excuse the plaintiff from further performance if such refusal amounts to a repudiation of the contract. *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434. *Payzu, Ltd.* v. *Saunders*, [1919] 2 K.B. 581.

Here the correspondence makes it quite plain that instead of repudiation the defendant was always insisting upon completion and it was to insure completion that the balance on the first delivery was withheld.

As to the second contention it is to be noted that no claim of lien was ever made nor was there any offer to ship the balance of the order upon payment of the small balance unpaid on the goods delivered.

But apart from that, my view of the law is that where goods sold are delivered in instalments and separate payment is to be made for each instalment as a general rule and in the absence of specific agreement a lien cannot be claimed for a balance owing in respect of an instalment already delivered against instalments still to be delivered, even though the contract be an entire one, for though entire in a sense it is apportionable in a sense. Upon the delivery of the goods in July upon terms of credit for the full price thereof, the plaintiff lost any claim of lien he might otherwise have had against those goods or in respect of the price thereof. See *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (1877), 5 Ch. D. 205.

Against this proposition the plaintiff's counsel cites *Ex parte Chalmers* (1873), 8 Ch. App. 289, but in that case the purchaser had declared himself insolvent before the last instalment was delivered and it was held that the vendor had a right after the

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declaration of insolvency to refuse to deliver any more goods till the price of both instalments had been tendered to him.

In Benjamin on Sale, 6th ed., p. 956, the question is discussed and the law is thus stated:—

"If by agreement each instalment be treated as a separate contract the seller's lien is apportionable accordingly. And even where there is no such provision, when the instalments are to be separately paid for, the contract will be treated as apportionable."

See also Chalmers' Sale of Goods, 9th ed., p. 102, where it is stated that in regard to severable contracts "the seller cannot withhold delivery of the third instalment till he has been paid for both the second and third instalments, unless (1) the non-payment involves a repudiation of the contract, or (2) the buyer is insolvent."

I hold that in the circumstances of this case the non-payment by the defendant of the balance unpaid on the goods delivered did not excuse the plaintiff from delivering the balance. The defendant was, I think, quite justified in withholding the balance to apply against his apprehended loss from the plaintiff's breach of contract.

A course similar to that taken by the defendant was approved by Earl of Selborne, L.C., in *Mersey, etc.* v. *Naylor*, 9 App. Cas., at p. 441.

Regarding the objection that the defendant has not pleaded nor given evidence that he was able, ready and willing to pay for the goods not delivered, I think the proper conclusion from the evidence is that all the goods were sold on credit. The plaintiff's manager stated in his evidence that in the absence of special terms there would be 30 days from the first of the month following delivery, in fact 60 days were given for the goods that were delivered, and it is fair to assume the same terms were applicable to the balance, so that sec. 27 of the Sale of Goods Ordinance which provides that unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions does not assist the plaintiff, it being in this case otherwise agreed.

It is difficult upon the evidence to fix the damages with any degree of accuracy. Section 49 (3) of the Sale of Goods Ordinance C.O. 1915 (Alta.), ch. 39, 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 of the goods at the time or times when they ought to have been delivered or if no time was fixed then at the time of the refusal to deliver."

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Upon the evidence there was in fact a refusal in October when the plaintiff was able to deliver but did not do so, but the defendant was not notified of refusal till the letter of January 30, 1920. I am inclined to think the defendant is entitled to choose either October or January as the date of refusal. See *Wilson* v. *London and Globe Finance Corp. Ltd.* (1897), 14 Times L.R. 15.

The amount I would allow for damages would be justified by the market price at either date, and I would fix the damages at $215.

The plaintiff contends that the defendant should have minimised the damages by paying the balance in dispute and relies upon *Payzu, Ltd.* v. *Saunders, supra.* There would be much force in this argument if the plaintiff had offered to deliver the balance of the goods upon payment of the $114, but I see no evidence of such an offer, and on the contrary the defendant was led to believe that the goods were not available.

The result is that the appeal should be allowed with costs, the judgment below set aside and judgment entered in favour of the defendant for $101 being the difference between the amount allowed for damages and the amount of plaintiff's claim, the plaintiff to pay the costs of the action and the counterclaim.

Appeal allowed.

BRONFMAN v. HAWTHORN AND ATTORNEY-GENERAL FOR NEW BRUNSWICK.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 18, 1921.

INTOXICATING LIQUOR (§IIIH—90)—SEARCH AND SEIZURE—EXCLUSIVE JURISDICTION OF MAGISTRATE—INTERFERENCE BY INJUNCTION DENIED PENDING HEARING BY MAGISTRATE—SALE FOR EXPORT BY WHOLESALE DEALER IN NEW BRUNSWICK—LEGALITY OF DELIVERY IN THE PROVINCE TO THE FOREIGN BUYER—INTOXICATING LIQUOR ACT 1915 (N.B.) CH. 8.

An injunction will not be granted pending a hearing before the magistrate of a charge of unlawful sale of intoxicating liquor and the determination by the magistrate of search and seizure proceedings under the Intoxicating Liquor Act 1915 (N.B.) ch. 8, to restrain the seizing officer from remaining in possession of the liquor seized. The jurisdiction to determine upon the charge laid and upon the concurrent seizure is given to the magistrate by the terms of the Act, and he should not be enjoined pending a postponement of the hearing. Delivery of intoxicating liquor sold in wholesale quantities in pursuance of a *bonâ fide* order for same received from outside of New Brunswick for the purpose of being conveyed outside of the province may legally be made to the purchaser coming into New Brunswick for the purpose of himself conveying the liquor out of Canada. The Act does not make it obligatory upon the wholesale exporter to make delivery beyond the province.

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White, J.

MOTION by plaintiff for an injunction, restraining the defendant John B. Hawthorn, Chief Inspector under the Intoxicating Liquor Act, 1915, his servants or agents, from levying, seizing, or interfering with intoxicating liquor of the plaintiff, sold for export to a place outside the Province, and for an order for the return to the plaintiff of liquor seized, and for a declaration that officers under the said Act have no right to interfere with intoxicating liquor properly sold for export. Motion dismissed.

F. R. Taylor, K.C., for plaintiff.

W. B. Wallace, K.C., for Attorney-General.

W. M. Ryan, for John B. Hawthorn.

WHITE, J.:—In this matter the plaintiff is applying for an interim injunction ordering and directing "that the defendant John B. Hawthorn, his servants, agents, inspectors, sub-inspectors and employees and every one of them to be restrained from retaining from the possession of the plaintiff or of one Pope D. McKinnon certain intoxicating liquors contained in sixty cases and three kegs sold by the plaintiff to said Pope D. McKinnon and about to be delivered to him at the time of seizure by the defendant or his agents, and from selling, levying upon, taking possession of or interfering in any way with the said liquor or any other liquor of the plaintiff bona fide sold for export to persons or corporations outside the Province of New Brunswick or in transit or in process of shipment bona fide to such persons or corporations."

The application was first made to my brother Grimmer at Chambers on Monday, October 31, last, and at the same time Mr. Wallace, K.C., acting for the defendant, informed the Judge that he would like to be heard in opposition to the application. The Judge thereupon suggested to the parties that as this Court would so soon sit, the application should be made to the full Court, and on the opening day of this term Mr. Fred R. Taylor, K.C., Mr. Roy A. Davidson with him, moved accordingly. Mr. Wallace, K.C., Mr. William M. Ryan with him, opposed the motion.

On behalf of the plaintiff four affidavits were read, one made by Percy H. Hand, one by James B. Dever, one by Roy A. Davidson and one by Pope D. McKinnon; and on the part of the defendant three affidavits were read, viz., those of William B. Wallace, William M. Ryan and Alexander Crawford. In reply to the affidavits submitted on the part of the defendant was read the affidavit of Barnett Aaron.

I may say here that as the affidavits with the exhibits are

so voluminous I propose reading only so much thereof as I think is important and bears directly upon the question we have to determine.

In his affidavit Percy H. Hand states *inter alia*;—

"1. That Samuel Bronfman the above named plaintiff is carrying on the business of trade of wholesale importer and exporter of liquor at the City of Saint John in the Province of New Brunswick under the name style and firm of The Canadian Distributing Company and I am the assistant manager of the said business and of the office of the said Samuel Bronfman at the said City of Saint John and have a personal knowledge of the matters hereinafter deposed to.

2. That the said Samuel Bronfman is engaged only in the business of importing intoxicating liquor to the said City of Saint John and having the same therein for export sale and of carrying on a wholesale importing and exporting liquor business buying and acquiring liquor for such trade wholly without said Province of New Brunswick and selling and shipping such liquor only to persons and corporations outside said Province of New Brunswick.

4. That the said Samuel Bronfman for the purpose of carrying on said business maintains a bonded warehouse at numbers 24 to 26 Nelson Street in said City of St. John and continually keeps therein a sufficient stock of liquor to carry on said business.

6. That I did on the twenty-fourth day of October instant receive from Pope D. McKinnon of Bangor, in the State of Maine, one of the United States of America, two orders for liquor for export to him at Bangor aforesaid true copies of which said orders are hereto annexed marked "A" and "B" respectively and I did also on the twenty-seventh day of October instant receive from the said Pope D. McKinnon an order for a certain further quantity of liquor for export as aforesaid a true copy of which said order is hereto annexed marked "C" and I did on the twenty-second day of October instant receive from the said Pope D. McKinnon a cheque drawn by J. Foley & Co. at Bangor, Maine, for $1995.00 and I did on the twenty-fifth day of October instant receive from the said Pope D. McKinnon a cheque for $1800 drawn by the said J. Foley & Co. at Bangor aforesaid both of which said cheques were made payable to the said Pope D. McKinnon and endorsed by him and which said cheques were given in payment of the orders referred to in this paragraph.

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7. That at the request of the said Pope D. McKinnon I did on the twenty-seventh day of October instant cause packages containing a portion of such liquor, namely, sixty cases and three kegs of such liquor to be got ready for shipment to the said Pope D. McKinnon at Bangor aforesaid and to be labelled in a conspicuous place with a label containing the name in full and address of the said Pope D. McKinnon and the trade or firm name and address of the said Samuel Bronfman to wit The Canadian Distributing Company, P.O. Box 1411, St. John, N.B., and on each of said labels I caused to be specified the character and quantity of liquor contained in each such package."

The affidavit of Pope D. McKinnon sets forth:—

"1. That I did on the twenty-seventh day of October instant purchase from the above named plaintiff through Percy H. Hand the assistant manager of his business at the City of St. John in the Province of New Brunswick sixty cases and three kegs of liquor to be loaded at the said plaintiff's bonded warehouse into a motor car and conveyed by me to Bangor aforesaid and said liquor was purchased by me for export from New Brunswick and was not for use or consumption within the Province of New Brunswick and was not intended to be delivered to any person within said Province.

2. That I am a bona fide resident of Bangor aforesaid and am a citizen of the United States of America and have no domicile in New Brunswick.

6. That it was my intention when I came to the said City of Saint John to return to Bangor on the night of the said twenty-seventh day of October, and it is now my intention to return as soon as said liquor is returned to me and I am being put to considerable expense by reason of the detention of said liquor.

7. That I paid the said plaintiff for said liquor the sum of $2,629.00."

It is not disputed that the liquor in question was seized by the inspector and that an information was thereupon on Saturday, October 29, last, laid before the Police Magistrate at St. John against said Percy H. Hand for unlawfully selling the said liquor and that Hand made a deposit of $200 and that the hearing of the case has been postponed in consequence of this application for injunction now pending. Under these circumstances I do not think the injunction asked for should be granted. The Legislature has provided that the Police Magistrate of St. John shall have jurisdiction to hear and determine the matter

of the said information, has authorised the inspector to seize liquor which in his opinion is unlawfully kept for sale or disposal contrary to the Act, and provides that in case of a conviction the magistrate may declare said liquor or any part thereof to be forfeited to His Majesty:

The present application can only be sustained on the assumption, or at least upon a well founded belief, that the Police Magistrate will not dispose of the information before him pursuant to the requirements of the law. There is nothing in the facts disclosed in this case to warrant such an assumption or belief. The application should, I think, therefore be dismissed and with costs. At the same time, in view of the question raised and argued as to whether under the New Brunswick Prohibition Act liquor lawfully kept at a place within this Province for the purpose of export sale can lawfully be delivered by the vendor at such place or must be shipped without the Province by a common carrier or other person acting as the vendor's agent, I should perhaps say that I have carefully examined the New Brunswick Prohibition Act and can find there no express provision requiring that the vendor in such case should make delivery of the liquor without the Province. It was argued by Mr. Wallace from several sections of the Act to which he referred that we were bound to infer that it was the intention of the Legislature to impose upon the vendor this duty of making delivery of the goods without the Province. In answer to that I need only point out that the Prohibition Act is in the nature of a criminal law and such offences as are created thereunder must be created in clear and express terms, and cannot be left to inference unless such inference follows irresistibly and unquestionably from the language used, and I can find no language used in the Act which irresistibly and unquestionably does carry such inference; and in this connection I would point out that sec. 42 of the Provincial Prohibition Act dealing with the transport of liquor enacts:—"Nothing in this Act contained shall prevent common carriers or other persons from carrying or conveying liquor from a place outside of the Province to a place where the same may be lawfully received and lawfully kept within the Province, or from a place from which such liquor is lawfully kept and lawfully delivered within the Province where it may be lawfully delivered outside the Province, etc."

By a foot-note published at the end of the section it appears that this sec. 42 is adopted in part from ch. 112 of the Manitoba Act, [Temperance Act 1916 ch. 112] sec. 50, and in part from

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the Acts of Assembly of this Province, 1915 (N.B.) ch. 8 sec. 3, as amended.

The words of part of sec. 50 of the Manitoba Act are identical with that portion of sec. 42 of the New Brunswick Act which I have quoted, save that where in sec. 42 we find the words "where it may be lawfully delivered outside the Province" we find in the Manitoba Act the words "to a place without the Province." Ordinarily where we find a change in the verbiage of a statute from that contained in a statute upon which it was admittedly fashioned or patterned one would *prima facie* attribute the change to design on the part of the legislature to alter the law or adopt a different provision from that contained in the statute copied, but I cannot in reading the words of sec. 42 of our own Act see that the change makes any difference whatever in the meaning of the section from that which is clearly borne by the Manitoba section from which our own is confessedly patterned. I can see nothing in the New Brunswick Act which makes it incumbent upon a person exporting liquor into a foreign country to deliver the same beyond the Province boundary, or renders delivery of the goods at his place of business within the Province unlawful, provided the requirements of the statute in respect to the sale are in all other respects complied with.

HAZEN, C.J.:—I agree with my brother that in this matter an injunction should not be granted for the reasons which he has stated. I am further of opinion that a person who has the legal right to have liquor in his possession in this Province for the purpose of export has the right to sell that liquor provided the sale is *bona fide* for delivery in a province in Canada outside of New Brunswick, or in a foreign country, and if he makes such a sale in all cases it is not incumbent upon him personally to deliver that liquor in the place to which he is selling it in a foreign country or another Canadian province, but he has the right to deliver it at his warehouse or elsewhere to a person who is to carry it to the place where under the terms of the sale it is to be delivered.

GRIMMER, J.:—I agree with the judgment of the Court.

Injunction denied.

KENNEDY LUMBER Co. v. BATKE AND MASSEY-HARRIS Co.

Sask.

C.A.

Saskatchewan Court of Appeal, Turgeon, McKay and Martin, JJ.A. October 3, 1922.

MECHANICS' LIENS (§ III—10) — HOMESTEAD — EXECUTION REGISTERED AGAINST—SUBSEQUENT REGISTRATION OF MECHANIC'S LIEN—PRIORITIES—LAND TITLES ACT AMENDMENT 1917 (SASK. 2ND SESS.), CH. 18—APPLICATION.

Homestead lands in Saskatchewan being free from seizure and not affected by writs of execution against the homesteader before the passing of the amendment to the Land Titles Act, 1917 (Sask. 2nd sess.), ch. 18, although registered against the lands, the holder of a registered mechanic's lien against the land is entitled to have it sold free and clear from the execution although the lien was registered subsequently to the execution. The amendment of 1917 does not give an execution priority over a mechanic's lien which was already a charge on the homestead at the time the amendment came into force.

[*Northwest Thresher Co.* v. *Fredericks* (1911), 44 Can. S.C.R. 318, applied.]

APPEAL by plaintiff from that part of the trial judgment which granted the plaintiff in an action to sell the respondent Batke's land under a mechanic's lien, an order for sale subject to the execution of the respondent the Massey Harris Co. Reversed.

A. McWilliams, for appellant; no one *contra*.

The judgment of the Court was delivered by

MCKAY, J.A.:—The appellant brought this action to sell respondent Batke's land, the n/w¼-1-14-6-w3rd., under its mechanic's lien.

The trial Judge granted an order for sale subject to the execution of the respondent Massey-Harris Co. The appellant appeals from this portion of the order.

With deference to the trial Judge, I think he was wrong in so doing. The execution of the respondent Massey-Harris Co. is dated July 6, 1917, and was registered on July 6, 1917. The appellant's mechanic's lien is dated August 10, 1917, and was registered August 27, 1917.

The execution was, therefore, registered prior to the mechanic's lien, but at the time of these registrations the execution was not a charge or lien in any way against the land in question, as it was then the respondent Batke's homestead and was so up to at least May 1, 1918, according to the evidence. (*Northwest Thresher Co.* v. *Fredericks* (1911), 44 Can. S.C.R. 318; *Union Bank of Canada* v. *Lumsden Milling Co.* (1915), 23 D.L.R. 460, 8 S.L.R. 263.) Whereas the mechanic's lien was, at any rate from the time of its registration, a charge or lien against the said homestead.

The fact that the amendment to the Land Titles Act in 1917 (Sask. 2nd sess.), ch. 18, which came into force May 1, 1918, made a writ of execution a charge on the homestead, would not give the execution in question priority to the appellant's me-

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chanic's lien which was already a charge on said homestead.

In my opinion, then, this appeal should be allowed, with costs against the respondent Massey-Harris Co., and the order of the trial Judge varied by directing the sale of the said homestead free and clear of the said execution.

Appeal allowed.

ELFORD v. ELFORD.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

POWERS (§ II—5)—POWER OF ATTORNEY—WIFE TO HUSBAND—TRANSFER BY DONEE OF POWER TO HIMSELF—VALIDITY.

A power of attorney given by a wife to her husband, authorising him to sell and absolutely dispose of the lands of the wife and for her and in her name to execute transfers thereof does not authorise the husband to transfer the properties to himself, and the wife is *primâ facie* entitled to have the husband declared a trustee for her, and the Court will not receive evidence to displace this *primâ facie* right, that the wife's title was acquired in pursuance of an unlawful design and plan to defeat the creditors of the husband.

[*Elford* v. *Elford* (1921), 61 D.L.R. 40, 14 S.L.R. 363, affirmed.]

APPEAL by defendant from the judgment of the Saskatchewan Court of Appeal (1921), 61 D.L.R. 40, 14 S.L.R. 363, in an action brought by a wife to have certain transfers of property which the husband transferred to himself under a power of attorney given to him by her set aside. Affirmed.

John Feinstein, for appellant.

R. Hartney, for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, J., with which I fully concur, I would dismiss this appeal with costs.

IDINGTON, J. (dissenting):—This is an action between husband and wife who during 12 or 13 years had resorted to various devices to defeat the creditors of the husband who pretended to act for the wife and acting under powers of attorney from her to preserve for him or her the fruits of his labour and enterprise in fraud of his creditors.

But for his course of so dealing having been properly held by the trial Judge, Taylor, J., a legal barrier in his way he was entitled to claim that his wife was his trustee of the properties in question herein. The correct inference to be drawn from the history of the dealings between them is that in her giving the power of attorney in question, it was given for the sole purpose of continuing to protect his property from and in fraud of his creditors.

She herein complains of his unexpected abuse of such power of attorney in conveying the property to himself.

I cannot think that a suitor depending upon an instrument so designed to perpetuate a fraudulent course of dealing, and thus tainted with illegality, can properly ask the Court to protect her from any abuse of such power. She has already had the benefit of the application of such a principle of law by being freed from any liability to account to her husband by reason of the trusteeship by which she would have had to account to him but for the whole being tainted with illegality. I do not see that she can properly complain after invoking the principle to defeat his claim being in turn applied to the residue of their illegal undertakings.

The principle upon which the decision of the Court proceeded in the case of *Scheuerman* v. *Scheuerman* (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625, works both ways.

Notwithstanding her illegal acquisition of the properties, I recognise that if she had given a power of attorney to a stranger to sell and dispose of same, and he had dealt with them as the husband has done, she might have been entitled to relief by way of having him so empowered declared her trustee, quite independently of the abstruse questions arising under the Land Titles Act, R.S.S. 1920, ch. 67. In my view of the case, I need not either try to resolve that question or deal with many others discussed here and below.

But let us suppose that power of attorney to her husband had expressly provided that he might convey thereby to himself, and she had applied to the Court to have such an instrument rectified because it had been inserted by mistake, would she have been entitled to any such rectification of an instrument so tainted with fraudulent purpose as I think this was? With some confidence I submit not, and that all that which is involved herein is essentially of that character.

It was mentioned during the course of the argument that the creditors, or some of them, had issued executions and registered judgments against the lands in question.

Nothing I have said herein is to be taken (even if concurred in by others of my brother Judges) as in any way deciding the effect thereof in light of the legal puzzle arising out of the registration of the conveyance by the appellant to himself having been recognised by the Registrar. The creditors, of course, may, until that is solved, have a measure of protection meanwhile.

I would allow the appeal herein with costs here and below and restore the judgment of the trial Judge, Taylor, J.

DUFF, J.:—This appeal appears to present little difficulty once the facts are understood. The respondent was the registered owner of the lands under dispute. She had given her husband a power of attorney conferring upon him a wide general authority

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to deal with them, but this general authority did not embrace the power to execute a conveyance in favour of the agent himself. Any attempt to acquire a title by such a use of the authority vested in him would be a fraud upon the power. *Primâ facie*, therefore, the wife is entitled to have the husband declared trustee for her.

The question, therefore, arises whether the husband can displace this *primâ facie* right of the wife's by alleging that she held her title to the property for his benefit, but for the purpose of protecting it from his creditors. In other words, whether her title was acquired in pursuance of an unlawful design and plan to defeat the creditors of the husband.

It is quite clear, I think, that such a defence is not competent to the husband. As Lord Hardwicke said in *Cottington* v. *Fletcher* (1740), 2 Atk. 155, 26 E.R. 498, as long ago as 1740, such "fraudulent conveyances" are "absolute against the grantor." It is quite clear that the husband would not be heard in an action to impeach the wife's title brought by himself to set up a claim based upon an arrangement of the character he now seeks to rely upon. If authority were needed for such a proposition it would be found in the judgment of Lord Shelborne in *Ayerst* v. *Jenkins* (1873), L.R. 16 Eq. 275, 42 L.J. (Ch.) 690, 21 W.R. 878, 29 L.T. 126, and it is equally clear that the wife is entitled to assert her rights as owner, that is to say the rights incidental to her ownership against the husband as well as against a stranger, so long as it is not necessary for the purposes of her case to rely upon the fraudulent arrangement with her husband. The principle is illustrated admirably in the judgment of Maclennan, J.A., in *Hager* v. *O'Neil* (1893), 20 A.R. (Ont.) 198, at p. 218 and in the decision of the Court of Appeal in *Gordon* v. *Chief Commissioner of Metropolitan Police*, [1910] 2 K.B. 1080, 79 L.J. (K.B.) 957, 26 Times L.R. 645, 103 L.T. 338. The appeal should be dismissed with costs.

ANGLIN, J.:—I would dismiss this appeal.

The transfer to himself executed by the defendant as his wife's attorney transgresses one of the most elemental principles of the law of agency. It was *ex facie* void and should not have been registered.

In order to succeed the plaintiff merely requires to establish that in executing the transfer to himself of the property in question, which stood registered in her name her husband committed a fraud on the power of attorney from her under which he professed to act. She does not have to disclose the alleged intent to defraud her husband's creditors in which her own title to the land is said to have originated, or to invoke any of the transac-

tions tainted by that fraud. *Simpson* v. *Bloss* (1816), 7 Taunt. 246, 129 E.R. 99; *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309, 38 L.J. (Q.B.) 225, 21 L.T. 359; *Clark* v. *Hagar* (1894), 22 Can. S.C.R. 510 at p. 525; affirming 20 A.R. (Ont.) 198. It is the defendant who brings that aspect of the matter before the Court in his effort to retain the fruits of his abuse of his position as his wife's attorney; and to him the maxim applies *nemo allegans turpitudinem suam est audiendus. Montefiori* v. *Montefiori* (1762), 1 W. Bl. 363.

Neither does the plaintiff seek any equitable relief. The equitable maxim invoked by the defendant—"he who comes into equity must come with clean hands"—is, therefore, inapplicable.

Nor did the defendant by making an unauthorised and illegal use of his wife's power of attorney put himself in a position to assert rights to property which the Court would not have allowed him to prefer had that property remained registered in the plaintiff's name, as it was prior to his wrongful attempt to vest the legal title to it in himself.

The rights of the husband's creditors are not affected by this litigation, to which they are not parties. The confessedly guilty defendant cannot now shelter himself under the rights of his creditors whom he sought to defraud—if indeed the creditors would be entitled to claim under the void transfer here in question.

BRODEUR, J. (dissenting):—This is a very sad case. This is an action between husband and wife. The husband used his wife's name to do some business in order to shield himself against the actions of his creditors. The properties acquired were put in his wife's name. All the work was done by the husband himself under a power of attorney which he had from his wife. They both conspired together to defraud his creditors.

It has been found by the trial Judge, Taylor, J., that the husband most brazenly lied in a suit instituted by one of his creditors to gain an advantage for his wife and himself; and that in this case the husband and wife evaded telling the truth or would not hesitate to tell falsehoods.

The wife in that atmosphere of purity has developed, what is not surprising, an intimacy with a man named Iceton, whom she had as a boarder in her house. The husband realising how far this intimacy would lead to, ordered this man to leave his house, but with not much success. He even found his wife and that man searching in his papers the title deeds of the properties which had been acquired. He then, using the power of attorney which he had from his wife, had the properties transferred to

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his own name and registered under the Land Titles Act, R.S.S. 1920, ch. 67.

The wife now sues him to have the properties re-transferred and registered in her name.

Her action was dismissed by the trial Judge on the ground that these properties had originally been put in her name for the purpose of defrauding the creditors of her husband and that the Courts of justice would not assist her in carrying out that fraud. Besides, some creditors in the meantime have registered claims to have the properties made available for payment of their claims; and the claims constitute a charge and lien upon the land.

The trial Judge decided also that the power of attorney was not wide enough to authorise the agent to transfer the lands in his name.

The Court of Appeal (61 D.L.R. 40, 14 S.L.R. 363), agreed with the trial Judge that the power of attorney was insufficient to authorise the husband to transfer the properties in his name; but they reversed his judgment and decided that the transfers and their registration should be set aside.

If the husband had taken proceedings to claim that the properties in question belonged to him he could certainly not have succeeded; a man who is obliged to set up his own fraud as the basis for the granting of an equitable relief should not succeed. The wife would have been entitled to retain the property for her own use, notwithstanding that she was a party to the fraud.

The husband, in such a case, could not be relieved from the consequences of his actions done with intent to violate the law. In other words, the Courts are always refusing to assist in any way, shape or form, those who violate the law or who act fraudulently. *Ex dolo malo non oritur actio.* See *Gascoigne* v. *Gascoigne*, [1918] 1 K.B. 223, 87 L.J. (K.B.) 333, 34 Times L.R. 168; *Scheuerman* v. *Scheuerman*, 28 D.L.R. 223, 52 Can. S.C.R. 625.

It is disclosed in this case that the wife had conspired with her husband to deprive the creditors of the payment of their legitimate claims and that the power of attorney she gave her husband was given for the purpose of continuing the fraud intended against her husband's creditors. She seeks, however, to have the Courts to transfer to her the properties in question. It seems to me that, applying the principle mentioned in the cases above quoted, we should refuse to assist her. The properties should remain in the hands of the husband, to be sold for the payment of the legitimate claims of the husband's creditors.

The appeal should be allowed with costs of this Court and of the Courts below and the judgment of the trial Judge restored.

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MIGNAULT, J.:—In my opinion the appeal fails.

It seems hopeless to contend that the husband (appellant) under the power of attorney which he held from his wife (respondent), could transfer to himself the properties standing in the Land Registration Office in the name of his wife. His counsel could cite no authority permitting such a transfer, and it certainly cannot stand.

The wife's action to set aside this transfer was, therefore, well founded. The husband, however, resisted her action by alleging that the properties in question really belonged to him and that they had been placed in his wife's hands merely as a trustee to hold them for him. In the evidence it was disclosed that the husband, who formerly lived in Halifax, had left unsatisfied judgments there when he moved to the West, and for that reason, although these properties were purchased with his moneys or from moneys coming from a partnership in which his wife was nominally a partner, they were placed in her own name to hinder or defeat the action of the husband's creditors.

If the wife was a trustee for her husband to further any such purpose, the husband cannot be listened to claim from his wife the properties thus held by her. (*Montefiore* v. *Menday Motor Components Co.*, [1918] 2 K.B. 241, 87 L.J. (K.B.) 907, 34 Times L.R. 463). To demand their return he would have to rely on an illegal contract, and this he cannot do. The wife's position is different in this sense that the properties already stand in her name and all she does or has to do is to attack the transfer which the husband made to himself under the power of attorney granted by his wife. To succeed, she does not have to rely on an illegal contract, while the husband cannot get back the properties without claiming them under a contract made in furtherance of an unlawful purpose.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

CANADIAN BANK OF COMMERCE v. McGILLIVRAY.

Saskatchewan Court of King's Bench, Bigelow, J. September 27, 1922.

FRAUD AND DECEIT (§ II—5)—GUARANTEE FOR PAYMENT OF DEBT—MISREPRESENTATION AS TO NATURE OF DOCUMENT—PERSON SIGNING UNABLE TO READ—LIABILITY.

A representation that a document which is in reality a guarantee for the payment of a debt, is only an agreement that the person obtaining the signature will not remove his goods out of Canada, is fraud which will relieve the person signing the document from liability, where he is an illiterate person and unable to read the document, although he is negligent in not having it read over to him before signing.

ACTION on a guarantee whereby the defendant guaranteed

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payment of his brother's debt to the plaintiff. Action dismissed.

C. E. Bothwell, for plaintiff.

H. L. Cathrea, for defendant.

BIGELOW, J.:—This is an action for $5,624.35 on a guarantee whereby the defendant guaranteed payment of his brother's (William McGillivray's) indebtedness to the plaintiff. On November 2, 1920, William McGillivray was indebted to the plaintiff in that amount, for which plaintiff had a chattel mortgage on William McGillivray's stock and implements, then situated in Saskatchewan. William McGillivray wanted to move his chattels to Alberta. Plaintiff's manager at Swift Current told William McGillivray that he would give him permission to move his chattels to Alberta, if he, William McGillivray, would get the defendant to sign the guarantee in question. William McGillivray got defendant's signature to the document and took it to the plaintiff's manager, who gave William McGillivray permission to move his chattels to Alberta. The bank also registered its chattel mortgage in Alberta. I cannot find from the evidence that the plaintiff sustained any loss after the guarantee was given.

The defence set up is that William McGillivray obtained the defendant's signature by a fraud, and that the defendant did not know he was signing a guarantee. The signature to the document was obtained in the following way. William McGillivray went to the defendant's place to get him to sign the document. He represented to the defendant that he was going to ship his stock to Alberta and the document was only an agreement with the bank that he would not take his stock out of Canada. The defendant cannot read writing at all; he can read printing to a certain extent, only with his glasses. He had not his glasses with him, and he wanted to go to his house to have his wife read the document over. William McGillivray said he had not time to wait; and the defendant then signed the document.

There is no dispute about this evidence, and I see no reason for disbelieving the evidence of the defendant. I find that the defendant's signature was obtained by the fraud of William McGillivray, and that defendant did not know that the document he signed was a guarantee. The mind of the signer did not accompany the signature. For these reasons, I think the defendant is entitled to judgment.

Plaintiff's counsel contended that the defendant was negligent, and should, therefore, be liable. I think he was negligent in not finding out what he was signing, and I so find, but I do not think this makes any difference in the result. *Carlisle & Cumberland Banking Co.* v. *Bragg*, [1911] 1 K.B. 489, 80 L.J. (K.B.)

473; Anson on Contracts, 15th ed., p. 164; *Sager* v. *Manitoba Windmill & Pump Co.* (1914), 23 D.L.R. 556; *Letourneau* v. *Carbonneau* (1904), 35 Can. S.C.R. 110.

There will be judgment for the defendant with costs.

Judgment for defendant.

SHANNON v. SMITH.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Barry and Crocket, JJ. April 21, 1932.

ESTOPPEL (§ IIA—21)—MORTGAGE—DEFAULT — SALE — FORECLOSURE DEED —PROPERTY CONVEYED—INTENTION OF PARTIES.

A grantor by foreclosure deed is bound by the terms and recitals in such deed and where it is impossible to draw from the face of the deed, both from the recitals and the operative clause any other conclusion than that it was the intention of the grantor to convey, and the intention of the grantee to receive the whole of the lot described in the deed, the grantor is estopped from denying the operation of the deed according to such intention.

APPEAL by plaintiff from the judgment of the trial Judge dismissing an action to recover damages for trespass alleged to have been committed by the defendant on the southerly half of a hundred acre lot described in the statement of claim, and for an injunction to restrain the defendant from repeating the acts complained of. Affirmed.

The facts of the case are fully set out in the judgments following.

C. J. Jones, for appellant.

M. L. Hayward, for respondent.

HAZEN, C.J. agrees with CROCKET, J.

BARRY, J.:—In the written reasons for judgment which he has given, Grimmer, J., who tried this case in the Chancery Division, has dealt so exhaustively with the facts, that anything more than a casual reference to them here is unnecessary. The question in dispute involves the ownership of the southern half, containing 50 acres, of a 100 acre lot of land situate in the Parish of Wicklow in the County of Carleton, which was referred to at the trial, and can, for convenience, be referred to here as the Birmingham lot.

The trial Judge found in favour of the defendant and dismissed the plaintiff's action with costs on the grounds:—First: that by the deed dated February 12, 1916, the appellant had conveyed and transferred unto his brother Robert Shannon, all of the interest which he had acquired in the Birmingham lot as well under the deed of May 19, 1906, from Jemima Pryor as under the mortgage of October 30, 1899, from John A. Shannon; and secondly: That the appellant was estopped by his conduct

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and the surrounding circumstances from asserting his alleged title. From that finding, this appeal is brought.

All that was conveyed by the mortgage from John A. Shannon to the appellant, which mortgage must, I think, be regarded as the foundation of the respondent's paper title, was John A. Shannon's right, title and interest, be that much or little, in the northerly half of the Birmingham lot. It could not have conveyed anything more than that because the mortgagor owned no more than that and had nothing more to convey.

But the trial Judge has found as a matter of legal construction, basing his judgment on Rule 60 to be found in Elphinstone on the Interpretation of Deeds, p. 204, that because Jonathan Shannon had on May 19, 1906—that would be between the date of the mortgage and the time of the sale thereunder—acquired the title to the southern half of the Birmingham lot, and because the several descriptions of the lands and premises in the mortgage, notice of sale and mortgagee's deed, all described, though erroneously as the Judge has found, the whole lot, instead of, as they should have done, the northern half of it, therefore, the appellant's right, title and interest in the whole lot, no matter how or in what character he acquired it, passed to his grantee under the deed of February 12, 1916. I am unable to agree with that construction.

The deed which the appellant gave to his brother Robert Shannon presents to my mind no ambiguity whatever. It is in fact what it purports to be, a mortgagee's deed to the purchaser of the mortgaged lands at a sale made in the execution of the power of sale contained in the mortgage; and the deed cannot properly be interpreted without giving effect to the word "therefore" around which so much of the argument has turned and which is to be found in the beginning of the paragraph commencing: Now *therefore*, this indenture witnesseth, etc.

The word "therefore" is here used as expressing a consequence and pointing to a preceding sufficient cause. It is the most precise word which the conveyancer could have used for expressing the direct conclusion of the sequence of circumstances which preceded the making of the deed and, in consequence of which the same was made. It is here to be interpreted, I think, as equivalent to "for these reasons" or "on that account;" and by adopting that interpretation any seeming ambiguity in the deed disappears.

Now, that being, as I say, the meaning which, in my opinion, is to be attached to the word, let us see where, if I am right, that construction leads us. The deed recites the fact of the mortgage having been given, stating in the recital the date of the instru-

ment, when and where registered, the names of the parties to it, describing the lands and premises conveyed by the mortgage, and that the instrument had been made to secure the repayment of $200 with interest. Then there is recited the fact that the mortgage contained a proviso for the sale of the mortgaged property upon default being made in the payment of the money it was made to secure; such sale to be made only after giving 1 month's notice of sale by publishing such notice for 1 month in a newspaper printed and published in the County of Carleton. Then the deed recites as facts that default has been made in the payment of the sums secured; that notice that the lands and premises would be sold under and by virtue of the power of sale contained in the mortgage, at a time and place named in the notice, was given by publishing the notice in the "Carleton Sentinel," a weekly newspaper printed and published in the County of Carleton for 6 successive issues of the newspaper, giving the dates of each of such issues; that at the time and place stated in the notice the lands and premises were sold at public auction for $375 to Robert Shannon, he being the highest bidder therefor; and then—*now, therefore,* that is for these reasons; or on that account, or in consequence of what has gone before, this *indenture witnesseth* that the grantor (appellant) for and in consideration of $375, the purchase price, grants, bargains and sells unto Robert Shannon, the purchaser, what? What does the mortgagee sell and what does he profess to sell? Surely nothing more than the lands which John A. Shannon had mortgaged, the lands which the mortgagee had advertised and sold in execution of the power of sale contained in the mortgage, the land which Robert Shannon had purchased at the sale, that is to say, John A. Shannon's right, title and interest in the northerly half comprising 50 acres of the Birmingham lot and nothing else.

That there was a mistake in the description of the lands, a mistake known or one that should have been known to the three Shannon brothers, is not denied. But equity will correct that, for as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it, according to the maxim *falsa demonstratio non nocet.*

Llewellyn v. *Earl of Jersey* (1843), 11 M. & W. 183, 152 E.R. 767, or, as has been held in another case, where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it will not frustrate the grant; but, where the grant is in general terms, there the particular circumstance will operate by way of restriction and modification of such grant;

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Roe, dem. Conolly v. *Vernon* (1804), 5 East 51, 102 E.R. 988. Here the grant having described in general terms the whole 100 acres, the narrative clauses or recitals in the instrument operate by way of restriction or modification, and so control the generality of the grant and limit its operation to the mortgaged part which the grantor started out to sell.

"For the purpose of construing the dispositive or operative clause, the whole of the instrument may be referred to, though the introductory narrative or recitals leading up to that clause are, perhaps, more likely to furnish the key to its true construction than the subsidiary clauses of the deed." *Per* Lord Macnaghten in *Orr* v. *Mitchell*, [1893] A.C. 238 at p. 254.

"I have always considered, of late years," says Romilly, M.R., "that where the recital is that you intend to convey certain specific property, and the general words in the habendum, including 'interest,' and the like, are sufficiently large to carry other property which is not specified and is distinct from that which is specified in the recital, that that other property does not pass." *Neame* v. *Moorson* (1866), L.R. 3 Eq. 91 at p. 97, 15 W.R. 51. With every deference to those who hold to a contrary opinion, it seems to me to be impossible to say that, upon a proper construction of the mortgagee's deed, Robert Shannon acquired any greater interest than the mortgagor John A. Shannon has possessed in the Birmingham lot.

The mistake which was made by the successive owners of the two half-lots respectively, was that in the conveyances which were made after the partition of the Birmingham lot between the devisees, each owner of the half-lot adhered to the original description of the whole lot as descriptive of the half lot without any restrictive or qualifying words such as "the one-half of all that lot" or "all the right, title and interest of so and so in and to all that lot, etc.;" so that in looking at the conveyances to-day, one would be led to think that the titles to the whole lot descended in two parallel lines from two different sources until it became fused in the appellant on May 19, 1906. And that has been the whole cause of the contention which has arisen between the parties as to the extent of the interest conveyed by the mortgagee by the deed which he gave to Robert Shannon on February 12, 1916.

The correctness of the rule which the Judge quotes from Elphinstone on the Interpretation of Deeds and which seems to have been first formulated by Sir Edward Sugden, L.C., in *Drew* v. *Earl of Norbury* (1846), 3 Jo. & La. 267 at p. 284, 9 Ir. Eq. R. 171, 524, referred to by Lord Cranworth in *Johnson* v. *Webster* (1854), 4 De G. M. & G. 474 at p. 488, 43 E.R. 592 at p. 598, and

followed by Stirling, L.J., in *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231 at p. 256, is not questioned here. The rule as stated by Sugden, L.C., is:—"That when a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance." And the Lord Chancellor adds (at p. 284):—"Nothing could be more mischievous or contrary to law than to hold that when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance."

This rule has, in my opinion, no application to the questions arising for determination in the present case. It is not disputed that whatever estate was vested in the appellant in the northern half of the Birmingham lot at the time of the conveyance to Robert Shannon, was transferred to him; and that would be so no matter in what character he professed to make the conveyance. The only lands which by the foreclosure deed the appellant professed to sell, and the only lands which in the exercise of the power of sale he could sell, and the only land, which in point of law, if my construction of the conveyance be correct, he really did sell, was the northern half of the lot. The appellant did not acquire title to that part of the lot in several characters and then proceed in one of those characters to transfer the title to another. Had he done that, why then, doubtless, the rule which has been quoted would have been applicable. His title was always that of owner of the fee simple, subject to the equity of redemption of the mortgagor; and the equity having become extinguished by the foreclosure and sale, the absolute title to the land in fee simple vested in the purchaser, but never, in my judgment, to anything more than the northern half of the lot.

If the result of this appeal depended wholly upon the construction of the mortgagee's deed, then I think the appellant should succeed. But the result does not so depend. The second ground upon which the Judge bases his judgment, that is, estoppel, has, I think, been fully established by the facts, and must, therefore, prove fatal to the success of the appeal.

The rule as to estoppel by conduct, or as it is sometimes called estoppel *in pais*, has been authoritatively stated in the leading case of *Pickard* v. *Sears* (1837), 6 Ad. & El. 469, at p. 474, 112 E.R. 179, at p. 181, as follows:—"Where one by his words or conduct *wilfully* causes another to believe the existence of a cer-

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tain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And whatever a man's intentions may be, he is deemed to act *wilfully* if he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it. *Coventry, Sheppard & Co.* v. *Great Eastern R. Co.* (1883), 11 Q.B.D. 776; *Seton, Laing & Co.* v. *Lafone* (1887), 19 Q.B.D. 68.

In defining the last of the four propositions into which he divides the subject of estoppel *in pais*, Brett, J., in *Carr* v. *London & N.W.R. Co.* (1875), L.R. 10 C.P. 307, at p. 318 (23 W.R. 747) says:—"If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist."

In language which is peculiarly applicable to the facts in the present case, Ewart, on Estoppel, at p. 5 says:—"Suppose that the owner of property stands by and allows it to be sold by another person to one unaware of the real state of the title; the owner is and ought to be estopped from asserting his position. He has misrepresented, or rather, contributed to the misrepresentation of the facts, and is estopped, therefore, from asserting them. This is estoppel by misrepresentation."

An estoppel by conduct may arise from an untrue representation of fact, not only when fraudulently, but even when mistakenly or innocently made. And conduct by negligence, omission, or even silence, where there is a duty cast upon the person to disclose the truth may often have the same effect. In order to raise such an estoppel, the following conditions are necessary: there must be a representation of fact; there must have been an intention, or conduct raising a reasonable presumption of intention, that the injured party was meant to act upon the representation as true; the party relying on the representation must have acted on it to his own detriment; and the misstatement or negligence must have been the proximate cause of the detriment, or, perhaps, more strictly, of the error which caused the detriment. See Phipson on Evidence, 6th ed., 1921, pp. 686-687.

It is disclosed by the evidence that the appellant and Robert Shannon are brothers, and had been for some time previously to, and at the time of the sale to the respondent, living together in the same house and under the same menage. It is a justifiable

assumption to suppose that, living together in this intimate and brotherly way, what one of them knew about their ordinary business affairs, the other knew, and more especially would this be likely to be true about their real estate transactions, which were not many.

The property was advertised by the appellant himself under the general description in 6 issues of a newspaper printed and circulated in the county, and was thus given wide publicity. It was sold publicly under that description and Robert Shannon became the purchaser. During all this time the appellant stood by and said nothing; he never asserted any right or title to the southern half of the lot, or said that it was his, or that it was not included in the property sold under the mortgage, but silently acquiesced in the advertising and public sale under the mortgage of what he now claims to be his own 50 acres. We do not find him making any objection to the sale of the whole 100 acres or hear of any claim to the southern half of the lot until a month after the sale had been consummated between his brother Robert and the respondent, or, to be exact, until December 30, 1919. That was 3 years and 9 months after he himself had sold to his brother Robert.

Furthermore, it is in evidence, and although disputed, is found by the Judge to be true, that some 2 years previous to the purchase by the respondent, he negotiated with the appellant and his brother Robert, both being together, in regard to the purchase of the whole lot, and that the three went over the place together. Both of the brothers, the respondent says, called the place "ours" and Jonathan said that "they" owned it. Although Robert was the chief negotiator on the vendor's side and eventually closed the transaction, never was there a hint or suggestion from Jonathan that his brother Robert did not have the right to sell and convey the title to the whole 100 acres.

The trial Judge has found that Robert Shannon's intention in disposing of the property at the price named was to convey the entire lot, and that the defendant so understood it and paid the price of the whole lot, and that this was and must have been done with the knowledge, consent and acquiescence of the appellant. And the Judge has stated it as his opinion that, in view of all the surrounding circumstances, it would be a gross injustice if the plaintiff were now allowed to take advantage of anything that occurred in connection with the sale of the property to the defendant, and reap a further benefit from this action. With that finding and with that opinion, I fully and entirely concur.

Applying the principles upon which the doctrine of estoppel *in pais* is founded to the facts in the case, I think that there was

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here a misrepresentation of the fact of the ownership of the property; and that there was culpable negligence on the part of the appellant in standing by and not disclosing to the respondent the true estate of the title; that there was an intention on the part of the appellant that the respondent should act upon the representation as true; that he did act upon it to his own detriment, as the sequel shows; that the misrepresentation or negligence was the proximate cause of the error which caused the detriment; and that the appellant is now estopped from asserting title to the southern half of the Birmingham lot.

While for the reasons which I have stated, I am unable to concur in the obstruction which the Judge has put upon the mortgagee's deed, on the other branch of the case, I think that the appellant's conduct in standing by and giving a kind of sanction to the proceedings on the sale and afterwards on the re-sale by his brother to the respondent, was a fact of such a nature as to lead any reasonable man to conclude that he had ceased to be the owner of any part of the property embraced within the description in the preceding conveyances. I would dismiss the appeal with costs.

CROCKET, J.:—The plaintiff claimed title to the *locus* through a registered deed from Jemima Pryor and her husband, bearing date of May 19, 1906, which the trial Judge, Grimmer, J., found was a proper deed and conveyed the southerly half of the lot in question to the plaintiff.

The defendant on the other hand claimed title to the southerly half as well as the northerly half of the lot through a registered deed from Robert Shannon to him, bearing date November 28, 1919, whereby Robert Shannon purported to convey to him all his right, title and interest in the whole of the 100 acre lot, and a foreclosure deed from the plaintiff to the said Robert Shannon bearing date February 12, 1916, purporting to convey the whole of the said 100 acre lot, and to be executed in pursuance of the power of sale contained in a mortgage deed from John A. Shannon to the plaintiff, bearing date of October 30, 1899, whereby the mortgagor purported to convey all his right, title and interest in the whole 100 acre lot to the plaintiff by way of mortgage to secure re-payment of the sum of $200. The right, title and interest of John A. Shannon, the mortgagor named in the mortgage deed referred to, comprised only the right, title and interest which he acquired under a deed from the commissioners of the Provincial Lunatic Asylum acting as the committee of the estate of one Fraser W. Birmingham, bearing date October 24, 1899, and which interest the trial Judge found consisted of a one undivided half interest in the northerly half of the lot. It

is evident, therefore, that unless the title, which the plaintiff acquired to the southerly half of the lot by the deed from Jemima Pryor and her husband in May, 1906, passed to Robert Shannon under the foreclosure deed of February 12, 1916, or the plaintiff was estopped from setting up this title against the defendant, he was entitled to succeed in his action.

There can be no doubt that the foreclosure deed, which the plaintiff executed on February 12, 1916, purported in the plainest possible terms to convey to Robert Shannon, not the right, title and interest of the mortgagor John A. Shannon in the 100 acre lot, but the entire lot. Whatever the terms of the orgiinal mortgage may have been, whether it purported to convey only the right, title and interest of John A. Shannon in the lot as would appear to be the case from the admissions set out in the return, or the whole lot itself as in the foreclosure deed, the plaintiff's foreclosure deed recites that John A. Shannon by the mortgage 1899 "did sell and convey by way of mortgage unto the above named grantor (the plaintiff) the land and premises therein described as follows," and proceeds immediately to a description of the entire 100 acre lot by metes and bounds. It then recites that the said indenture contained a proviso that, upon default in the payment of the sums of money therein provided for, or upon breach of any of the covenants and agreements therein contained, the plaintiff might sell "the said land and premises" to realise the sum due him upon the said mortgage after giving 1 month's notice thereof by publishing the same for 1 month in a newspaper printed and published in the County of Carleton; that default was made in the payment of the sums secured by the mortgage; that notice was published in accordance with the proviso that "the said lands and premises" would be sold under and by virtue of the power of sale contained in said mortgage at public auction in front of the office of Jones & Jones at Woodstock on February 12, 1916; and that "the said lands and premises" were sold at the time and place named to the grantee for the sum of $375, "he being the highest bidder therefor;" and proceeds "Now therefore this indenture witnesseth that the grantor for and in consideration of the said sum of $375, to him paid &c. &c. hath and doth hereby grant, bargain, sell, alien, release, convey and confirm unto the said grantee, his heirs and assigns, all the above described lands and premises" together with the buildings &c.

Apart altogether from the question as to whether the original mortgage raised an estoppel against the mortgagor and his privies, and the question whether the plaintiff as mortgagee would be bound by such an estoppel, if there were one, so as to be

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precluded from denying that the mortgagor had, in fact, conveyed to him the whole lot, I am of the opinion that the plaintiff was estopped by the terms of the foreclosure deed which he executed himself and under which the defendant claims, from averring that the mortgage did not convey to him the entire lot, and from setting up an independent title in himself to one-half of it through the Pryor deed of 1906. Dr. Washburn, in discussing the subject of the creation of estates by estoppel in his Law of Real Property, says, vol. 3, 4th ed., p. 105, that in this country no greater effect is given to a grant or a conveyance by bargain and sale, or lease or releases, unaccompanied with covenants of warranty, than in England under the Statute of Uses. "They pass," he says, (at p. 105) "only the estates which are vested in interest at the time, and do not bind or transfer, by way of estoppel future or contingent estates. . . . . But where it distinctly appears upon the face of the instrument, without the presence of the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate, the grantor will be estopped from denying the operation of the deed according to such intent. If the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance." In the present case, it is quite impossible to draw from the face of the plaintiff's foreclosure deed, through which the defendant claims, any other conclusion than that it was the intent of the grantor to convey and the intent of the grantee to receive the whole 100 acre lot. This appears, not by implication, but in the most distinct and positive manner, both from the recitals and the operative clause. Notwithstanding that it was clearly a foreclosure deed, it was none the less the plaintiff's deed, by the recitals and terms of which he must, in consequence, be bound.

For these reasons, I am of opinion that, as between the appellant and the respondent, it must be held that the entire 100 acre lot in question passed by the plaintiff's foreclosure deed to Robert Shannon and by Robert Shannon's subsequent deed to the respondent.

The appeal should be dismissed with costs.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

NEW TRIAL—*Improper rejection of evidence—Crown case reserved—New trial—Cr. Code 1018.* [See also (1922), 67 D.L.R. 769, 37 Can. Cr. Cas. 25.]

Avery Casey, K.C., for appellant.

H. E. Sampson, K.C., for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The following case is stated for the opinion of the Court:—

"The accused was charged with the following offence, namely:—

' For that he, the said William McPherson, on or about the 31st day of July, A.D., 1920, at or in the vicinity of the Post Office of Medstead, in the said Province, and within the said judicial district, did unlawfully and carnally know Beatrice Bell, a girl of previously chaste character, then under the age of sixteen years, and above the age of fourteen years, she not being his wife' and was tried before me at Battleford, with a jury, on October 28th, 1921, when the jury found the accused guilty.

The accused gave evidence on his own behalf, and during his examination in chief, the following took place,—see page 61 of the evidence:—

Q. That was the 25th of July? A. Yes, Sunday night. Q. What happened the next day? A. The next day Bell came down in the forenoon and wanted us to go in with him haying; it was our implements he was using, both mowers and rakes, and there was a team he had in our pasture and we could use if we wanted to. He said if we would work along with him and his brother-in-law, Charlie Ausman, they would work along with us when they got that tame hay cut.

His Lordship: What has this to do with the case?

Q. What did you do on the 25th July?

His Lordship: What difference does that make? The point is whether he did this on the 31st July, 1920. It isn't interesting to the Court to know whether he was haying on the 25th July.

Q. Do you remember the 31st of July, Mr. McPherson? A. I do. Q. Tell me what happened on that day.

The question for the Court of Appeal is whether there was any improper rejection of evidence.

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A witness, Alice Scott, was called to the stand purporting to be for the purpose of contradicting Beatrice Bell,—see page 85, (of evidence).

The foundation laid for this evidence appears on page 27:—

Q. Do you know Alice Scott? A. Yes. Q. Did you have any conversation with her about the wrist watch? A. No. Q. Did you not tell her Mr. McGreavy gave you this? A. No, I don't think I did, not that I remember of. Q. Did you not tell Alice Scott that Mr. McGreavy had connection with you? A. No. Q. Whenever he wanted to? A. No. Q. You are positive of that? A. Yes.

Mr. Atkinson: I submit he should be more positive as to the place and so on. I don't want to raise the objection later on. His Lordship: When were these alleged conversations? Mr. Walker: In the summer of 1919 as to Starling and Larsen, and July, 1919, as to Alice Scott.

Q. You deny these? A. Yes.

I ruled that under sec. 11 of The Canada Evidence Act, R.S.S. ch. 145 a proper foundation for the reception of the evidence had not been laid because the circumstances of the supposed statement sufficient to designate the particular occasion were not mentioned to the witness. It was not argued before me that such a statement would be admissible in any event, but the whole contention was as to whether a proper foundation had been laid or not.

The question for the Court of Appeal is whether the evidence of Alice Scott was properly rejected.

The evidence, which is made a part of the stated case, shows that the girl had a child which was born on the 7th May, 1920, and which she swore was the result of the alleged unlawful connection with the accused. According to the evidence of the girl, which was very unsatisfactory on the point, the alleged offence may have been committed at any time during the last week of July or the first week of August, 1919. There was no evidence given to establish a probable date based on the date of the birth of the child. The offence was alleged to have been committed at the house of the accused. From the evidence set out in the stated case, and from other evidence given at the trial, it is quite clear that an attempt was being made by the defence to show that the accused was not at his own house during the period above-mentioned, but was working elsewhere. In my opinion he should have been allowed to give that evidence, and

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there was no evidence to justify the statement of the trial Judge that the point was whether the accused committed the offence on July 31, or his further statement in his charge to the jury that the date did not make any difference.

On this ground alone I think that the accused is entitled to a new trial, and it will therefore be unnecessary to consider any other question raised in the stated case.

New trial ordered.

BEAVER LUMBER Co. v. BURNS.

Saskatchewan Court of King's Bench, Brown, C.J.K.B. September 20, 1922.

MECHANICS' LIENS (§ VIII—69)—PERSONAL JUDGMENT ON COVENANT—EFFECT ON MECHANICS' LIEN—MECHANICS' LIEN ACT, R.S.S. 1920, CH. 206, SEC. 27—CONSTRUCTION.

By obtaining personal judgment against a defendant on his covenant, a plaintiff does not lose his right to enforce his mechanic's lien under the Saskatchewan Mechanics' Lien Act.

APPEAL by plaintiffs from the judgment of the local Master in an action to enforce a mechanic's lien and for personal judgment against the defendant on his covenant. Reversed.

A. L. McLean, for appellants; no one for respondent.

BROWN, C.J.K.B.:—The plaintiffs bring their action against the defendant in the District Court to enforce a mechanic's lien and for personal judgment against the defendant on his covenant and asked that their right to proceed to enforce the lien at their option be reserved. The local Master held that the plaintiffs had only two courses open to them: that they either must proceed to enforce the lien and get judgment for any deficiency, or in the alternative, if they wished personal judgment for the full amount claimed, they must abandon their claim under the lien. From this judgment the appeal is taken.

Section 27 of the Mechanics' Lien Act, R.S.S. 1920, ch. 206, is, according to my interpretation of same, a determining factor in the case. This section reads as follows:—

"The taking of any security for or the acceptance of any promissory note for or the taking of any other acknowledgement of the claim or the giving of time for the payment of the claim or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment therefor shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by this Act unless the lienholder agrees in writing that it shall have that effect."

It is clear from this section that the recovery of a personal judgment in an action for that purpose is not to prejudice the

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lien or the plaintiff's right under the lien. The local Master in dealing with this section expresses himself as follows:—

"It is true that sec. 27 makes provision against merger or waiver of lien by recovery of personal judgment, that means that a personal judgment recovered by lienholder shall not deprive him of rights in any action brought by another lienholder."

With deference I do not think the section should be construed in this limited way. If the lienholder's rights under his lien are not to be prejudiced by an action brought on the covenant, that, it seems to me, implies that he has the right to bring a subsequent action in his own name if necessary for the purpose of enforcing his claim against the property under the lien. To say that he cannot enforce his lien except in an action brought by some other lienholder would clearly, in my opinion, seriously prejudice his position. It may be and it frequently will happen that there is no other lienholder and, moreover, even though there were other lienholders their claims might be settled by the defendant and they might not find it necessary or desirous to proceed by way of enforcement under the Act. If, therefore, the plaintiff has the right to bring an action on the covenant and a subsequent action to enforce his lien, as, in my opinion, he has, then, surely, he would have the right to seek relief on the covenant by way of personal judgment and also relief by way of enforcement of the lien in the same action. This is the procedure that the plaintiffs adopted in this case and it seems to me to be a proper procedure. If the plaintiffs brought separate actions as they had the right to do, they might very properly, under ordinary circumstances, be penalised by being allowed only one set of costs. Adopting the course which has been adopted here, the plaintiffs, without extra costs, will have the right to personal judgment and execution with the possibility of recovering by way of execution, and if they are driven to the necessity of recovering under their lien against the property, they can do so without delay and without unnecessary expense.

In the result, the appeal will be allowed. The plaintiffs will have judgment against the defendant for the amount claimed and costs including costs of the application to the local Master and of this appeal and the plaintiffs will have the right to proceed further at their option and as they may be advised to enforce their lien.

Appeal allowed.

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Quebec Sessions of the Peace, Choquette, J. September 14, 1922.

BAIL. (§ I—26)—THEFT—CONVICTION — SENTENCE — APPEAL — POSTPONEMENT OF SENTENCE AND BAIL PENDING HEARING—CR. CODE, R.S.C. 1906, CH. 146, SEC. 1014.

An application for a reserved case, on a conviction and sentence for theft having been refused, and notice of appeal having been duly given and served, and it appearing that if bail is not granted the accused will have served his sentence before the sitting of the Court of Appeal, the Court may, under sec. 1014 of the Cr. Code postpone the sentence until after the sitting of the Court of Appeal and admit the accused to bail.

THEFT (§ I—3a)—BANK MANAGER—INSTRUCTIONS AS TO LOANING MONEY—MONEY LOANED CONTRARY TO INSTRUCTIONS—CR. CODE, R.S.C. 1906, CH. 146, SEC. 357.

A bank manager who receives money from the bank with instructions to apply it towards legitimate purposes of banking and according to certain directions as to its use, and in violation of good faith, and contrary to the instructions received loans such money in large amounts to insolvents, without any guarantee, or security, and makes false returns to the bank is guilty of theft under sec. 357 of the Cr. Code.

PETITION for respite of execution of sentence and for bail pending the hearing of an appeal in a criminal action. Petition granted.

CHOQUETTE, J.:—The defendant is charged with having: "between the 31st of December, 1920, and the 15th of August, 1921, in the parish of St. Romuald, in the district of Quebec, then being in the employ of the National Bank as manager and in such capacity having received from or for the said bank money to the amount of more than $15,000, with instructions to apply it towards legitimate purposes of banking and according to certain directions as to its use, fraudulently applied, in violation of good faith and contrary to the instructions and directions received, the said money received by him in such quality to other purposes, by giving to L. Eugene Martineau money to the amount of more than $10,000 and to Joseph Larose money to the amount of more than $5,000, thereby becoming guilty of theft, to the prejudice of the said National Bank for more than $15,000 and in contravention of the statute in such cases made and provided."

The defendant after preliminary investigation and being sent before the criminal assizes, elected a speedy trial. At the trial, the defendant, through counsel, and the Crown, through the Crown prosecutor, agreed to submit the case on the merits on the evidence adduced at the preliminary investigation. Subsequently, the Crown prosecutor applied for permission to hear other witnesses, and despite the objections of defendant, this permission was granted. Some witnesses were heard and then the Crown proposed that the defendant should be heard. The case was here adjourned in order to enable the defendant to

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arrive at a decision, and some days afterwards his counsel stated that he had no witnesses to hear; the case was then pleaded.

The Crown relying on sec. 357 of the Cr. Code, asked for the condemnation of the defendant. On the other hand, the defendant contended that on the face of the indictment itself there was no legal offence committed, that sec. 357 did not apply and that if the defendant was guilty of a certain illegality, this could only be under sec. 390 of the Cr. Code, and in such case under sec. 596, no proceedings could be instituted against him without the authorisation of the Attorney-General, and that there was no theft as defined by sec. 357.

The Crown replied that under sec. 357: "Every one commits theft who, having received . . . . . any money . . . . . with a direction that such money . . . . . shall be applied to any purpose specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose . . . . such money . . . . or any part thereof." This is absolutely the case of the defendant who, being manager of the National Bank, received sums of money that he should have applied in good faith and according to the directions received, whether these directions were verbal or written. Contrarily to these directions, he loaned money without any guarantee to insolvents like Martineau and Larose, the persons named in the indictment. Moreover, not only did he not make the reports that he was bound to make to the head office of the advances made, but he made false ones; again, he paid with money in his care, for Larose's account, drafts which he did not even have him accept, though he handed him the bills of lading for the goods paid by the drafts, without even knowing whether he was in a position to refund these amounts, and, moreover, advanced him large sums on his cheque without security.

It was also proven that one Martineau had deposited with brokers at Quebec, to the credit and for the benefit of defendant, several thousands of dollars.

In view of all these facts, there is no doubt that it is sec. 357 which should be applied, and the admissions made by defendant to the inspector of the bank, at the time of the inspection, positively establish that there was a theft in the sense of the law. The defendant used the money received in violation of good faith and contrary to the directions received, which were to loan only on substantial guarantees and after taking the necessary information. His conduct, his false reports, his incorrect entries in the books, constitute fraud in law, and he must be declared to be guilty.

As soon as the defendant was found guilty, his attorney moved

for a reserved case, and the following questions were reserved for the consideration of the Court of Appeal:—"(a) Does the information and the evidence adduced reveal a crime of theft, under sec. 357? (b) Does the evidence adduced or the information reveal a crime under sec. 390? (c) If so, had the Court of Sessions the jurisdiction to decide and to pronounce on said information without the intervention of the Attorney-General, under sec. 596? (d) Has the Court the jurisdiction to discharge the deliberé in order to hear new witnesses after the case has been declared closed?"

Relying on sec. 1014 of the Cr. Code, the attorney for the defendant applied for a respite in the execution of the sentence and to admit his client to bail. The Court refused the application but adjourned the sentence until the next day in order to allow the defendant to take the proceedings that he thought fit. On the following day, the Court sentenced the defendant in the following words: "Taking into consideration the good reputation of the defendant, the fact that it was not proven that he personally shared in the money advanced to Martineau and Larose, except insofar as the few thousand dollars deposited by Martineau to his credit with a broker: that the present proceedings were only taken several months after the facts were ascertained; that the defendant has given to the bank all possible information to recover the money and that he has transferred to the bank the stocks he has with the brokers as well as all his assets; that he was left in charge of the bank without adequate inspection until the one made by Inspector Rousseau; all the recommendations made both for him and his family and many other circumstances, the Court wishing simply to apply the principle that the defendant was not entitled to act as he did, condemns him to 15 days' imprisonment only.

After the sentence was pronounced, the attorney for the defendant presented the following motion:

Whereas accused Alphondar Roy has been found guilty of the crime of theft, sec. 357, Cr. Code; said Alphondar Roy has been sentenced to 15 days imprisonment: a motion for a reserved case has been presented and refused before sentence; notice of appeal has been duly given and served for hearing at the next sitting of the Court of Appeal on or about September 27 next; the accused hereby prays this Honourable Court to respite the execution of sentence as by sec. 1014, sub-sec. 5, until said questions are decided and prays that the said Alphondar Roy be admitted to such bail as the Court thinks fit."

The Crown consented to the motion being forthwith presented, after having admitted that the facts alleged were true.

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The Court taking into consideration the fact that the defendant remains under its jurisdiction until the commitment is signed; that if the petition is not granted and the accused admitted to bail, he would serve his sentence before the case could even be argued in appeal. The Court being of opinion that the petition for reserved case is produced in good faith and in view of sec. 1014 Cr. Code, postpones the sentence to October 16 next and admits the accused to bail.

Judgment accordingly.

REX v. BROWN.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. October 16, 1922.

INTOXICATING LIQUORS (§IIIH—90)—LIQUOR ACT 1916 (ALTA.) CH. 4—SEIZURE AND CONFISCATION—SUFFICIENCY OF INFORMATION ON WHICH TO ISSUE WARRANT—CONVICTION—IRREGULARITY—AMENDMENT—REDUCTION OF PENALTY.

Before issuing a search warrant under sec. 79 of the Alberta Liquor Act (as amended 1917 (Alta.), ch. 22, sec. 15), a magistrate is bound to exercise his own judicial discretion and in order to enable him to do so he must be informed by an officer under oath of such facts and circumstances as will enable the magistrate himself to form his own opinion that there is reasonable ground for belief that liquor is being kept for sale, the mere statement of the officer's suspicion is not sufficient.

A conviction which does not state who the informant is to whom the costs are made payable is irregular and the Court will amend such conviction by inserting the name of the informant.

The Court has power to reduce a penalty imposed for breach of the Alberta Liquor Act even when it is within the legal limit prescribed by the Act, and will do so where the maximum penalty has been imposed for a first offence, when in the opinion of the Court the minimum penalty is sufficient.

[*Rex* v. *Moore* (1922), 63 D.L.R. 472, 37 Can. Cr. Cas. 72; *Rex* v. *Nelson* (1922), 69 D.L.R. 180, 37 Can. Cr. Cas. 270, applied.]

MOTION by way of *certiorari* to quash a conviction for unlawfully having liquor for sale and an order of forfeiture.

Order of forfeiture quashed; conviction affirmed but penalty reduced.

S. J. Helman, for appellant.

J. Short, K.C., for respondent.

STUART, J.A.:—I agree that both the forfeiture and the conviction in this case are defective. With regard to the first it is perfectly plain that a magistrate could not possibly be "*satisfied* that there is reasonable ground to *believe*" anything by merely having an information in which the deponent swears only that he has just and reasonable cause to *suspect* the thing, his reason being that he has *received information* (not stating from whom or how received). Furthermore, the magistrate never made anything but an oral order of forfeiture. No

written order was ever drawn up. I am afraid that we can not permit forfeitures of goods to be carried out in that manner. We must have law; and if some formality were not observed we should soon have, not law, but arbitrary rule. Section 727 of the Cr. Code, R.S.C. 1906, ch. 146, is imperative that an order of a Justice must be in writing. The forfeiture order, so far as there is one at all, should be quashed.

Then as to the conviction, it does not state who the informant is. The convicted person has a right not to be left in any uncertainty, after reading the formal conviction, as to what has happened to him and as to what he is to do and he has a right to be able to learn all this from the conviction. The conviction says that he is to pay $5.75 as costs to "the informant." The accused at once will have to ask "Who is that?" and the conviction does not, on its face, tell him who that person is.

This, I conceive, to be a clear irregularity, not so serious by any means as that which existed in *Rex* v. *Seale* (1807), 8 East 569, 103 E.R. 461, but a clear irregularity all the same. We should amend the conviction by inserting the name of the informant therein because the evidence was quite sufficient to establish guilt.

I agree with the view expressed by Tweedie, J., in *Rex* v. *Nelson* (1922), 69 D.L.R. 180, 37 Can. Cr. Cas. 270, with regard to the Court's power to reduce the penalty even when it is within the legal limit prescribed by the Act. I do not think the maximum penalty should have been imposed on the accused in the circumstances of this case. I think rather the minimum of $200 is the proper amount. It was a first offence and I think the imposition of the maximum penalty would not have upon others such a deterrent effect as was probably intended by the magistrate. I think there should be no costs of the motion. It succeeds so far as the conviction is concerned on a nice technicality which has enabled us to relieve the defendant of $500 of the penalty when he was clearly guilty of the offence.

BECK, J.A.:—This is a motion by way of certiorari to quash a conviction for unlawfully having liquor for sale and an order of forfeiture.

As to the order for forfeiture. In *Rex* v. *Moore* (1922), 63 D.L.R. 472, 37 Can. Cr. Cas. 72, this Division held that before issuing a search warrant under sec. 79 of the Liquor Act, 1916 (Alta.) ch. 4, amended by 1917 (Alta.) ch. 22, sec. 15, a magistrate is bound to exercise his own judicial discretion, and, to enable him to do so, he must be informed by an officer under oath of such facts and circumstances as will enable the magistrate himself to form his own opinion that there is reasonable

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ground for belief that liquor is being kept for sale; the mere statement under oath of the officer's belief is not sufficient. In that case, the information upon which the search warrant was issued reads as follows (See 63 D.L.R. at p. 473):—

"Who says that liquor is being kept for sale in contravention of the Liquor Act, 1916, and that the said liquor is, and that he has just and reasonable cause to believe and suspect and suspects that the said liquor or some part of it is concealed in the warehouse of Sam Moore of Coleman, Alberta, from reliable information received."

In the present case the information upon which the search warrant was issued reads as follows:—

"Who says that . . . . he has just and reasonable cause to *suspect* and *suspects* that the said liquor is concealed in the trunks and boxes of the said news agent (the accused) . . . The cause of the informant's *suspicions*, being that he has received information that the said news agent is selling liquor on the train."

What the Act calls for, in respect of the information, is that the *magistrate*—not the officer—be *satisfied* by information, that is, by being *informed of facts* on oath of the officer—that is that the *magistrate* be satisfied that there is reasonable ground for *belief*—not mere *suspicion*—that liquor is being kept for sale.

On the ground of the insufficiency of the information for the search warrant, therefore, following and applying our former decision, I hold the forfeiture invalid and I would, therefore, quash it.

As to the conviction. One of the objections taken to the conviction is this: There is nothing on the face of the conviction to show who was or is the "informant." The conviction directs the payment of a fine of $700 to be paid and applied according to law; and orders the accused "also to pay the *informant* the sum of $5.75 for *his* costs in that behalf."

The forms of conviction given in the Cr. Code, Forms 31 *et seq* are all drawn on the supposition that the informant or complainant is named in the earlier part of the conviction. Yet these forms direct the costs to be paid not to the "said informant" or the "said complainant" but to the "said C.D." Doubtless if the informant or complainant were named and identified elsewhere in the conviction, an adjudication that the costs be paid to the said informant or complainant would be sufficient; but in the absence of the informant or complainant being named at all, I think that a direction that the costs be paid merely to the informant is insufficient. I think that the conviction—

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both the adjudication of guilt and the imposition of punishment —must be certain in all respects and that that certainty must appear "upon the face of the conviction" (See *Rex* v. *Seale*, 8 East 569, at p. 567, 103 E.R. 461, at p. 463 so that it shall not be necessary to go outside the four corners of the formal conviction to ascertain the person entitled to the costs.

The very terms of sec. 63 of the Liquor Act corresponding with sec. 1124 of the Cr. Code emphasises the continued recognition of just such "irregularities, informalities, and insufficiencies" as this, enacting, not that they shall no longer be considered as such, but that where they are found to exist, the proceedings shall nevertheless not be held invalid on account of them, and in case any such irregularity, informality or insufficiency is found to exist, the words of section casts upon the Court, not merely the right but the duty of perusing the depositions. Perusing the depositions, we must affirm the conviction. We agree, however, with the decision in *Rex* v. *Nelson*, 69 D.L.R. 180, 37 Can. Cr. Cas. 270 in which he held that under sec. 63 of the Liquor Act (as amended 1918 (Alta.), ch. 4, sec. 17) the Court has power to reduce a penalty imposed by a magistrate for a violation of that Act even though the penalty be within the prescribed limits. Short, K.C., for the Crown, expressed his concurrence with the opinion of Tweedie, J.

The fine imposed was $700. The offence was a first offence. The accused instantly on being charged told the constables where the liquor would be found and made not the slightest attempt to hinder them doing their duty. Under the circumstances, I would reduce the fine to the minimum amount $200 (1921 (Alta.), ch. 6, sec. 10).

In the result then, I would quash the order of forfeiture. I would affirm the conviction with the variation that for the fine of $700 a fine of $200 be substituted.

As to the costs of this motion I would give no costs.

HYNDMAN, J.A. concurs with STUART, J.A.

Conviction affirmed; penalty reduced.

STAUFFER v. STAUFFER.

Saskatchewan Court of King's Bench, Bigelow, J. September 29, 1922.

DIVORCE AND SEPARATION (§IIIB—25)—ACTION BY HUSBAND—ADULTERY OF WIFE—HUSBAND LEAVING WIFE WITHOUT CAUSE—WILFUL NEGLECT AND NON-SUPPORT—REFUSAL OF DECREE.

A wife is entitled to a home with her husband where he resides and where he wilfully leaves her without reasonable excuse and wilfully neglects her, he is not entitled to a divorce on the ground of her adultery which has been conduced by his own mis-conduct.

[*Kesterin*g v. *Kesterin*g (1921), 61 D.L.R. 44, 14 S.L.R. 367;

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Bigelow, J.

Samail v. *Samail* (1922), 66 D.L.R. 93, 15 S.L.R. 393, followed. See Annotation 62 D.L.R. 1.]

ACTION by a husband for divorce on the ground of the wife's adultery. Action dismissed.

J. F. Bryant, for plaintiff; no one *contra*.

BIGELOW, J.:—This is an action by the husband for a divorce. The parties were married in 1903; they lived together until 1912, and had four children. At that time they lived at Rivers, Manitoba. In the year 1912, plaintiff moved his residence to Regina, and left his wife and children in Rivers. Plaintiff did not cohabit with his wife after April 1, 1912; he apparently did not even visit his family since that date. He says he sent her money, $75 to $100 a month; he does not say that he sent it regularly or all the time. It appears from her letters, written in February 1915, put in evidence by the plaintiff, that she was in want. In a letter from her to the plaintiff, February 7, 1915, she says:—"Say Herb could you send me ten dollars for to get flour for they won't sell it without cash and I am just out." And again in another letter, undated, but sent in February 1915, she says: "Herb try and send me enough flour to do some baking for me and the children are starving." I conclude from these letters that he did not properly support his wife or children after he left them in April, 1912.

In June 1915 the defendant had a child, which the plaintiff says is not his. This being so, the adultery is proved. But, in my opinion, that is not enough to obtain a divorce. In Dixon's Divorce Law & Practice, 3rd ed., p. 67 the law is stated to be as follows:—

"A husband cannot neglect and throw aside his wife, and afterwards, if she is unfaithful to him, obtain a divorce on the ground of her infidelity. If he has left her *without* a reasonable excuse, he cannot resist an answer setting up desertion. If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of her husband's society, the security of his home and name, and his protection as far as circumstances permit. If he fall short of this, he is not wholly blameless if she fall, and, though not justifying her fall, he has so far compromised himself as to forfeit his claim for a divorce."

This is approved by our Court of Appeal in *Keslering* v. *Keslering* (1921), 61 D.L.R. 44, 14 S.L.R. 367. Lamont, J.A. goes into the cases and concludes, at p. 48:—

"These authorities shew that the petitioner, by throwing his wife aside and by his wilful neglect of her and his refusal to

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continue to act the part of a husband to her, forfeited his right, in the discretion of the Court, to a divorce on the ground of her subsequent infidelity."

I had occasion to go into the same point in the case of *Samail* v. *Samail* (1922), 66 D.L.R. 93, 15 S.L.R. 393, where I refer to two further authorities, *Jeffreys* v. *Jeffreys* (1864), 3 Sw. & Tr. 493, 164 E.R. 1366, where a petition for dissolution of marriage by reason of the adultery of the wife was dismissed on the ground that the petitioner, before the adultery, had wilfully separated himself from the respondent without reasonable excuse; *Groves* v. *Groves* (1859), 28 L.J. (P.) 108, where the Court refused to dissolve the marriage on the ground that plaintiff had been guilty of wilful neglect which had conduced to the adultery.

I find in this case that the petitioner wilfully separated himself from the respondent without reasonable excuse, and that he wilfully neglected her, and that conduced to the adultery charged. In my opinion, it was the plaintiff's duty to provide her with a home in Regina where he lived, and she was entitled to the comfort and support of his society, the security of his home and name, and his protection.

The plaintiff's action is dismissed.

Action dismissed.

***MONTREUIL v. ONTARIO ASPHALT CO. AND CALDWELL SAND AND GRAVEL CO.**

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. February 7, 1922.

EQUITY (§ID—27)—LESSEE OF LAND—MISTAKE AS TO LESSOR'S TITLE—IMPROVEMENTS BY LESSEE—EQUITABLE RELIEF—R.S.O. 1914, CH. 109, SEC. 37—APPLICATION.

A lessee of land with an option to purchase at the termination of the lease is not entitled to the benefit of R.S.O. 1914, ch. 109, sec. 37, which provides that a person who, under the belief that he is the owner makes lasting improvements to land, is entitled to a lien on the land for the enhanced value given to it by the improvements, because as lessee he cannot believe the land to be his own, but where such lessee makes improvements in the mistaken belief that his lessor is the owner of the fee which he can acquire by exercising his option to purchase, he will be granted equitable relief to the amount of the enhanced value of the land by such improvements, where the lessor is the owner of a life estate in the land only, but no compensation will be allowed for improvements made after the lessee became aware that the lessor's title was questionable.

APPEAL and cross appeal from the judgment of the Ontario Supreme Court, Appellate Division (1920), 52 D.L.R. 563, 47

*Application for leave to appeal to the Privy Council refused.

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O.L.R. 227, which reversed the judgment at the trial (1919), 46 O.L.R. 136. Varied.

Armour, K.C., and Bartlet, K.C., for the appellants.

Rodd, K.C., and *Fripp,* K. C. for the respondents.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, I am of the opinion that the judgment of the Appellate Division (1920), 52 D.L.R. 563, 47 O.L.R. 227, appealed from should be varied by striking out sub-paragraph 2 of para. 3 and substituting a direction for a reference to ascertain (1) to what amount the plaintiffs are entitled for mesne profits; (2) by what amount the value of the property has been enhanced by reason of permanent improvements effected by the defendants before October 2, 1908; (3) *what* balance, (if any) the plaintiffs should recover as their actual damages. No costs of main appeal.

IDINGTON, J. (dissenting):—The result of this appeal and cross-appeal, in my opinion, should turn upon the question of whether or not sec. 37 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, should govern the rights of the parties concerned.

That section reads as follows:—

"37. Where a person makes lasting improvements on land, under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct."

I shall revert presently to the history of that enactment but meantime may be permitted to state the outline of the story out of or in relation to which its relevancy has to be considered.

By a lease of February 2, 1903, the late Luc Montreuil demised to the Ontario Asphalt Block Co. certain parcels of land for 10 years at an annual rental of $1,000 a year, and thereby gave it an option to purchase same on giving 6 months' notice during said period at the price of $22,000.

The said company thereby bound itself not only to pay said yearly rental but also to build a dock to cost not less than $6,000 which, if the option not exercised within said period, was to become the property of the said lessor.

The said lessee at once proceeded to erect upon said property a building and factory for the purposes of its business at a cost of $80,000, or more, and the said dock at a cost much exceeding

said $6,000 and added to such equipment, year by year, a great deal in way of improvement.

After this expenditure, it was discovered in October, 1908, in regard to some other property which had been held by said lessor, upon an identical title by which part of that, covered by said lease and agreement, was held by him, that his title was found to be only that of a tenant for life and that the remainder would go to his children.

He made good to other purchasers by inducing appellants to release their claims therein.

Upon learning of this, on October 2, 1908, the respondent Asphalt company's secretary wrote the said lessor as follows:—

Windsor, Ont., Oct. 2nd, 1908.

"Luc Montreuil, Esq.,
Walkerville, Ont.

Dear Mr. Montreuil:—

I understand that some question has arisen with reference to your right to sell the farm property at Walkerville, and it occurs to me that being the case, you should get from your children a confirmation of the lease that you made to The Ontario Asphalt Block Co. Ltd., of the premises they now occupy. In case of your death the children might repudiate the lease and as we have spent a very large sum of money on the building, etc., we would be obliged to hold your estate liable on your covenant for quiet enjoyment, in case any trouble arose, and all this can be avoided now by your getting from the children some documents confirming the lease.

O. E. Fleming, secretary."

And not receiving any reply again wrote him the following:—

Windsor, Ont., Dec. 24th, 1908.

"Luc Montreuil, Esq.,
Walkerville, Ont.

It would be very much more satisfactory to us and also to yourself if you would have your children convey to you the property leased by you to the Asphalt Block Co., and under which lease you are bound to convey to them at the expiration of the lease.

We would feel very much more satisfied if you would do this.

O. E. Fleming, treasurer."

The writer of said letters was called as a witness on the trial of this action brought by appellants to eject respondents from the posession of that part of said lands for which the said lessor had failed to get the said deed from appellants, as requested, and

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in course of his explanatory reason for writing said letters, testified as follows:—

Mr. Rodd: You had made a large expenditure? A. Yes, and we had not any idea but what when we spent the first dollar on the property that we had purchased under the option we could not afford to spend the money without doing that.

Q. You say that was the intention of the company from the outset? A. Yes.

Q. Why did you take the lease instead of buying out-right at the first? A. Because $1,000 a year is less than 5% on the purchase price of $22,000, and in addition to that $22,000 meant a lot to us in establishing a plant of this sort.

Q. At any rate that was the reason you wrote the letter? A. Yes.

Q. Did you ever get any reply to those letters? A. No, no reply.

Q. You were going to tell me what you had spent up to December 31st, 1912, on the plant? A. $159,126.18, and on the 31st December, 1917, $174,354.78.

HIS LORDSHIP:—And then you went on after the discovery; after 1908 you went on? A. Yes, my Lord, we had to take care of the business; it was a case of necessity.

MR. RODD:—What position would your client have been in if you had not gone on? A. We would not have been able to have taken care of the increase of business; business has to grow or go back; we could not stand still."

This evidence seems to have been overlooked by the Court below when quoting part of the evidence given on cross-examination by the same witness, in the judgment appealed from.

Taken together therewith and the other facts in evidence to which I will presently refer, I respectfully submit that it seems to me that the conclusion reached resting upon said cross-examination is far from convincing.

Passing meantime from that to relate what ensued, the respondent Asphalt Block Co. continued in possession of said premises, enlarging and improving the factory so built, and in course of so doing making it quite evident that its owners were determined to enforce the option of purchase contained in the said lease. And in due course of time the respondent Asphalt Block Co. served the lessor, on January 5, 1912, with notice pursuant to the terms of said option, that it intended to exercise the right to purchase said lands and premises according to the terms in the said lease provided, at the end of the said term of 10 years.

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The said notice recited the facts of the lease for 10 years from February 2, 1903; the going into possession; the option given of purchase at the expiration of said term upon giving 6 months' previous notice in writing of its intention to do so.

The said lessor refused to carry out his agreement and the respondent Asphalt Block Co. brought an action on February 10, 1913, for specific performance which was tried on the 27th of following May. Judgment was given therein directing specific performance of so much of the interest in said lands as the lessor could convey and allowing an abatement of price for what he could not convey, and damages for breach of his contract. (1913), 12 D.L.R. 223, 29 O.L.R. 534.

On appeal to the Appellate Division of the Supreme Court of Ontario that judgment was modified as appears in the report of the case (1913), 15 D.L.R. 703, 29 O.L.R. 534 at 540, 24 O.W.R. 838. And an unsuccessful appeal therefrom to this Court was heard in 1916, 27 D.L.R. 514, 52 Can. S.C.R. 541.

I understand counsel agreed in the statement that the reference directed thereby has never been proceeded with.

Luc Montreuil, the said lessee when this case was before the said Appellate Division, as directed by that Court, filed an affidavit shewing that he got a grant to himself of part of the lands covered by said lease in 1874 and giving in detail the ages of his children, from which it appears that the present appellants were each at the time of his making the lease in question over 21 years of age.

They are shewn also to have made at his request conveyances of their interests to other purchasers from him of property held upon the same title as in question herein.

They also are shewn to have known of the improvements made by the appellant Asphalt Block Co. now in question, but never objected or in any way protested or warned the said company of their claim to be entitled to the remainder of said property, upon which they rest herein, asserting the right to eject the respondents from that part of the premises now in question.

The lessor and vendor Luc Montreuil, died in January, 1918. And in the following August, his childiren, the appellants, brought this action of ejectment.

The Asphalt Block Co., respondent, in reply set up the salient facts which I have set forth above and rely thereon, by way of counterclaim, upon estoppel and seek a declaration to that effect, and next a declaration "that this defendant upon making proper compensation is entitled to retain the lands in question or in the alternative a lien thereon in respect of the improvements made under mistake of title as claimed in para. 13 hereof."

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The appellants joined issue thereon and the case went to trial before the late Falconbridge, C.J., who gave effect to the latter contention, 46 O.L.R. 136. And in doing so, of course rested entirely upon the section I have quoted above.

The First Appellate Division (52 D.L.R. 563, 47 O.L.R. 227), quoting as already stated, the cross-examination of the secretary of the Asphalt Block Co., overlooking his examination in chief and, I respectfully submit, also overlooking the weight to be given the actual facts of such a large expenditure as made upon lasting improvements and all implied therein, and which testify, in my appreciation of fact, much more forcibly than the mere words, of doubtful import, upon which the Appellate Court relied, to the existence of the realities required by the statute, of belief in the efficacy of an option as a means or method of ownership.

Such is, I submit, the attitude which the Court should hold in trying to solve the question of fact as to belief in ownership.

And when we come to consider what the quality of ownership may be upon which such a belief may be reasonably founded, certainly we are not to bind him seeking relief under the statute in question to prove an actual absolute ownership or its equivalent, for then the statute would be rendered meaningless.

We may, first recalling that in our English law there is no such thing as any absolute ownership of land except in the Crown, properly turn to the many varying meanings which the word "owner" may present.

We find in Bouvier's Law Dictionary vol. 3, p. 2437, the following:—

"*Owner.*—He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right."

Surely a man having an option to purchase can well believe himself such a person as therein and thus defined.

Clearly a man possessed of such an option as the opinion expressed in *London and South Western R. Co.* v. *Gomm* (1882), 20 Ch. D. 562, 30 W.R. 620. demonstrates, has an interest in land and the extent thereof may be demonstrated by the acts of the optionee evidencing this intention to exercise, long before the actual notice of acceptance as foundation for an assertion of belief in his ownership.

The right of dominion over the land in respect of which he has such an option of absolute purchase is as absolute as any

man may desire and the only question remaining, I submit, is whether or not at the time when he acts on his alleged belief, that is, under all the circumstances, an honest belief, in other words, an honest determination to exercise the option.

There are also cases cited in Stroud's Judicial Dictionary in which, though turning (in some of the cases cited) possibly on legislative interpretation, yet in the mode of reasoning adopted in disposing of same, are worthy of note.

The judgments in the cases of *Ramsden* v. *Dyson* (1886), L.R. 1 H.L. 129, 14 W.R. 926, and *Plimmer* v. *Mayor etc., of Wellington* (1884), 9 App. Cas. 699, may also be advantageously referred to for an elucidation of the principles upon which the Court of Equity act in protecting the parties making improvements under the belief that they have such an interest in the property or right to acquire same, as entitles them to rely thereon in making substantial improvements.

Surely one is, in such a case as presented herein, in just as good a position as the vendee paying a mere nominal deposit and that test seems to me to be important and ought to be observed as a guide, for such was the chief basis of the recognized law; and springing from that the doctrine so grew as to cover other like cases. Possibly, prevention of fraud was the earlier basis.

The sole reason for the statement of the first part of the statute in question as it appeared in 1873 (Ont.), ch. 22, sec. 1, was doubtless to render clear and of universal application by the imperative requirement of a statutory law, a doctrine developed in Courts of equity and not so uniformly observed even there as was desirable, and seemed even to startle learned Judges in common law Courts.

For example, though the doctrine had been enunciated and applied by the Chancellor, Hume Blake of Upper Canada in the case of *Bevis* v. *Boulton* (1858), 7 Gr. 39, his successor Spragge, C., only four years later, in the case of *Kilborn* v. *Workman* (1862), 9 Gr. 255, refused to apply it, and nine years thereafter in the case of *Gummerson* v. *Banting* (1871), 18 Gr. 516, after reviewing many of the then leading cases in point, applied the doctrine.

In doing so it may be observed that he referred to the said *Kilborn* v. *Workman* (1862), 9 Gr. 255, and excused its non-application there by referring to the case of *McKinnon* v. *Burrows*, and mentioning that a later case in England had shown he was in error. The only *McKinnon* v. *Burrows* case I can find is a common law action in (1833), 3 U.C.Q.B. (O.S.) 114.

Clearly, there was an error in failing to observe the English

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decision in the case of *Bunny* v. *Hopkinson* (1859), 27 Beav. 565, 54 E.R. 223, perhaps excusable if regard is had to the changed conditions from then to now. And, I submit, that the right therein recognised was no higher than the right of him possessed of an option upon which he might reasonably act and assert as a basis of honest belief in ownership as above defined.

My own impression is that there was another case in Ontario which in a more remarkable degree brought to public attention the want of uniformity in applying the law and led to the enactment of the first part of the clause now in question. I cannot find it reported, and my memory does not serve me to recall the name thereof.

Illustrative, however, of the state of, even the judicial mind, in the common law Courts, then being constrained to apply some equitable doctrines and procedure, I find the new enactment referred to as follows in the case of *Carrick et al* v. *Smith* (1874), 34 U.C.Q.B. 389, at p. 399:—

"36 Vict. (Ont.), ch. 22, declares that: 'In every case in which any person has made [or may make] lasting improvements on any land under the belief that the land was his own, he or his assignee shall be entitled to a lien upon the same, to the extent of the amount by which the value of such land is enhanced by such improvement.' This is a very extensive protection, and perhaps it may be called very advanced legislation to give a lien *in every case* to a person who has made improvements, even *lasting* improvements, on any land, *under the belief* that the land was his own."

I think these several decisions and judicial expression show how much need there was for an enactment of the kind now in question not so much as an advancement in legislation, as the need of having the law well understood and of universal application.

It was much needed. It was introduced, I believe, by the late Hon. Edward Blake, a master of law and language, well knowing what he was about, and was aptly entitled 1873 (Ont.) ch. 22, "An Act for the protection of Persons improving Land under a Mistake of Title."

The case of *Gummerson* v. *Banting*, 18 Gr. 516, is relied upon in the judgment appealed from to give herein the measure of relief which, in principle, was on all fours with the said enactment passed a couple of years after said decision. I am unable to distinguish the doctrine applied in the said decision, from the principle sought to be enforced by the enactment as it first stood.

And all that was done thereafter was to add thereto by an

enactment passed on the eve of the 1877 Revision of the Statutes of Ontario, which reads as follows 1877 (Ont.), ch. 7, Sched. A. (114):—

"or shall be entitled or may be required to retain the land if the Court is of opinion or requires that such should be done, according as may under all the circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct."

If justice is to be done in many cases in applying either the doctrine in *Gummerson v. Banting, supra*, or the statute of 1873, which in principle are, I think, identical, this addition was necessary, otherwise, innocent men might suffer unduly.

The later enactment confers on the Courts the power to avoid and avert such possible injustice.

I think we have presented in this case a state of actual facts which call for such a legislative enactment, and that its efficacy should not be rendered futile or entirely nullified by reason of a witness hesitating under pressure of cross-examination to give the true and obvious meaning of what respondents claim and that too when at the very outset he had declared what he meant.

I think the late Falconbridge, C.J., was absolutely right and that his judgment should be restored.

The appeal should, I therefore hold, be dismissed with costs and the cross-appeal so far as seeking that alternative should be allowed with costs save so far as same increased by the contention that there never was a mere life estate tail or otherwise.

I have not perhaps examined the lastly mentioned question as it may deserve. It seems, however, untenable and to have been abandoned since argument.

DUFF, J. (dissenting).:—The enactment to be considered, sec. 37, R.S.O. 1914, ch. 109 is in these words: (See judgment of Idington, J. at p. 314).

It should first be noticed that the draftsman of this enactment has carefully avoided technical legal nomenclature. "Under the belief that the land is his own" does not contain a single word (except the word "land") having a definite legal meaning. The word "owner" itself is indeed a word of very flexible signification. *Lister* v. *Lobley and Farrer* (1837), 7 Ad. & El. 124, at pp. 127-9, 112 E.R. 417, at pp. 419-420; *Phyn* v. *Kenyon* (1905), 42 Sc. L.R. 382 at p. 384; *United States of America* v. *Ninety-nine Diamonds* (1905), 2 L.R.A. (N.S.) 185 at p. 193. The appellant company, that is to say the officers of the appellant company, believed that company was entitled to possession under a lease for a defined period under which the com-

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pany had the right to make improvements and to remove them at the expiration of the term; and under it also the company was entitled to receive a conveyance of the fee simple from the lessor (who, it was believed, was the owner of the title in fee simple subject to the lease) upon the payment of a fixed sum of money and upon notice by the company exercising its option not later than a prescribed date. Treating the assumptions upon which all the parties were proceeding as facts, the company, it having been decided that the option should be exercised and the necessary moneys being available, had not only the necessary means within its hands but had all the necessary legal rights vested in it to acquire at its sole discretion the full title in fee simple. In a practical business sense the company was in control of the property. It could sell, investing the purchaser with not indeed a title in fee simple in possession, but the absolute right to acquire such a title on the payment of a specified sum of money. It had possession with full power to use the property for all the purposes of its business and particularly for the purpose of making improvements over which the dispute arises. It may be open to argument whether or not the company, so long as its option was not exercised, could by legal process prevent the lessor from transferring his title, but by exercising the option, that is to say, by binding itself to take the property on the stipulated terms, such a right would immediately become vested in it. A lessee invested with such a measure of control occupies a position which I think is not in any practicable way distinguishable (discarding of course the technical legal point of view) from that of a mortgagor in possession of property held by him subject to a mortgage securing a debt equal almost to the pecuniary value of the property and still less from a purchaser who has bound himself to buy but has paid only a small sum on account of the purchase money. In all these cases, the person in possession has, subject to one condition, the payment of a sum of money, the same power of control over the property as that possessed by the owner in fee simple. If he makes improvements under the belief that his rights are in fact what they appear to be he does so in the belief that he possesses powers of control that will enable him to make full use of the improvements so long as his rights remain vested in him and which at the same time will enable him to transfer his powers and rights to another and on such transfer to obtain in the ordinary course the enhanced value of the property due to the improvements.

I repeat, the language of the enactment is not lawyers' lan-

guage, and construing the language according to the usage and understanding of men who are not lawyers I think the appellant company has brought itself within the condition expressed in the words above quoted.

I am unable to agree that anything in Mr. Fleming's evidence creates any obstacle in the way of giving effect to this view. Mr. Fleming, a member of the bar, was being pressed on cross-examination to give an answer which would involve an expression of opinion on a question of law, namely, the construction of the statute now under consideration. He gave the only answer that could be given, that is to say could properly be given if he was to answer the question at all; and in effect his answer is that he believed that the rights which the lease purported to give to the company were in fact vested in the company.

This is sufficient to dispose of the appeal. In view of the ground upon which, however, the majority of the court has proceeded I think it is important to make an observation or two upon the rule respecting the measure of damages in an action to recover mesne profits. In the American courts a rule has been adopted (the effect of which is stated in a well known text book Sedgwick on Damages 9th ed. vol. 3, p. 1886, para. 915), that the action for mesne profits is a liberal and equitable action and one which will allow of every kind of equitable defence and in particular that improvements made by the occupant may be the subject of set off. This is based upon reasoning derived in part from the rules of the civil law. But the reasoning is also based upon the supposed effect of earlier English decisions. The case principally relied upon in support of it, see *Putman* v. *Ritchie* (1837), 6 Paige Ch. R. 390 at p. 401; *Jackson* v. *Loomis* (1825), 4 Cow. 168 at p. 171, is *Coulter's* case (1598), 5 Co. 30a, 77 E.R. 98, in which a set off was allowed of rent payable under a rent charge and the decision is explicitly put upon the ground that the disseisor might have recovered what he had paid in an action and the set off was allowed for the purpose of avoiding circuity of proceedings.

The American authorities appear to proceed to some extent upon the analogy of the ancient real actions in which Sedgwick says, the set-off was always allowed. (See *ubi supra* para. 915). It would be profitless to follow the American authorities into this discussion. At common law, damages were not recoverable in the real actions generally. They were recoverable in the assize, because it was regarded as a mixed action and by the Statute of Gloucester, ch. 1, VI Edw. 1, this procedure was made applicable and this right given to the plaintiffs in real actions

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generally; Booth, Real Actions, ch. 23, pp. 74-75. But in ejectment which was a development of the old action of trespass *de ejectione firmæ* damages, that is to say, damages in the nature of reparation for deprivation of possession or compensation for use and occupation were not recoverable prior to the statute of 1 Geo. IV 1820 (Imp.), ch. 87, sec. 2; for this relief the plaintiff was obliged to resort to a supplementary action in trespass—trespass for mesne profits. And the law governing the measure of damages in such action was well settled. It is stated in these terms in Lush's Practice, vol. 2, p. 1012:—

"The measure of damages is the yearly value of the land, subject to such deductions for ground rent, taxes &c., as were chargeable thereon, and as the defendant necessarily paid; and the costs of such proceedings as were necessarily taken in order to obtain possession, and in case of judgment by default, the costs of ejectment to be taxed as between party and party. If any special damage had been sustained this also may be recovered if specially laid in the declaration."

To the same effect it is given in Selwyn's Nisi Prius vol 1, at p. 685, in Roscoe's Nisi Prius 18th ed. vol 2, at p. 947 in Tidd's Practice, vol. 2, at p. 889 and in Cole on Ejectment at pp. 642—643. Under the head of special damage a jury might take into consideration the plaintiff's trouble and inconvenience by reason of being kept out of possession and the costs of ejectment. The "yearly value of the land" is calculated as in an action for use and occupation, Cole *ubi supra* at p. 643. The rule is and has long been settled that the measure of damages in such an action is the value of the mesne profits calculated as mentioned subject to deductions of the character mentioned plus special damage if any be alleged and proved and it is a claim for such damages so measured which by the statute of Geo. IV and the Common Law Procedure Act, 1852 (Imp.), ch. 76, sec. 218 the landlord might at his option add to a claim in ejectment against an overholding tenant and which under the Judicature Act of 1875 (Imp.), ch. 77, might and under the existing practice may now be joined to a claim to recover possession of land. In Ontario the statute of Geo. IV (Imp.), was adopted and re-enacted in 1856 (Can.); it was reproduced in the Con. Stats. U.C. 1859, ch. 27 sec. 60, and remained the law in Ontario until the passing of the Ontario Judicature Act of 1881 (Ont.), ch. 5, when the English rule of 1875 above referred to was reproduced as marginal *rule 116*, the rule which is now in force.

The claim for mesne profits authorised by the Upper Canada statute of 1856 and by the Ontario rule just mentioned of 1881

was a claim the plaintiff was entitled to assert prior to the statute of Geo. IV in England and prior to the statute of 1856 in Upper Canada in an action of trespass for mesne profits and it is such a claim and only such a claim that the plaintiff is now under the English Judicature Act and under the practice in Ontario entitled to join to an action for the possession of land.

It can I think be conclusively shewn that in passing upon such a claim whether under the existing procedure or under the old procedure the Courts in England have never admitted the right of the defendant by the law of England to a set off for the cost of improvements except of course in a case in which (under the existing procedure) an equitable right arises, for example, from the conduct of the owner in encouraging the defendant to make such improvements relying upon a supposed title or right of possession. That is made quite clear by reference to the well-known text books referred to above as well as by the decision of the Court of Exchequer in *Cawdor* v. *Lewis* (1835), 1 Y. & C. (Ex.) 427, 160 E.R. 174, which is a decisive authority upon the point.

I call attention to the law in this point because it is important in view of the course which has been taken in respect of the appeal, to make it quite clear that whatever be the law in Ontario the rule in other Provinces where the law of England prevails in relation to these matters is definitely settled.

As regards the rule in Ontario, no point having been raised as touching the common law right of set off either in the Court below or in this Court and not having had the benefit of any argument upon it I should have required something much more convincing than anything I have seen to induce me to concur in laying down a rule for the guidance of the Ontario Courts on this subject which diverges in a very marked way from the law governing the rights of the parties in the common law action of trespass for mesne profits as uniformly laid down in all the recognised books on procedure and as accepted and administered by the Courts in England. The Legislature of Canada in making provision for the joining of a claim for mesne profits in a landlord's action of ejectment reproduced the statute of Geo. IV (1820 (Imp.), ch. 87), *ipsissimis verbis* and in 1881 in providing for joining such a claim in all actions to recover possession of land the legislature of Ontario reproduced the English rule on the subject also *ipissimis verbis*. *Prima facie* the claim thus dealt with by the Legislature was the claim known to lawyers by the designation trespass for mesne profits and governed by long established rules, (rules as I have

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said expounded in all the recognised books of practice) governing the disposition of such a claim by the English Courts. *Primâ facie* that seems to be so and the presumption that it is so could only be displaced by shewing a continuity of decision and a settled practice in accordance with such decisions which it would be the duty of this Court to respect as establishing a divergence between the Ontario and the English law. I find no evidence of any such course of decision. Two cases have been cited in which the Court *en banc* refused to interfere with the verdict of a jury although the jury had evidently taken into account the improvements made by a trespasser in passing upon the question of damages but I cannot find any evidence that these decisions have been regarded as laying down any definite rule which has since been followed. They are not referred to in the latest books on practice, they are not cited in Maclennan's book on the Judicature Act or in Holmested's Ontario Judicature Act. They are referred to in one or two subsequent cases in an incidental way but in a manner which goes to indicate a considerable doubt as to the precise effect of them. Osler, J., whose knowledge of practice must have been exact, says in *McCarthy* v. *Arbuckle* (1880), 31 U.C.C.P. 405, at p. 415, that these decisions apply only where the possession is not tortious meaning apparently that they are limited to cases where the plaintiff's conduct has been such as virtually to amount to a license.

An observation or two upon the grounds upon which the Court below has proceeded. The view taken appears to be that the decision of the Court of Chancery in Ontario in *Gummerson* v. *Banting*, 18 Gr. 516, and of Story, J., in *Bright* v. *Boyd* (1843), 2 Story 605, constitute a sufficient weight of authority to establish the proposition that according to the law of Ontario a person in possession of land under an honest belief that he has a title to it who expends money upon it in such a way as to enhance its value has apart from statute a charge upon the land to the extent of such enhancement. I do not think that principle is part of the law of Ontario except to the extent to which as a principle of law it is supported by the statute already discussed. It is the opinion of Osler, J., as expressed in *McCarthy* v. *Arbuckle, supra*, that the object of the statute was to enable a person expending money in such circumstances to assert in a substantive action against the true owner his right to a lien to the same extent to which he could have done so in answer to an equitable claim by the true owner to recover the land. If Osler, J.'s, view be the right view of the statute

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then, of course, no difficulty arises; it is quite clear that where the owner was obliged to resort to the Court of Chancery for the purpose of asserting his title against a person in possession who in good faith had expended money in effecting improvements increasing the value of the land, the Court would require the plaintiff as a condition of equitable relief to make such compensation as might in the circumstances be just. The principle is well settled and it is unnecessary to elaborate it. It is sufficient to refer to *Murray* v. *Palmer* (1805), 2 Sch. & Lef. 474, at p. 490, and to Sugden's Vendors and Purchasers, 14th ed. p. 287. *Bright* v. *Boyd*, 2 Story 605, was such a case.

On the other hand the law is clear that where the plaintiff seeks the enforcement of his strictly legal rights and consequently does not require the aid of a Court of Equity this principle has no application. If the aid of a Court of Equity is not required then to cite from the work just mentioned "and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and improvements, but must dismiss a bill for that purpose with costs."

ANGLIN, J.:—In 1903, Luc Montreuil, believing himself to be the owner thereof in fee under his father's will, leased to the defendants for 10 years the land in question, together with an adjoining water lot of which he was in fact owner in fee under a Crown grant to himself. The lease contained an option to purchase for $22,000 the entire property leased, exercisable at the end of the term on giving 6 months' previous notice; it also provided, in the event of the option not being exercised, for a renewal for 10 years on like terms in other respects, but without the option to purchase; and it reserved to the lessees the right to remove all buildings and plant to be erected by them on the demised premises, except a dock, which they covenanted to build at a cost of not less than $6,000. It was expressly provided that, if the option were not exercised, this dock should become the property of the lessors on the expiry of the term or of any renewal thereof.

The defendants took possession under the lease and before October, 1908, expended on the dock and on buildings $80,000, or possibly a somewhat larger sum. How much of that expenditure was made on the part of the demised lands here in question does not appear.

In October, 1908, doubt first arose as to the extent of Luc Montreuil's interest. In litigation commenced then or shortly afterwards between him and the late Hiram Walker, over a

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piece of property, held by the same title as that here in question, it was determined, in October, 1911, that under his father's will, Luc Montreuil was not an owner in fee but merely a life tenant (1911), 3 O.W.N. 166, 20 O.W.R. 259, the remainder in fee having been devised to his children. Up to that time the evidence makes it abundantly clear that the children of Luc Montreuil (the present plaintiffs) had believed that their father owned in fee the lands devised to him. They appear to have acquired knowledge of their possible interest in remainder about the same time and probably in much the same way that their father's lessees learned of it. No investigation of Luc Montreuil's title had been made on behalf of the defendants either when they took their lease or before they began their large expenditures on the property.

With knowledge of the doubt cast upon the title of their lessor, the defendants made further large expenditures on the leased premises and in January, 1912, gave notice to Luc Montreuil of their intention to exercise the option to purchase. Montreuil having refused to convey an action for specific performance ensued in which his limited title to the land now in question was recognized. Specific performance of the option as to the other demised land held under Crown grant was ordered and, as to the land now being dealt with, the defendant was required to convey his life interest therein and the plaintiffs (the present defendants) were allowed an abatement in the purchase money (the amount thereof to be fixed on a reference) in respect of the interest in remainder which Luc Montreuil could not convey. (See 12 D.L.R. 223; 15 D.L.R. 703; 19 D.L.R. 518; 27 D.L.R. 514.)

Luc Montreuil died in January, 1918. The defendants continued to hold possession of the entire property. The present action was begun in August, 1918, by the children of Luc Montreuil, the devisees in remainder under the will of their grandfather. By their statement of claim they demand (1) possession of the said (devised) lands; (2) mesne profits; and (3) their costs of the action."

The statement of defence sets forth the terms of the lease and option, the exercise of the latter, the expenditure made by the defendants in improvements and the refusal of Luc Montreuil to convey to them. It alleges that the present plaintiffs were aware of the terms of the lease, that all or some of them took part in the negotiations leading to the making of it, and that they all stood by without protest while the improvements were being made and that they are therefore estopped from denying the defendants' right to hold the lands or alternatively are liable

to them in damages. The R.S.O. 1914, ch. 109 sec. 37, is also pleaded and under it the relief is claimed either of the defendants being allowed to retain the land, making compensation to the plaintiffs for their interest therein, or of their being awarded compensation for the amount by which the value of the land has been enhanced by their improvements.

The late Chief Justice of the King's Bench, who tried the action, held that the case fell within the purview of the statute pleaded and gave judgment allowing the defendants to retain the land and referring it to the master to ascertain what compensation should be made by them to the plaintiffs, 46 O.L.R. 136.

On appeal by the plaintiffs the Appellate Divisional Court held that the case did not fall within the statute because the defendants never believed that the land was their own; but, following *Bright* v. *Boyd*, 2 Story 605, and *Gummerson* v. *Banting*, 18 Gr. 516, also held that, while the plaintiffs should recover the land, the defendants were entitled to equitable relief for the amount by which lasting improvements, made by them while under the impression that Luc Montreuil was owner in fee, had enhanced its value, 52 D.L.R. 563, 47 O.L.R. 227.

From this judgment the plaintiffs appeal asserting a right to recover the land unconditionally. The defendants cross-appeal claiming to have the judgment of the trial Judge restored; they also sought to reopen the question of the extent of Luc Montreuil's interest, contending that it was an estate tail.

By notice given since the appeals were heard, the last mentioned contention has been abandoned in view of the futility of pressing it in the absence of any conveyance sufficient to bar the entail. The case must therefore be dealt with on the basis that Luc Montreuil had merely a life estate.

The statutory provision invoked by the defendants reads as follows R.S.O. 1914, ch. 109, sec. 37:—

"37. Where a person makes lasting improvements on land, under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of the opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct."

The part of this section which precedes the semicolon was

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originally enacted in 1873 (Ont.), ch. 22; the part following the semicolon was added in 1877 (Ont.), ch. 7, Sched. A. (114), in preparation for the revision of that year in which the complete section appears as sec. 4 of the R.S.O. 1877, ch. 95.

This statute gives the Court the extraordinary power of depriving a lawful owner of his property against his will, although for a compensation. *McCoy* v. *Grandy* (1854), 3 Ohio St. Rep. 463 at pp. 468-9. The conditions on which a jurisdiction so much in derogation of common law right is conferred must be strictly construed and fully satisfied. *Hughes* v. *Chester Holyhead R. Co.* (1861), 31 L.J. (Ch.) 97 at p. 109, 10 W.R. 219, 7 L.T. 197; *Wright* v. *Mattison* (1855), 18 How. 50; *Osterman* v. *Baldwin* (1867), 6 Wall. 116; *Rigor* v. *Frye* (1872), 62 Ill. 507; *Wheeler* v. *Merriman* (1883), 30 Minn. 372 at p. 376; *Hollingsworth* v. *Funkhouser* (1888), 85 Va. 448 at p. 454; *Van Valkenburg* v. *Ruby* (1887), 68 Tex. 139 at p. 143; *White* v. *Stokes* (1899), 67 Ark. 184, closely resembles the case at Bar, although the wording of the statute, as in the other American cases, is somewhat different.

Did the defendants when making their improvements believe that the land in question was their own? Unless they did they cannot invoke the statute just quoted. They had a lease with an option to purchase. They had neither legal nor equitable ownership. They, no doubt, believed that their lessor owned the fee of the property and that they could acquire it by an exercise of the option. But even if they intended to exercise the option, the belief that Luc Montreuil actually owned the land excluded belief that it was theirs. Until they actually gave notice of intention to exercise the option, assuming its validity, they had merely a right of election either to acquire the land or not to do so. It is impossible to conceive that they could have believed under these circumstances that the land was their own. They might never have acquired its ownership. *Young* v. *Denike* (1901), 2 O.L.R. 723, relied on by the late Chief Justice of the King's Bench, 46 O.L.R. 136, was a case of contract for sale under which, if the vendor had title, the purchaser would have become the equitable owner. Belief of the purchaser that the land was his own by equitable title was apparently regarded as sufficient to bring the case within the statute, although this is not mentioned in the judgment. No such belief could exist here.

Moreover, the provisions of the lease for its renewal, and that the dock to be built on the premises should belong to the lessor and that all other buildings erected by the lessees might be re-

moved in the event of the option not being exercised certainly do not indicate that when the defendants leased the premises they had definitely determined that they would eventually purchase them. But, whenever the definite intention to purchase may have been formed, until the option was in fact exercised, whatever may have been their interest in the land (*London and South Western R. Co.* v. *Gomm*, 20 Ch. D. 562; *Davidson* v. *Forstrant* (1921), 57 D.L.R. 377, 61 Can. S.C.R. 493), they could not have believed it to be their own. The portion of the evidence given by Mr. Fleming, the secretary-treasurer and legal adviser of the defendant company quoted by the Chief Justice of Ontario, read with the rest of his testimony, is conclusive that they had in fact no such belief.

"Q. Did you believe you owned it then? A. No, we could not own it. The only right we had was under the lease."

It is therefore, I think, quite clear, as held by the Appellate Divisional Court, that the defendants are not entitled to the benefit of the statute they invoke and that their cross-appeal fails.

Are they entitled, as equitable relief, to the allowance in respect of lasting improvements which they have been accorded in that Court.

I should perhaps first consider the two objections chiefly pressed by Mr. Armour, (a) that because they merely held an option and did not believe themselves to be actual purchasers or owners of the property the defendants do not fall within the class of persons entitled to equitable relief in respect of improvements made in mistake of title; (b) that no actual enhancement in value was proved at the trial and the defendant's plea for compensation should, therefore, have been rejected.

(a) I think effect should not be given to this objection. The evidence of Mr. Fleming makes it reasonably clear that when the expenditure for improvements was made the defendants had determined to exercise their option to purchase. They made improvements in the full belief that they could on the expiry of their lease acquire title to the land from their lessor. In this they were mistaken, and that mistake, in my opinion, was such a mistake of title as brings them within the equitable doctrine which they invoke. The cases are numerous in which an expectation of acquiring title has been held sufficient to support a claim for an allowance in respect of improvements made while it was reasonably entertained. *Plimmer* v. *Mayor, etc. of Wellington*, 9 App. Cas. 699 at p. 710; *Biehn* v. *Biehn* (1871), 18

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Gr. 497; *Unity Joint Stock Banking Ass'n.* v. *King* (1858), 25 Beav. 72, 53 E.R. 563. But see *Smith* v. *Smith* (1898), 29 O.R. 309; affirmed (1899), 26 A.R. (Ont.) 397. Nor does the fact that they were, undoubtedly, careless in making such expenditure without a proper investigation of their lessor's title disentitle them to such relief. So long as the mistake was *bona fide* the fact that it may have been due in part to carelessness does not debar the defendants from redress.

(b) As to the second point, it is within the power of the Ontario Courts under sec. 64 (1) of the Judicature Act to try one or more of the issues in any case and to refer any other issue or issues to a master for inquiry and report. That apparently has been done here by the Appellate Divisional Court as the form of the inquiry directed—"what, *if any*, lasting improvements were made" and "the amount, *if any*, by which the value of the said lands was enhanced"—indicates. A passage from the judgment of Kay, J. in *Shepard* v. *Jones* (1882), 21 Ch. D. 469, at p. 472, is relied upon by the appellants. There were in that case, however, other grounds as well as lack of proof of actual enhancement assigned by the Judge for the refusal to order an inquiry as to improvements. Reference may also be made to the direction for inquiry formulated by the Privy Council in *Henderson* v. *Astwood*, [1894] A.C. 150, at p. 164, *per* Lord Macnaghten, viz., "an inquiry whether any and what sum ought to be allowed . . . in respect of lasting improvements."

In the present case however there was evidence of enhancement in value given at the trial. Thus Mr. Fleming on cross-examination would place an additional value of $1,200 or $1,000 on the land in consequence of a shed standing upon it. Mr. Warden states that the land is really only good for manufacturing purposes and that for such purposes the Grand Trunk spur built upon it gives it additional value. In his opinion the buildings on the land make it worth $1,500 more than it would be without them. In the course of the trial the learned trial Judge expressed the opinion that it was a self-evident proposition that this land, if intended for manufacturing purposes, would be benefited by the railway siding. In the view taken by him that the case fell within the Ontario statute and that the defendants were entitled to retain the land no actual determination that there had been enhancement in value was necessary. But upon the evidence in the record there might well be an adjudication that there had in fact been some enhancement in value. How much is quite another question.

If the defendants' right to equitable relief rests only on the authority of the decisions in *Bright* v. *Boyd*, 2 Story 605, and *Gummerson* v. *Banting*, 18 Gr. 516, cited by the Chief Justice of Ontario, I should, with respect, regard it as not established. In so far as those cases maintain the proposition that, "without any contract or encouragement or standing-by" on the part of the true owner and although he has not sought the aid or intervention of a Court of Equity and there is no trust or other matter cognisable only in equity (see *Bevis* v. *Boulton* (1858), 7 Gr. 39), he may be compelled at the suit of a person who has made improvements under mistake of title to compensate him to the extent to which the value of the land has been thereby enhanced, they would seem to carry the law farther than is warranted by English equity jurisprudence. (*Beaty* v. *Shaw* (1888), 14 A.R. (Ont.) 600 at pp. 605, 607, 609. In the civil law the broad doctrine enunciated in *Gummerson's* case, 18 Gr. 516, no doubt obtains and the decision of Story, J., in *Bright* v. *Boyd*, *supra*, in the United States Circuit Court, would rather seem to have involved an extension of the English equity doctrine by introducing into it the principles of the civil law. The distinction between the two systems is clearly pointed out in Story on Equity Jurisprudence, 13th ed. vol. 2, paras. 1234 et seq., citing the case of *Putnam* v. *Ritchie*, 6 Paige Ch. R. 390 at pp. 403-5, where Chancellor Walworth of New York had expressed an opinion as to the state of the law contrary to the view acted upon by Story, J.

Whatever authority the *Gummerson* case, *supra*, may have had was practically destroyed by the observations made upon it in the Court of Appeal in *Beaty* v. *Shaw*, *supra*. Hagarty, C.J.O. there said at p. 605, speaking of the judgment of Spragge, C. in *Gummerson's* case:—"The learned Chancellor appears to me to state the rule of equity too broadly."

Burton, J.A., added p. 607, that the Chancellor's decision, "took the profession a good deal by surprise and was supposed to carry the law in reference to allowance for improvements, where there was no privity between the parties, no fraud, no standing by and suffering the improvements to be made, much farther than any previous decision either here or in England; and the passage of the 36 Vict. (Ont.), ch. 22 very shortly afterwards, probably prevented the point being further considered in a Court of Appeal."

Again the same Judge said at p. 609:—"The case of *Gummerson* v. *Banting* was a peculiarly hard case, one of those cases which it is proverbially said are apt to excite the sympathies of a Judge, and lead to the making of doubtful law."

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The equitable jurisdiction to provide for compensation in respect of improvements made under mistake of title is old and well known. *Edlin* v. *Battaly* (1676), 2 Lev. 152 and *Clavering's* case (see *Bankart* v. *Tennant* (1870), L.R. 10 Eq. 141), mentioned in *Jackson* v. *Cator* (1800), 5 Ves. 688, at p. 690, 31 E.R. 806 may be referred to. The bases of the jurisdiction, however, and the circumstances under which it will be exercised are sometimes not so well remembered or appreciated. It may conduce to a clearer understanding of the ground on, and of the extent to, which I would vary the judgment in appeal if I should briefly examine them at the risk of appearing to make a pedantic parade of learning, some of which is, no doubt, quite elementary.

Apart from the old and very meagre report of *Edlin* v. *Battaly, supra*, where a compromise was eventually reached, I have found no English decision, old or modern, that goes so far as either *Gummerson* v. *Banting*, 18 Gr. 516, or *Bright* v. *Boyd*, 2 Story 605. In England the equitable jurisdiction to relieve a person who has made improvements under mistake of title by requiring compensation to be made him for enhancement in value seems to have been rested either on the power of the court of equity to compel the legal owner, when seeking its aid as a plaintiff, to do equity, or on the existence of a situation creating such a personal equity against the legal owner, when defendant, as would make his insistence on his legal right without submitting to compensation a constructive fraud. It is only in cases of the latter class that a person seeking the relief of compensation can do so as an *actor*. Sugden on Vendors and Purchasers, 14th ed. p. 747, ch. 23, secs. 29 and 31.

When the legal owner seeks the aid of a Court of Equity, however, that Court will compel him to compensate the defendant for enhancement in value through lasting improvements made by the latter under mistake of title, although no conduct on the part of the plaintiff, active or passive, can be relied upon as giving rise to such a personal equity against him. *Neesom* v. *Clarkson* (1845), 4 Hare 97, 67 E.R. 576 is usually cited as authority for this proposition. It can scarcely be said to be satisfactory, for two reasons: first, because, as stated in a foot note, the right of the defendants to an account of the moneys expended on lasting improvements was conceded at the original hearing ((1842), 2 Hare 163, 67 E.R. 68), without argument and was not in question on the rehearing; and secondly, because, in delivering his judgment, Wigram, V.C., expresses the view that a defendant should not be granted this relief un-

less the equity which he claims is one that he himself might have enforced by bill. More satisfactory authority is to be found in *Mill* v. *Hill* (1852), 3 H.L. Cas. 828 at p. 869, 10 E.R. 330, at p. 346, which in some respects closely resembles the case at Bar. The life tenant under an equitable settlement, which he suppressed, had conveyed to the defendant what purported to be an estate in fee. On his death the remainderman, who was entirely innocent in the matter instead of bringing action at common law in ejectment, as in the case at Bar, filed a bill in equity to set aside the deed to the defendant. As a condition of being given relief he was required to submit to a decree for compensation for permanent improvements made by the defendant to the extent to which the value of the land was thereby enhanced. The defendant was, it is true, treated as a trustee for the plaintiff. Reference may also be made to *The Attorney-General* v. *Baliol College* (1744), 9 Mod. 407, at pp. 411-12, 88 E.R. 538 at pp. 540-541; *Cooper* v. *Phibbs* (1869), L.R. 2 H.L. 149 at p. 167; and *Davey* v. *Durrant* (1857), 1 De G. & J. 535, 44 E.R. 830. *Carroll* v. *Robertson* (1868), 15 Gr. 173, is an instance of this jurisdiction being exercised in the Court of Chancery of Upper Canada. See too *Munsie* v. *Lindsay* (1882), 1 O.R. 164.

On the other hand where the legal owner has not by invoking its aid submitted himself to equitable jurisdiction, a clear case of encouragement of, or acquiescence in, the expenditure made under mistake of title must be made out by the person seeking compensation in equity in respect of it. Fry, J., in *Willmott* v. *Barber* (1880), 15 Ch. D. 96, at pp. 105-106, thus states the essential elements of such a case in terms which have become classic.

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in

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the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his right. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

As put by Lord Eldon in *Dann* v. *Spurrier* (1802), 7 Ves. 231, at p. 236, 32 E.R. 94 at p. 96:—

"This Court will not permit a man knowingly, though but passively to encourage another to lay out money under an erroneous opinion of title; and the circumstances of looking on is in many cases as strong as using terms of encouragement . . . . Still it must be put upon the party to prove that case by strong and cogent evidence; leaving no reasonable doubt that he acted upon that sort of encouragement. . . . It must be shewn, that with the knowledge of the person, under whom he claims, he conceived, he had that larger interest, and was putting himself to considerable expense, unreasonable compared with the smaller interest; and which the other party observed, and must have supposed incurred under the idea, that he intended to give that larger interest, or to refrain from disturbing the other in the enjoyment."

Cotton, L.J. in *Falcke* v. *Scottish Imperial Ins. Co.* (1886), 34 Ch. D. 234, at p. 243, emphasises two of the requirements of such a case:—

"But in order to make this doctrine applicable there must be not only knowledge on the part of the person having the real title that the man whom he sees so acting believes he has a title and acts in consequence of that belief, but also a knowledge that the title on the faith of which he is acting is a bad one."

Again in *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, at p. 769, the same Judge said:—

"It is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title."

Ramsden v. *Dyson*, L.R. 1 H.L. 129 *and Plimmer* v. *Mayor*,

etc, of Wellington, 9 App. Cas. 699 at p. 710, are well known instances of the exercise of this jurisdiction.

And when the case is clear and the circumstances are such that complete justice cannot otherwise be done the Court does not stop at ordering compensation by the owner but will give the relief provided for by the addition to the Ontario statute of 1873 made in 1877, and, preventing his asserting his legal right to recover the property, allow the person whose expenditure he had encouraged to retain it making such compensation to the owner as may be fair. *The East-India Co.* v. *Vincent* (1740), 2 Atk. 83, 26 E.R. 451; *Duke of Beaufort* v. *Patrick* (1853), 17 Beav. 60, at pp. 74-5, 51 E.R. 954 at p. 960; *Att'y.-Gen'l. to the Prince of Wales* v. *Collom*, [1916] 2 K.B. 193 at p. 203; *Davis* v. *Snyder* (1850), 1 Gr. 134; Story's Equity 13th ed., vol. 1, para. 388.

It can scarcely be necessary to state that for outlay after they became aware that their lessors' title was questionable (October, 1908) the defendants can have no equity for compensation, even though steps to establish the adverse claim were deferred. *Russell* v. *Romaines* (1879), 3 A.R. (Ont.) 635; *Master of Clare Hall* v. *Harding* (1848), 6 Hare 273, 67 E.R. 1169; *Rennie* v. *Young* (1858), 2 De G. & J. 136, 44 E.R. 939. Relief in such a case may possibly be given under very exceptional circumstances. *Corbett* v. *Corbett* (1906), 12 O.L.R. 268.

In addition to the authorities already cited reference may be had to Smith's Principles of Equity, 5th ed. p. 211; Snell's Principles of Equity 18th ed., p. 338; Pomeroy's Equity Jurisprudence, vol. 3, sec. 1241 and note.

In the case at Bar the evidence conclusively establishes that there was no sort of active encouragement by any of the plaintiffs of the defendants' belief in the ownership of the fee by Luc Montreuil. It is also made abundantly clear that prior to October, 1908, the present plaintiffs were quite as ignorant as were the defendants themselves that Luc Montreuil was not the owner of the lands in fee. All alike believed him to be so and that the present plaintiffs had no interest in the property. There was therefore neither knowledge by them of their own right nor of the defendants' mistaken belief of their right. The plaintiffs could not have known that "the title on the faith of which (the defendants were) acting was a bad one." The defendants are therefore driven to invoke the other head of equitable jurisdiction, viz., that the plaintiffs are actively seeking the aid of equity.

They are not helped by the fact that the Supreme Court of Ontario, in which they sued, is a Court of equity as well as of

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law. The Judicature Act did not confer any new right of relief. Equitable relief may be granted by that Court under sec. 16, R.S.O. 1914, ch. 56 only where, and to the same extent as, the former Court of Chancery ought to have given such relief in a suit in that Court. In order that the defendants should have an equitable right to the relief they seek, no case of constructive fraud having been made, it must still appear that the plaintiffs have invoked the equitable jurisdiction of the Court.

The action brought by the plaintiffs is in fact purely a common law action for ejectment and mesne profits. Although before the time of Henry VII. an action in which damages for disseisin, of which the measure was the mesne profits, were awarded, when ejectment in a fictitious form with a nominal plaintiff came into use for the recovery of the term, or possession of the land, that only was recoverable in it, with nominal damages, but not with mesne profits, *Goodtitle* v. *Tombs* (1770), 3 Wils. 118 at p. 120, 95 E.R. 965, at p. 966, which then became the subject of a supplemental but distinct action in trespass, in which it was necessary to shew a prior recovery of the possession in ejectment. *Aslin* v. *Parkin* (1758), 2 Burr. 665, 97 E.R. 501. Obviously the nominal damages given in ejectment did not afford a subject for set-off of compensation for improvements. Since the 1856, ch. 34, sec. 267, however, (see now Ont. Con. R. no. 69) mesne profits may be recovered in ejectment (though not specifically demanded, at least where the plaintiff is a landlord suing his overholding tenant, *Smith* v. *Tett* (1854), 9 Exch. 307, 156 E.R. 131, and without the plaintiff having obtained possession. *Dunlop* v. *Macedo* (1891), 8 Times L.R. 43.

What is sought in the present action is not an accounting for the rents and profits of the plaintiffs' lands while in the defendants' possession. Such an accounting would seem to involve an exercise of equitable jurisdiction and the correlative right of the defendants to an equitable allowance for enhanced value due to their improvements would thereupon ensue.

When they obtained the decree for specific performance, the defendants became tenants of the property *pur autre vie*. After the death of the *cestui que vie* their occupation was that of trespassers and they became liable to the owners for damages accruing during the continuance of their wrongful possession. The plaintiffs claim for mesne profits is nothing else than a demand for those damages.

Where a plaintiff sued at common law for mesne profits I have found no case in England where a set-off for improve-

ments was allowed; and, upon the defendant shewing that he had an equitable claim in respect of improvements, a plaintiff's action at law for mesne profits was, in at least one instance, stayed "because in an action for mesne profits no set-off is allowed." *Lord Cawdor* v. *Lewis*, 1 Y. & C. (Ex.) 427, at pp. 433-4, 160 E.R. 174 at p. 176. See also Mayne on Damages 9th ed pp. 433-436. But see too *Putman* v. *Ritchie*, 6 Paige Ch. R. 390, at p. 404. Sedgwick, however, in his valuable treatise on Damages 9th ed., vol. ii. p. 1886, para. 915, says:—

"The action for mesne profits is everywhere held to be a liberal and equitable action, and one which will allow of every equitable kind of defence. Among the most important considerations that a defendant can urge, in answer to the claim for the rents and profits received by him, is that which the common law has, to a certain extent, adopted from the civil law, and which grows out of permanent improvements made by him upon the premises during his occupancy. The civil law treated the occupant in good faith with lenity. The reasoning of the civilians has so far obtained in many of our tribunals, that a *bona fide* occupant of lands is allowed to mitigate the damages in the action brought by the rightful owner, by offsetting the value of his permanent improvements made in good faith, to the extent of the rents and profits claimed."

In a case noted in Viner's Abridgment (1752), at p. 556, para. 3, *sub-tit* "Discount," recoupment of damages was allowed by the assize "because the land was sown and the house well amended"; and in *Coulter's* case, 5 Co. 30a, at p. 30b, 77 E.R. 98, it was held that "the disseisor . . . shall recoupe all in damages which he hath expended in amending of the houses."

See too Brooke's Abridgment (1586) at Fol. 202, para. 7, sub-tit. "Damages." Citing these authorities Sedgwick in his work on Damages adds (p. 1886, para. 915) that:—

"In our own ancient real actions the improvements of the tenant appear always to have been the subject of set-off or recoupment. The set-off cannot however go beyond the value of the rents and profits; the defendant is never allowed to recover a balance, unless . . . the recovery . . . is allowed by statute. This principle, however, properly applies only to the case of a *bona fide* possessor, or one without notice."

This doctrine was approved in the United States Supreme Court in *Green* v. *Biddle* (1823), 8 Wheat. 1 at pp. 81-2.

Under the Ontario statute R.S.O. ch. 109, sec. 37, when it

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applies the dispossessed occupant is given a lien enforceable at common law for the enhanced value created by his improvements and the Court is empowered, and indeed required, after setting-off mesne profits, if any, to award him judgment for the balance. *McCarthy* v. *Arbuckle*, 31 U.C.C.P. 405 at p. 409. No existing right of redress either at common law or in equity was affected.

As early as 1818 statutory provision was made in Upper Canada (1818 (Upper Can.) ch. 14, sec. 8), for compensation to defendants in ejectment for improvements made by them in consequence of erroneous surveys, whether made before or after the passing of the Act, *Gallagher* v. *McConnel* (1842), 6 O.S. 347. The statutory right remained confined to such cases until 1873. But the common law Courts of Upper Canada, influenced no doubt by the consideration shewn in the civil law for the occupant in good faith, in actions brought for mesne profits held that evidence of substantial improvements made by the defendant was admissible in mitigation of the plaintiffs' damages. Thus in *Lindsay* v. *McFarling* (1829), Draper's K.B. Rep. 6, where such evidence had been rejected by the trial Judge, the Court of King's Bench directed a new trial, the Chief Justice saying:—"I think this evidence proper to have gone to the jury; it would most probably have materially affected the verdict."

Again, in *Patterson* v. *Reardon* (1850), 7 U.C.Q.B. 326, in an action for mesne profits the jury gave a verdict for nominal damages only, evidence having been given at the trial that the defendant had made substantial improvements on the lot from which he had been ejected. The Court followed *Lindsay* v. *McFarling*, *supra*, and refused to hold the verdict perverse. In *McCarthy* v. *Arbuckle*, 31 U.C.C.P. 405, at p. 411, Wilson, C.J., citing *Green* v. *Biddle*, 8 Wheat. 1, and Sedgwick on Damages says:—

"In the former case [i.e. that of a possessor in good faith] the defendant in an action for mesne profits was allowed to set-off the value of his improvements."

This right of the defendant in an action to recover mesne profits is also recognised by Burton, J.A., in *Beaty* v. *Shaw*, 14 A. R. (Ont.) 600 at p. 609.

The action at Bar was tried by a Judge sitting without a jury. Under the modern Ontario practice the master may, in such a case, where the power conferred by sec. 64 (1) of the Judicature Act, R.S.O. 1914, ch. 56 is exercised, be required to perform some of the functions of a jury. I think he may and

should be called upon to do so here. There is no reason why he should not inquire and report, (1) to what amount the plaintiffs are entitled for mesne profits, of which apart from special circumstances, a fair occupation rent for the land is the usual measure (*Commissioners Niagara Falls Park* v. *Colt* (1895), 22 A.R. (Ont.) 1; but see *Munsie* v. *Lindsay* (1886), 11 O.R. 520; (2) what amount, if any, should be allowed as compensation to the defendants for enhancement in value of the property by reason of permanent improvements thereon effected by them prior to October 2, 1908; and (3), making the necessary set-off, what balance, if any, the plaintiffs should be allowed to recover as their actual damages. The defendants have no right in this common law action to any allowance in respect of improvements made after October 2, 1908, any more than they would have had if entitled to equitable relief. I cannot understand why in the judgment appealed from an inquiry was directed as to such subsequent improvements. It was apparently by inadvertence, as the learned Chief Justice of Ontario had distinctly indicated that as to such subsequent expenditures there could be no equity. Moreover, whatever might have been the case in granting equitable relief, the right of recovery here in respect of improvements being entertained merely in mitigation of damages cannot exceed the amount which the plaintiffs may be found entitled to under their claim for mesne profits. The purpose of allowing the set-off is to restrict the plaintiff's recovery to the actual damages they have sustained. I would, therefore, modify the judgment pronounced by the Appellate Divisional Court by striking therefrom sub-paragraph 2 of paragraph 3 and substituting a direction for a reference in the terms above indicated.

While the cross-appeal should clearly be dismissed with costs, the proper disposition of the costs of the main appeal is not so obvious. The appellants have established that the respondents are not entitled to the equitable relief accorded them in the Appellate Division, on the other hand the direction for a reference to fix the compensation which the respondents should be allowed in respect of improvements should be maintained in a modified form and as relief at common law, to which they did not assert a right, although their pleadings contain averments of the facts essential to support such an allowance on the evidence now before us it may well be that the difference in the monetary result will be comparatively slight. On the whole, I think at least approximate justice will be done if no order is made as to the costs of the main appeal.

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MIGNAULT, J.:—I concur with my brother ANGLIN, J.

Appeal dismissed without costs.
Cross appeal dismissed with costs.

REX v. PARADIS AND PAQUET.

Quebec Court of King's Bench (Crown Side), Gibsone, J. May 18, 1922.

LIMITATION OF ACTIONS (§IIIJ—151)—TIME FOR PROSECUTION IN SUMMARY CONVICTION PROCEEDINGS UNDER FOOD AND DRUGS ACT 1920 CAN. CH. 27—APPLICATION OF CR. CODE SEC. 1142.

The limitation of time fixed by Cr. Code sec. 1142 applies to summary prosecutions under the Food and Drugs Act 1920 Can. ch. 27.

FOOD (§I—1)—ADULTERATION — SUMMARY CONVICTION PROCEEDINGS — DEFENDANT CITING HIS VENDOR—SUMMONS TO THIRD PARTY—PRIOR SALE NOT SUBJECT OF THE CHARGE—ORDER FOR COSTS AGAINST CITED PARTY—FOOD AND DRUGS ACT 1920 CAN. CH. 27, SECS. 16, 17.

Except as to the award of costs against the cited third party, sec. 17 (2) of the Food and Drugs Act 1920 Can. ch. 27 does not enable the original defendant to have his vendor charged with the separate offence of selling the adulterated article to the original defendant; it deals with the exculpation of the latter on proof of his want of knowledge and that he re-sold the goods in the same state as when he purchased them and that he could not with reasonable diligence have obtained knowledge of the adulteration. The "case" which is to be dealt with by the magistrate under sec. 17, after the third party has been called into it by summons, is the charge as laid against the original defendant.

APPEAL by defendant Paradis from a summary conviction before a judge of sessions for an offence of selling adulterated molasses in contravention of the Food and Drugs Act 1920, Can., ch. 27. The appeal was allowed in part and the conviction modified.

Apollinaire Corriveau, K.C., for appellant, Paradis, added party.

Drouin & Drouin, for O'Donnell, complainant.

T. W. Edge, K.C., for Paquet, original defendant.

GIBSONE, J.:—The particulars of the case and of the proceedings are recited in the formal judgment so it is sufficient to say here that the case comes before this Court as an appeal from a judgment of the Court of Sessions of the Peace at Quebec dated February 28, 1922. The appeal being under sec. 749, Crim. Code, is in reality a rehearing and readjudication of the whole matter. The witnesses were heard before me. I do not think there can be much disagreement as to what the facts are; as to them I believe that my findings are identical with those of the Judge of the Court of Sessions, and that the only questions for decision on this appeal are questions of law.

The complainant, O'Donnell, as Inspector for the Department

of Health, Canada, made complaint against Paquet, a local grocer, charging that on 21st July, 1921, Paquet had sold adulterated molasses in contravention of the Food and Drugs Act, 1920. The analysis from a laboratory of the Department of Health certified that the sample did not meet with the requirements of the definition of molasses (Standards XVII, 3) for the reason that a cheaper substance, namely Glucose, to the extent of some 32% had been substituted for cane sugar, also that the adulteration was of a nature deemed to be not injurious to the health of the person consuming the same.

Paquet admitted the sale and did not contest the analysis, but he invoked the defence allowed by him, sec. 17 of the Act [footnote (a)], viz.: without delay he pleaded and proved that he purchased the molasses as an article of the same nature, substance and quality as that demanded of him by the Inspector, and that he sold it in the same state as that in which he purchased it, and that he could not with reasonable diligence have obtained knowledge of its adulteration; by reason of this Paquet became entitled under sec. 17 to be discharged from the complaint. Paquet did more; under the further provision of sec. 17 he called into the case the party from whom he purchased the molasses, namely Paradis, and thereby he became entitled to be discharged also from the payment of costs. The Court of Sessions discharged Paquet from all liability both as to the penalty and as to costs, and the judgment is admittedly right in that respect.

Such judgment however declared Paradis to be solely responsible for the contravention (namely the sale by Paquet on July

NOTE (A)—CITATION OF PRECEDING VENDOR BY DEFENDANT CHARGED UNDER FOOD AND DRUGS LAW.

The Food and Drugs Act 1920 (Can.) ch. 27 provides an exceptional mode of procedure in summary conviction matters whereby the defendant charged with adulteration or misbranding may disprove any guilty knowledge on his own part and obtain the citation of his vendor as a third party called into the case. Section 17 of the Act is as follows:

17. (1) If the person accused proves to the magistrate before whom any prosecution is brought for selling, offering or exposing for sale any article of food or drug that is adulterated or misbranded, that he purchased the article in question for and as an article of the same nature, substance and quality as that demanded of him by the purchaser or inspector, and also proves that he sold it in the same state as that in which he purchased it and that he could not with reasonable diligence have obtained knowledge of its adulteration or misbranding, he shall be discharged from such prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him or gives notice in court that he will rely on the above defence and has called or calls the party from whom he purchased the said article into the case as hereinafter provided.

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21, 1921) and condemned Paradis to a fine of $25, and to all costs both on the proceedings against Paquet and on those against himself (Paradis); Paradis appeals. As to whether the Court of Sessions had a right so to condemn Paradis is the question on this appeal.

Paradis' defences in the Court of Sessions were renewed on this appeal, viz.:—

(1.) That he himself purchased the molasses from the Dominion Molasses Co. of Halifax, N.S., and that he was unaware of the adulteration. The only proof offered in support of this is by the production of some copies of letters and invoices; these are quite sufficient in my opinion to prove the allegation.

Paradis might have made a defence under sec. 17 (1) and have summoned his vendor, but he did not do so; this defence is unfounded.

(2.) That so far as he is concerned the action is prescribed. This defence is based on sec. 1142, Crim. Code, the terms of which are to the effect that as to offence punishable on summary conviction if no time is specially limited by the Act or law relating to the particular case the complaint must be made or information laid within six months from the time when the matter of complaint or information arose.

Paradis' contention is that, as the matter of complaint—the selling by Paquet of the adulterated molasses—arose on July 21, 1921, the denunciation of him by Paquet as the person from whom Paquet purchased made on January 31, 1922, was made after the expiry of the six months and therefore too late.

The respondent contends that the limitation of time here applicable is not the six months under Crim. Code, sec. 1142, but the two years under sec. 135 of the Inland Revenue Act. That contention is untenable for sec. 135 of R.S.C. 1906, ch. 51, has reference only to offences "against the provisions of this Act or

(2) If the person presenting such defence shall, upon his sworn declaration that he purchased the article in good faith and as provided for in the last preceding subsection, obtain a summons to call such third party into the case, the magistrate shall at the same time hear all the parties and decide *upon the entire merits of the case*, including the question of costs, not only as regards the person originally accused, but *also as regards the third party* so brought into the case.

A person who aided and abetted the commission of an offence punishable on summary conviction under the Food and Drugs Acts 1875, 38-39 Vict. Imp. ch. 63, and 1899, 62-63 Vict. Imp. ch. 51, was himself liable to be proceeded against in every respect as if he were a principal offender. *Benford* v. *Sims*, [1898] 2 Q.B. 641, 78 L.T. 718. He is for all purposes of procedure, conviction and punishment, to be deemed to be in point of law a principal. See *DuCros* v. *Lambourne*, [1907] 1 K.B. 40, 95 L.T. 782, 21 Cox, C.C. 311; *H. Gould & Co. Ltd.* v. *Houghton*

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any other law relating to the Inland Revenue" and the Food and Drugs Act does not relate to Inland Revenue but to Health.

Alternately respondent contends that as the complaint with respect to this offence of July 21, 1921, was made within six months of its commission, it (the complaint) is within the limitation of time prescribed and is effective both against the original defendant Paquet and against anyone who may subsequently become an added defendant under sec. 17 of the Act. This contention is unsupportable in law; the name or a sufficient description of the defendant is an essential part of a complaint or information (Crim. Code, sec. 654); others can avail themselves of sec. 1142.

There is not in the Act itself any limitation of time for prosecutions under the Food and Drugs Act 1920, and I find no general limitation as to matters of the Department of Health corresponding to sec. 135 of the Inland Revenue Act. I am satisfied that the limitation of time fixed by 1142 Crim. Code applies to prosecutions such as the present. I would declare the proceedings as they affect Paradis to be barred on this ground, were it not that by doing so I would implicitly admit that Paradis had incurred a penalty under the statute. For reasons to be stated I think that on the present record Paradis could be condemned to no penalty, and I will base my judgment upon that latter ground.

I stated above that Paquet availed himself of sec. 17 (1) and called Paradis into the case; this was done by a summons, and the Writ of Summons issued by the Court of Sessions of the Peace on February 6 ordered Paradis to appear on February 14; the Writ is in effect as follows:—

"To J. William Paradis of the City of Quebec, trading under the firm name of Universal Produce Exchange.

Seeing that on sworn information and complaint one Georges Paquet of Quebec was on January 18, 1922, accused before the undersigned Judge of the Court of Sessions of the Peace by Joseph O'Donnell, Inspector of Foods and Drugs for the Government of Canada of having on July 21, 1921, in the City of Quebec in his possession and sold a certain article of food called molasses which was not pure molasses, the whole contrary to the dispositions of the Food and Drugs Act 1920; and

Seeing that the accused on January 31, 1922, appeared and obtained from this Court permission to issue the present sum-

(1920) 26 Cox C.C. 693. Even if charged separately with aiding and abetting, the limitation period applicable to the principal offence will apply. *H. Gould & Co. Ltd.* v. *Houghton, supra.*

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tions against you as the party who sold such molasses to Paquet as an added defendant in the present case.

Therefore these presents are to order you in His Majesty's name to appear on February 14, 1922, before me or some other Judge of this Court to answer said accusations, and to be further dealt with in accordance to law."

It seems clear to me that offence with respect to which Paradis was made an added defendant was the sale of the adulterated molasses on the 21st July, 1921, and the conviction was clearly stated that Paradis is declared responsible for that offence and is accordingly fined (*Attendu que d'apres la preuve le Defendeur n'est pas coupable de l'offense commise, mais que seul le mis en cause est responsable de la dite infraction, il est en consequence condamné a une amende de* $25 *et les frais, etc.*)

Now the facts shown by the evidence are that Paradis sold the molasses to Paquet some time in November, 1920, that it was on July 21, 1921, that the Inspector visited Paquet's grocer shop and procured the sample; that the complaint was laid against Paquet on January 18, 1922, and Paquet's denunciation of Paradis as his vendor and his application for summons against Paradis was made on January 31, 1922.

From the above it seems to be certain that Paradis made a sale of adulterated molasses in November, 1920, and if within the statutory limitations of six months he had been charged with that offence, no doubt would be condemned.

The summons to him in the present record has no reference to the sale he made in November, 1920, and in the present proceedings he cannot be penalized for it even if the denunciation of January 31, 1922, had referred to the sale of 1920; that denunciation could not have served as a prosecution of the 1920 offence seeing that it was made beyond the limitation of time.

The question then is as to whether Paradis could be made responsible for the sale made by Paquet on July 21, 1921. He may be found guilty and condemned to a penalty if the statute so authorized but not otherwise; sec. 16 creates the offence.

There can be no question that a contravention of the Act was committed on July 21, 1921; it is sec. 16 that enacts the penalty for contravention and it states that every person who by himself or his agent or employee sells, etc., shall be guilty of an offence and liable, etc.

Can it be said that Paradis comes within these terms. I think not; the words of sec. 16 "by himself or employee" being put aside, as they must be, there remains "or agent" to make Paradis a party to the transaction would require the assumption that

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Paquet was making the sale as the agent of Paradis. There is nothing in the proof to justify such assumption. On the rule of *juncta juvant*, I think "agent" must be understood to be something akin to "employee": a person whose relationship presupposes that his conduct is controlled by and is for the account of his principal. In my opinion Paradis as Paquet's vendor cannot with reference to the sale on July 21, 1921, be included in the terms of sec. 16 "by himself, his agent or employee" nor be liable under that section for that offence.

The only other provision under which Paradis might be made liable for the offence committed on July 21, 1921, is to be found in sec. 17. The first paragraph of that section provides exculpation from the fine of the party charged if such party declares from whom he purchased and further provides him exculpation from the costs of the prosecution if he gives certain notice "and has called or calls the party from whom he purchased the said article into the case as hereinafter provided."

It may be noted that a mere summons into "the case" even as an added defendant as was done here fulfils this requirement; the purpose of the requirement is not stated in the section but from the fact that the calling is into "the case" where there is a charge against the original defendant only, and that it is a calling in not the laying of a charge against such party, and from the fact also that this calling in is exclusively in the issue as to the amount of costs to which the original defendant may be condemned to pay and that the calling in is at the instance of the defendant, it may be doubted whether it is more than a test of the *bona fides* of the defendant on his claim for exculpation.

The particulars promised by the concluding words of sec. 17 (1) "as hereinafter provided" are contained in sec. 17 (2), viz.: "If the person presenting such defence shall, upon his sworn declaration that he purchased the article in good faith and as provided for in the last preceding subsection obtain a summons to call such third party into the case, the magistrate shall at the same time hear all the parties and decide upon the entire merits of the case, including the question of costs, not only as regards the person originally accused, but also as regards the third party so brought into the case."

As I read this subsection all that is contemplated in it is the exculpation of the original defendant; the affidavit required of him is one of a nature to establish his own *bona fides* on the original charge, not one of a nature to lay a charge against him who is to become an added defendant.

The magistrate is to hear all the parties and to decide upon

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the entire merits of "the case," the words "the case" must, as I think, refer to the charge against the original defendant for no other charge is contemplated in the text hitherto. The Court of Sessions of the Peace interpreted these words as making the added defendant responsible for the offence charged against the original defendant; I disagree with that interpretation.

Parliament had authority to so declare but it would be exceptional legislation (an exception to the general rules of penal responsibility) and only clear language or at least necessary implication could justify a Court of law interpreting a statute in such sense.

No express words in sec. 17 declare the offender's vendor to be liable for the offender's offence, the language may be said to be consistent with such an intention on the part of the legislature, but it is also consistent with the intention of merely providing exculpation for the original defendant. In my opinion only the latter interpretation may be put upon this section (except as to costs).

With regard to costs however there is an express provision; as to them the magistrate is authorized to make order not only as regards the third party brought into the case; I interpret this to mean that the magistrate may condemn either. In the present case the Court of Sessions condemned Paradis to pay all the costs in that Court, the conviction to that extent is within the provisions of sec. 17, and I will not disturb it, but to the extent to which the conviction declares Paradis to be responsible for the offence committed by Paquet on July 21, 1921, and condemns Paradis to a fine, it is in my opinion wrong.

The appeal is maintained with costs, the conviction is modified by striking therefrom the condemnation of Paradis to a fine of $25, but the condemnation of Paradis to costs in that Court is confirmed.

Conviction modified.

MACKAY, HANLEY & BOYD v. FRASER.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. October 14, 1922.

LIMITATION OF ACTIONS (§IIA—35)—SERVICES OF SOLICITOR—ENTIRE WORK—ITEMS CHARGES IN CONNECTION THEREWITH MORE THAN SIX YEARS OLD—STATUTE OF LIMITATIONS—RIGHT TO RECOVER FOR WHOLE WORK.

Where work given to solicitors is an entire contract and not miscellaneous and unconnected services, the Statute of Limitations begins to run from the completion of the whole work, and the solicitors are entitled to be paid for their services for the whole work, if completed within six years from the time of bring-

ing the action, although more than six years have elapsed since the date of the first item charged in connection therewith.

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Hyndman, J. A.

APPEAL by defendant from a District Court judgment in an action on a solicitor's account. Affirmed.

F. C. Jamieson, K.C., for appellant.

G. B. O'Connor, K.C., for respondent.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—The action was on a solicitor's account incurred in the months of June and July, 1914, beginning with June 15, and the last item occurring on July 28. These dates and items are material, inasmuch as the action was not begun until July 12, 1920, that is more than 6 years after the date of the first item but less than 6 years after various other of the charges, and the Statute of Limitations is one of the defences relied on.

The facts may be briefly related. During the "oil boom" of 1914, numerous oil companies were formed by persons holding oil leases from the Dominion Government. The defendant and certain of his co-defendants held several of such leases and decided to form a joint stock company, one of the objects of which was the absorption of such leases in exchange for shares in the company to be formed. The evidence of Mr. Boyd was that the defendant Fraser along with one Stewart came to him in the office of Mackay, Hanley and Boyd (in which firm he was at least an ostensible partner) and instructed him to incorporate and register a company (the details of which need not be rehearsed) and to arrange for the transfer to it, when formed, of the oil leases mentioned; that these instructions were duly carried out by Mr. Boyd and the period which was occupied in order to do so extended from June 15 to July 28 as above mentioned. The evidence of the defendant Fraser largely contradicts the evidence of Boyd on material points, but, whilst the trial Judge did not give any reasons for judgment, it must be assumed that he considered the testimony of both witnesses, and chose to credit the one rather than the other. Therefore, it must be taken that the trial Judge found as a fact that instructions were given by Fraser to the plaintiffs to do the work necessary for the incorporation, preliminary organisation and transfer of the said leases.

That being the case, viewing the business performed as one continuous piece of work, it seems to me that the action must be held to have been brought within the 6 years from the date of the last item charged in connection therewith. One of the charges on July 13 was for "attending Mr. Fraser when he signed agreement of sale, $2." This must have been with respect

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to the acquisition of the company of the oil rights of the defendant. Subsequent charges are with reference to the appointment of a trust company, no doubt to stand as trustee between the company and its vendors. It seems to me that this would be matter properly falling within the instructions originally given by the promoters in the absence of agreement or understanding to the contrary.

The application of the Statute of Limitations seems to depend on whether the work sued for was an entire contract or miscellaneous and unconnected services. In other words, was there or not continuous employment?

In 19 Hals., sec. 73, p. 48, it is stated: "In respect of miscellaneous work done by a solicitor, the statute runs from the completion of the whole piece of work," and *Beck* v. *Pierce* (1889), 23 Q.B.D. 316, 58 L.J. (Q.B.) 516, 38 W.R. 29, and *Phillips* v. *Broadley* (1846), 9 Q.B. 744, 115 E.R. 1461, are cited. In the latter case, Lord Denman, C.J., at p. 753 (115 E.R. at p. 1465) said: "And it was contended that the whole must be taken to be done under one contract, and that there was no cause of action in respect of any till all were complete. There was no evidence except the bill itself; and the language of that led to a different conclusion; therefore the items beyond the six years should be disallowed."

It was also strongly argued that inasmuch as the docket charges were made in the name of the company that it must have been understood that plaintiffs intended to look to it alone for payment. That, however, does not appeal to me as reasonable when one considers that at the time of the first entries no company was in existence, and even after coming into existence could not be held liable for preliminary expenses without expressly making itself liable. It ought to be presumed, at least, that the plaintiffs knew this and would not be so careless as to undertake such services without better assurance of recompense.

The evidence is that there was no agreement of any kind, therefore, the law will imply a contract to pay on the part of the persons ordering the work to be done. This seems to me so elementary as to need no authorities to support it.

A further defence raised was that the action was wrongly brought in the name of Mackay, Hanley & Boyd, for as a matter of fact the work was done by Mr. Boyd himself and the fees for registration were arranged for by him on the security of his individual note. I confess I cannot appreciate how this answer can be at all effective. Mr. Boyd was ostensibly at least a member of the firm, his name appearing on the letterheads and other documents of the firm. At the time of the transactions in ques-

tion, he occupied an office in the regular place of business of the firm and the payment of the fees for registration were made by their cheque. Had any actionable negligence occurred in connection with the work, I have no doubt but that the firm might have been held liable.

But, at any rate, there can be no prejudice whatever to the defendant, for if he owes it at all it must be to either the firm or to Mr. Boyd, and a discharge from the firm under the circumstances must be a discharge from Boyd. To my mind, this question is one relating only to the private internal arrangements amongst the members of the firm and not one which can or ought to be taken advantage of by the defendant.

One other question was raised, namely, the propriety of suing in the name of Mackay, Hanley & Boyd, when as a matter of fact the senior partner, Mr. Mackay, died prior to the bringing of the action. Strictly speaking, I think, perhaps, the name of Mr. Mackay should not have been inserted, but it can make no practical difference and should not operate to defeat the claim. In Lindley on Partnership, 8th ed., p. 693, it is laid down that: "On the death of a partner the authority of the surviving partners to bind the firm continues so far as may be necessary to wind up the partnership affairs, and they are the proper persons to get in and pay its debts. But the debts they get in must be placed to the debit of the late firm and the debts they pay must be placed to its credit."

This claim when paid to the surviving partners then becomes a matter between them and the estate of the late Mr. Mackay, in which the debtor has no concern.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

ST. LAWRENCE UNDERWRITERS' AGENCY OF THE WESTERN ASSURANCE Co. v. FEWSTER AND MARCHIORI.

Supreme Court of Canada, Davies, C.J. and Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 7, 1922.

APPEAL (§I B—11)—COSTS—PLAINTIFF SUING AT INSTANCE OF INSURANCE COMPANY—JUDGMENT—EXECUTION FOR COSTS—NULLA BONA—ORDER OF COUNTY JUDGE THAT INSURANCE COMPANY PAY COSTS—ORDER SUSTAINED BY COURT OF APPEAL—APPEAL TO SUPREME COURT OF CANADA—JURISDICTION—SUPREME COURT ACT R.S.C. 1906, CH. 139.

The right of appeal to the Supreme Court of Canada in an action commenced before July 1, 1920, must be determined in accordance with the provisions of the Supreme Court Act before the amendments of 1920 (Can.), ch. 32 which came into force on that date, and under the provisions of sec. 37 of the Supreme Court Act, R.S.C. 1906, ch. 139, having regard to its incidental nature as a step taken to secure the realisation of a judgment for

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costs rendered against the plaintiff, an application made to a County Court Judge for an order that those costs be paid by an insurance company as the real plaintiffs, is not a judicial proceeding within the meaning of the term as used in the definition of final judgment, and no appeal lies to the Supreme Court of Canada.

MOTION to quash an appeal from the British Columbia Court of Appeal, which affirmed an order of the County Court Judge that an insurance company pay the defendant the taxed costs of the trial and appeal in an action brought by the plaintiff at the instance of the insurance company for damages to the plaintiff's motor car. As three of the six Judges were of opinion that the Court had no jurisdiction, it was considered that it would be futile to hear the case on the merits, and the Court dismissed the appeal, but without costs.

The facts of the case are as follows. A policy insuring plaintiff against damage to his automobile contained a clause by which the insurance company was to be subrogated to all the rights of the insured against any person in respect of any matters upon which payments were made under the policy. The insured, at the instance of the insurance company, brought an action for damages caused by collision with defendant's automobile. The plaintiff was successful in the first Court, but was unsuccessful in the Court of Appeal, and costs were awarded against him. A writ of execution was issued, but was returned *nulla bona* by the sheriff, and an order was then obtained from the County Court Judge that the insurance company pay the said costs. An appeal was taken from this order, and the Court of Appeal held by an equally divided Court that the County Court Judge had jurisdiction to make the said order, and the order was affirmed. The insurance company, having obtained leave from the Court of Appeal, appealed to the Supreme Court of Canada. The defendant moved to quash the appeal.

The judgment of the British Columbia Court of Appeal is as follows:—

MACDONALD, C.J.A.:—I would allow the appeal for the reasons stated by my brother Galliher.

MARTIN, J.A.:—In my opinion and quite apart from any power of inherent jurisdiction that any Court may have over the costs incurred therein by the real party, the Judge below had jurisdiction to make the order appealed from, and rightly exercised it, under sec. 161 of the County Courts Act, R.S.B.C. 1911, ch. 53, as follows:—

"All the costs of any action or proceeding in the Court not herein otherwise provided for shall be paid by or apportioned

between the parties in such manner as the Judge shall think fit, and in default of any special direction shall abide by the event of the action, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said Court."

In sec. 2 "party" is thus defined:—

"'Party' means a party to a suit, action, or proceeding, and includes a body politic or corporate, and every person served with notice of or attending any proceeding, although not named on the record."

And in the instructive and similar case of *Re Sturmer and Town of Beaverton* (1911), 25 O.L.R. 190, 20 O.W.R. 560; (1912), 2 D.L.R. 501 at pp. 510-511, 25 O.L.R. 566, 21 O.W.R. 55, Mess, C.J., in delivering the judgment of the Court of Appeal refusing leave to appeal, said that:—

"While apparent conflict between some of the early and the later decisions may be pointed at, it is plain that objections founded on technical reasons are no longer permitted to prevent the Court from dealing, so far as costs are concerned, with one who has so intervened as to make himself the substantial though not the ostensible party."

It is submitted that the "substantial," *i.e.*, the real, litigant here is the appellant, and I see no reason why the principle so laid down in Ontario should not be applied to this case, seeing that the language of our statute is fully as wide, nor can I see why the principle is altered after judgment has been entered for costs awarded in a sum greater than could have been sued for in the County Court—a judgment for costs in that Court may exceed, and has often far exceeded, the amount of a claim that could have been recovered therein, but nevertheless *qua* costs there is no limit for which judgment may be entered and appropriate remedies thereon enforced.

I have not overlooked the divorce case of *Forbes-Smith* v. *Forbes-Smith*, [1901] P. 258, 17 Times L.R. 587: relied upon by the appellant, but it has, in my opinion, with every respect, no application because costs were there refused as against the co-respondent in two consolidated actions for the reason that he was held to be, in the special circumstances, "a stranger to the proceedings" (p. 271), being neither a real nor ostensible party thereto, as regards the point in question, under the statutes and rules in question (cited at p. 260), whereas the appellant in the case at Bar is admittedly the real litigant and prime and sole maintainer of the litigation which has gone against it, and, therefore, is the party answerable for the consequences thereof.

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The appeal, therefore should be dismissed.

GALLIHER, J.A.:—In my opinion the appeal should be allowed. The motor cars of the plaintiff and defendant came into collision and were damaged. The plaintiff brought action against the defendant and was awarded damages in the County Court. On appeal, this judgment was reversed, and the defendant taxed the costs of the trial Court and the Court of Appeal against the plaintiff at $1,165.05, and issued execution, but the sheriff returned the writ *nulla bona*. Subsequently the defendant discovered that the present appellant had insured the car of the plaintiff and were in fact the parties behind the action brought against the defendant and responsible for the proceedings, though not a party thereto. On discovering this, the defendant made an application to the Grant County Court Judge who ordered that the present appellant (the St. Lawrence Underwriters Agency) pay to the defendant the taxed costs of the trial and Appeal Courts as taxed. The Underwriters Agency appealed.

Several cases were cited to us wherein the Courts in England had exercised their inherent jurisdiction in awarding costs against parties who, although not parties to the proceedings, were the instigators thereof and had a beneficial interest in the outcome. As our County Court has no inherent jurisdiction and is a creature of the statute, these cases have no application and we must look to the statute itself for any authority to impose costs.

I have examined sec. 161 of the County Courts Act and the different rules and orders cited to us, but in none of these do I find anything which would sustain the order made herein. Section 161, in my opinion, can only have reference to parties to the action.

If the decision in *Re Sturmer and Town of Beaverton*, 21 D.L.R. 501, 25 O.L.R. 566, in the Court of Appeal, is to be taken as deciding that independent of the inherent jurisdiction of the Court, under their Judicature Act, R.S.O. 1897, ch. 51, as amended to correspond with the English rule as amended in 1890 (Imp.), ch. 44, sec. 5, whereby these words were added:—"And the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid," the Courts of Ontario have power to order costs against persons not parties to the suit in circumstances of this kind, I am, with respect, constrained to say that I prefer and adopt the reasoning of Collins, L.J., in *Forbes-Smith* v. *Forbes-Smith*, [1901] P. 258, at p. 271, where he says in dealing with sec. 5 of the English Act of 1890 amending the English rule by

adding the words I have just quoted:—"Some limitation must be put upon the generality of the words. They cannot enable the Court to order the costs to be paid by a stranger to the proceedings; they can only mean that the Court may order the costs to be paid by any of the parties."

We have no such broad rule to contend with here, but had we, I would have no hesitation in following the English decision.

MCPHILLIPS, J.A.:—I would dismiss the appeal.

Appeal dismissed, the Court being equally divided.

DAVIES, C.J.:—In the opinion of a majority of the members of the Court, this action having been begun before July 1, 1920, the right of appeal must be determined upon the provisions of the Supreme Court Act, R.S.C. 1906, ch. 139, as they stood before the amendments which became effective on that date. Three of the Judges (the Chief Justice, Duff and Anglin, JJ.) hold the view that, having regard to its incidental nature as a step taken to secure the realisation of the judgment for costs rendered against the plaintiff, the application made to the County Court Judge for an order that those costs should be paid by the appellants as the real plaintiffs was not a "judicial proceeding" within the meaning of that term as used in the definition of "final judgment" enacted by 1913 (Can.) ch. 51, sec. 1, (*Svensson* v. *Bateman* (1909), 42 Can. S.C.R. 146) and that the judgment from which it is sought to appeal is, therefore, not a "final judgment" appealable to this Court under sec. 37 of the Supreme Court Act, R.S.C. 1906, ch. 139.

As the appeal is to be heard immediately and by the Court as now constituted, it is obvious that the opinion of three members of the Court adverse to its jurisdiction will necessarily be fatal to the appellant's success. It would, therefore, seem to be futile to hear argument on the merits, which may not be considered by one-half of the Court, with whom dismissal of the appeal is a foregone conclusion.

It would seem to be the better course that the motion to quash should be refused and the appeal itself now dismisssed—both without costs.

IDINGTON, J. (dissenting):—The respondent Fewster was sued in one of the County Courts of British Columbia by one Marchiori for damages done to his automobile, and recovered judgment for $597.52 and costs.

Upon appeal, the Court of Appeal reversed the judgment with costs, and that judgment was duly deposited with the Registrar of the County Court as provided for by one of the Rules

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of Court and thereupon the judgment derived its effect from that rule, which reads as follows:—

"21. When the Court of Appeal has pronounced judgment, either party may deposit the same, or an office copy thereof, with the registrar of the County Court, and upon being so deposited such judgment shall be filed and may be enforced as if it had been given by the County Court."

Thereupon, an execution was issued by said County Court against said Marchiori and duly returned *nulla bona* by the sheriff. That return was followed by an application by the respondent Fewster to the said Court to have the appellant ordered to pay the costs so awarded.

The grounds alleged were that the appellant had, in fact, instigated Marchiori to bring the action. And the senior Judge of the County Court granted said order without giving any reasons.

The appellant had never been made a party to the said action, or in any way been served with notice thereof, or relating thereto, until said notice after the judgment and execution and return thereof as aforesaid.

The appellant herein appealed from said order to the Court of Appeal and contended there was no jurisdiction in the County Court to make such an order.

That Court, on equal division, dismissed said appeal, the Chief Justice and Galliher, J. being in favour of allowing said appeal and the other Justices, Martin and McPhillips, being in favour of dismissing it (See above at p. 352).

Section 161 of the County Courts Act, R.S.B.C. 1911, ch. 53, is as follows:—[Cited in judgment of Martin, J.A. at p. 352-3].

It is difficult to see how the County Court Judge could have power to make such an order under said provision, especially as to the costs directed by the Court of Appeal which were specifically awarded by the said Court and liability therefor also specifically determined and finally disposed of by virtue of said order and R. 21 first above quoted.

I only refer to this to shew the importance of the questions raised and the reason for that Court, though so divided, agreeing to allow and granting an order giving leave to bring an appeal to this Court.

The power to grant such leave to appeal here was given by sec. 37 of 1920 (Can.), ch. 32, sec. 2, and radically amending the Supreme Court Act, and which in the enacting part of the new sec. 37 and sub-sec. (*a*) thereof, reads as follows:—

"37. Subject to sections 38 and 39, an appeal shall lie direct-

ly to the Supreme Court from any final judgment of a provincial court, whether of appellate or original jurisdiction, other than the highest court of final resort in the province, pronounced in a judicial proceeding which is not one of those specifically excepted in section 36.

(a) In any case by leave of the highest court of final resort having jurisdiction in the province in which the proceeding was originally instituted; provided that except in cases in which such highest court of final resort has concurrent jurisdiction with the court from which it is sought to appeal, special leave shall not be granted in any case which is not appealable to such highest court of last resort and which has not been heretofore appealable to the Supreme Court; and, ..."

That was brought into force by the following:—

"4. This Act shall come into effect on the first day of July, 1920; but in regard to appeals in proceedings which shall have been begun in the Court or before the body having original jurisdiction therein before that day, the Supreme Court shall nevertheless continue to possess and exercise the jurisdiction conferred by the sections hereinbefore repealed."

The said proceeding against the appellant was first taken on February 24, 1921, was quite independent of the original cause of action and had no relation thereto, but to the allegation that the affidavit and exhibits thereafter referred to set forth as the foundation for the motion.

In short, it was a substitution for any new action which might have been founded on the facts alleged as to the instigation of what in the final result might have been declared unfounded in law.

It was far more such an independent proceeding than is an interpleader issue founded on a judgment and in way of enforcing execution thereof which was declared long ago to be a new proceeding and the resulting judgment therein appealable here. The decision of the Privy Council in the case of *Macfarlane* v. *Leclaire* (1862), 15 Moo. P.C. 181, 15 E.R. 462, is presented in Cameron's Supreme Court Practice at p. 39 as the basis of our jurisprudence in that regard.

I submit that the order in question herein as clearly was as that the beginning of a new collateral proceeding under the Act giving the Court of Appeal power to grant that leave which it has given to come here. Hence, I hold the motion to quash such an appeal should not be granted.

I am unable to understand why the imperative words of the first part of the above quoted section bringing the amending Act

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into force on July 1, 1920, are to be discarded when invoked in a case where the proceeding in question clearly began after that date, and clearly had, for reasons already assigned, no legal connection therewith.

At all events if that County Court proceeding and judgments are to be held as so connected with the order in question as to be reasonably invoked as a barrier to the other parts of the amending Act expressly giving the power to the Supreme Court of Alberta to give such leave as given, then surely the right to appeal still exists within the remaining part of the said sec. 4.

I, alternatively, therefore, submit that the judgment now appealed from herein, if to be so based on the appeal from the Court of Appeal as arising out of the County Court suit, is appealable without leave under the provisions of the Supreme Court Act providing for appeal here where the jurisdiction was concurrent with that of the B.C. Supreme Court jurisdiction.

If such a jurisdiction existed in any case in any Court as to make such an order as in question, certainly it was also in the case here in question within the B.C. Supreme Court's jurisdiction.

It was a power which the Judge of the Court must be presumed to have exercised not by virtue of anything in way of trying the County Court suit, or anything in the way of trying to enforce said judgment therein, as in the case of *Svensson* v. *Bateman*, *supra*, and in exercising such a power he must have been, instead of leaving the parties to try it out, in a new action attempting to enforce or give a remedy for an alleged wrong which might well have been, and more properly, asserted by suing for the amount involved in the Supreme Court of British Columbia.

I by no means think that this is the correct view of the case presented on the motion to quash, but submit it is logically the alternative to be adopted if the latter part of said sec. 4 is to override the first, as urged upon us.

If the new motion is so bound up, however, with the case as to come within the latter part of the section, then surely an appeal must lie just as in any other like independent issue arising in the case in which the right of appeal is preserved by the latter part of the section.

In either of the foregoing alternatives by way of testing the power of the Judge, I think the appeal should not be quashed, but the motion dismissed and the appeal be heard in due course.

DUFF, J.:—I concur with the Chief Justice.

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ANGLIN, J.:—I concur with the Chief Justice.

BRODEUR, J.:—I am of opinion that the judicial proceeding which has given rise to this appeal is not the original action in the County Court but the application made by the respondent to have the appellant ordered to pay the costs awarded on the original action. *Turcotte* v. *Dansereau* (1896), 26 Can. S.C.R. 578; *King* v. *Dupuis* (1898), 28 Can. S.C.R. 388; *Lefeuntun* v. *Veronneau* (1893), 22 Can. S.C.R. 203; *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181, 15 E.R. 462.

This application having been made on February 24, 1921, then the right of appeal is to be determined by the amendment to the Supreme Court Act of 1920 (Can.), ch. 32, sec. 4. The appellants, under the provisions of the latter amendment, have obtained leave; then this appeal is properly before us and should be heard. This is a final judgment appealable to this Court under sec. 37 of the Supreme Court Act.

The motion to quash should be dismissed.

But as we are equally divided on this question of jurisdiction and as it is obvious that the opinion of three members of the Court adverse to its jurisdiction will be necessarily fatal to the appellants' success, it would, therefore, be futile to hear arguments on the merits.

The appeal then should be dismissed but without costs.

MIGNAULT, J.:—I concur in the opinion of the Chief Justice that the right of appeal in this case must be determined upon the provisions of the Supreme Court Act before its amendments in 1920.

Inasmuch as three members of the Court are of the opinion that the order complained of is not a final judgment within sec. 37 of the Supreme Court Act, it is obvious that the appeal could not succeed and, without expressing any opinion as to the nature of the judgment, I concur in the dismissal of the appeal without costs.

Motion dismissed without costs.
Appeal dismissed without costs.

REX v. MINGUY.

Quebec Court of King's Bench, Appeal Side, Carroll, Pelletier, Martin, Flynn and Tellier, JJ. November 11, 1920.

JURY (§IB—20)—SPEEDY TRIAL WITHOUT JURY OR TRIAL BY JURY—WHEN ATTORNEY-GENERAL MAY INSIST ON JURY TRIAL—MODE OF REQUISITION—CR. CODE SEC. 825 (5).

The demand of the Attorney-General for a jury trial at the Assizes if the accused is charged with an offence punishable with imprisonment for a period exceeding five years (Cr. Code sec. 825 (5)) is sufficiently evidenced by the preferring of an indictment upon which the Attorney-General had personally endorsed a requisition that it should be brought before the grand jury and the

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arraignment of the accused upon such indictment on the grand jury returning a true bill.

[See same case in appeal to the Supreme Court of Canada, *Minguy* v. *The King* (1920), 58 D.L.R. 77, 34 Can. Cr. Cas. 324, 61 Can. S.C.R. 263. The defendant's appeal was there dismissed upon the ground that there had been no valid election of speedy trial by the accused and the jurisdiction of the jury Court was, therefore, not displaced.]

MOTION by the accused for leave to appeal, by way of a reserved case, from the verdict of guilty returned against him at Quebec on June 31st, 1920, on a charge of theft with violence. In consequence of the verdict the accused was condemned on June 28, 1920, to fifteen years' imprisonment with hard labour by Desy, J. The grounds for appeal are stated in the notes of the Judges. The motion was dismissed by a majority decision of the Court, Carroll and Flynn, JJ. dissenting.

Déchêne and Choquette, for defendant appellant.

A. Marchand, K.C., and *L. Cannon*, K.C., for the Crown.

PELLETIER, J.:—I think that the motion should be dismissed.

The only serious argument advanced results from the fact that the accused was entitled to a speedy trial. This was offered him at the preliminary enquête but he did not take advantage of the offer.

Article 873 Crim. Code empowers the Attorney-General to take any crime (without exception) before the grand jury, provided he gives a special order.

Now that was done in the present case.

And art. 825, para. 5, authorizes the Attorney-General, whenever a true bill has been found, to bring the accused before the Court of Assizes to stand his trial before the petit jury.

This also was done, for the Attorney-General's representative—who did not require any special authorization for that purpose—objected to allowing the accused to appear again before the magistrate.

We cannot deprive the Attorney-General of this absolute discretion given him by law (which, when it is exercised, supersedes the option or right of re-election of the accused) in the interest of the administration of justice, which is intrusted to the Attorney-General, and which he must exercise without hindrance, as he sees fit, in what he conceives to be the public interest. It has been suggested that the case could not be taken away from the magistrate unless something was placed before him also by the Attorney-General.

The answer to this seems to me to be that the magistrate and

his office are dispossessed from the moment when the preliminary inquiry is over and the commitment made. The Attorney-General's proceedings were made before the court seized of the record.

I would dismiss the motion of the accused.

MARTIN, J.:—On June 21, last, the accused was found guilty, before the Court of King's Bench, Crown Side, sitting in and for the district of Quebec, presided over by Désy, J., and a petty jury, upon a charge of robbery with violence (*vol avec violence*) He was found guilty and sentenced to fifteen years imprisonment in the penitentiary at hard labour.

He moved that Court for a reserved case and for a new trial. This motion was rejected and the accused now moves this Court that a stated case be ordered for the opinion of this Court upon the questions raised respecting the legality of his trial and conviction.

The grounds invoked in support of this motion are three in number:—First, want of jurisdiction in the Court before whom the accused was tried; Second, illegalities in the charge of the trial judge to the jury; Third, new facts discovered since the trial.

So far as the alleged illegalities in the charge are complained of, I have read the typed copy of the charge submitted with appellant's factum and I do not see therein any misdirection in law, sufficient to establish that any substantial wrong or miscarriage was occasioned on the trial. Moreover, this objection was not persisted in before us.

The facts which, it is alleged, had come to the knowledge of the accused after his conviction and which formed the basis of his motion for a new trial on this ground before the Court of King's Bench, crown side, were that he could furnish evidence to impeach the credibility of one Omer Roy, a witness produced and examined on the trial. The trial Judge rejected this motion and wisely so. If I had been sitting in the Criminal Court, I would have done the same. I doubt very much if we have any jurisdiction to entertain an appeal and application for a reserved case on this ground, and, if any such jurisdiction can be found to exist, I would on this point confirm the ruling of the trial Judge.

We cannot interfere with the jury's appreciation of the evidence nor with the sentence imposed by the trial Judge. We cannot declare the sentence to be erroneous. It was one which

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the law enforces to be imposed as punishment for the crime for which the accused was tried and convicted.

The only serious question pressed for our consideration was the question of jurisdiction. A complaint was lodged against him on April 22, 1920. On the same day he was arraigned—*mis en accusation*—before the magistrate. He consented to a summary trial and afterwards withdrew such consent with the permission of the magistrate and a preliminary examination into the charge was held on April 28, followed by a commitment on May 5, on which date he made option for a speedy trial.

On June 9, an indictment was preferred against the accused before the grand jury of the district then in session, upon the order of the Attorney-General of the Province, under the provisions of art. 873 of the Criminal Code. A true bill was found on this indictment before the grand jury. The accused was arraigned the following day and moved to quash the indictment on the ground that it deprived him of the option made for a speedy trial. This motion was rejected and the trial proceeded before a petty jury, followed by conviction and sentence.

It was urged on behalf of the Crown that the prisoner's election for a speedy trial under art. 828, Crim. Code, and amendments, was too late, but the amendment 9-10 George V, ch. 46, sec. 14, relates to re-election and does not purport to deprive the accused to elect or make option for a speedy trial.

The only manner in which he can be deprived of the privilege of that option is contained in art. 825, sec. 5, which says:—

"Where an offence charged is punishable with imprisonment for a period exceeding 5 years, the Attorney-General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by the judge under this Part and thereupon the judge shall have no jurisdiction to try or sentence the accused under this Part" (part 18, speedy trials.)

The offence charged was an offence punishable with imprisonment for a period exceeding 5 years and the Attorney-General, by preferring an indictment before the grand jury, in effect required that the charge be tried by a petty jury. At the time such indictment was so ordered by the Attorney-General to be preferred, the accused had had a preliminary investigation. He had been bound over to stand his trial and he had made option for a speedy trial.

After the exercise of such option, the Court of King's Bench, crown side, had no further jurisdiction over the charge except

upon the intervention and request of the Attorney-General and the latter set in motion the procedure necessary to have the charge tried by a jury. The preferring of the indictment upon his order could have no other *raison d'être*, and without his order no indictment on such charge would have been laid before the grand jury. Upon the motion of the accused to quash the indictment preferred by order of the Attorney-General on the ground that it deprived the accused of his option to be tried by the Court of Sessions, the Attorney-General through his representative, the Crown prosecutor, objected to the motion being granted and thereby required that the charge be tried by a jury. By the order he gave in so preferring the indictment, he required that the charge should be tried by a jury notwithstanding that the accused had previously elected to be tried by a Judge of the Sessions under Part XVIII, and once the Attorney-General had so made this requirement and ordered such change to be preferred by a bill of indictment before the grand jury, he took away from the accused his right to proceed to trial before a Judge of the Sessions and such Judge of the Sessions had thereafter no jurisdiction to try or sentence the accused.

Jurisdiction to try and sentence the accused thereby became vested in the Court of King's Bench, crown side, and he was required to be tried by a jury as he was.

I would hold that that Court had jurisdiction in the matter and I would dismiss his motion and confirm the ruling of the trial Judge appealed from.

The decision of the Supreme Court, in the case of *Giroux* v. *The King*, 39 D.L.R. 190, 56 Can. S.C.R. 63, 29 Can. Cr. Cas. 258, is not in point. In that case, there was no preliminary investigation and no committal for trial by a magistrate, and it was held that even after an indictment had been preferred before the grand jury by order of the Attorney-General, that the accused could make option for a speedy trial, and that the Judge of Sessions in such case would have jurisdiction. Here there was a preliminary investigation into the charge and committal for trial by the magistrate and option made by the accused for a speedy trial, and the effect of such option was nullified by the action of the Attorney-General in preferring an indictment before the grand jury and requiring that the charge should be tried before a petty jury.

CARROLL and FLYNN, JJ. dissented.

Motion dismissed.

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LITTLE v. WESTERN TRANSFER AND STORAGE LTD. AND EDMONTON COLLIERIES LTD.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. October 13, 1922.

MINES AND MINERALS (§IA—28)—LEASE OF COAL MINE—RIGHT AND TITLE ACQUIRED UNDER LEASE.

A recital in a lease that the lessor is the registered owner of the coal and surface rights of the property leased, suggests and indicates a parity of title between the coal rights and the surface rights, and when after this recital the thing leased is stated to be "all the said coal" the proper construction is that the character of the title to the coal is of a like character to that which would have been given upon a lease of the surface namely a lease of the property, the stratum or strata, in which the coal is embedded and not merely an easement to take the coal, and then these words are followed by the words "together with the right to work the same, and together with such portion of the surface rights as may be necessarily interfered with in the working of the mine" the lease is a lease of, and not a mere grant of servitude over so much of the surface as comes within the description and such a lease gives the tenant the right of "outstroke" and the right to transport over the surface of the property leased foreign coal taken by outstroke from adjoining mines under lease by the tenant.

APPEAL by defendant from the trial judgment in an action for an injunction and for damages arising out of a lease. Reversed.

G. B. O'Connor, for appellant.

W. Short, K.C., for respondent.

STUART, J.A.:—At first blush it would appear to me on reading the document in question in this action, that the trial Judge was right in granting the injunction. One would naturally assume that all the grantor intended was to give a right to take away the coal and such other rights as were necessary to the enjoyment of that right. The right, whatever it was, certainly would determine whenever the coal was exhausted because as a condition of the grant a minimum of 10,000 tons per year was to be produced. But it seems to me that the precedents which interpret practically similar grants (or reservations which are re-grants in effect) all point the other way with the exception of *Dand* v. *Kingscote* (1840), 6 M. & W. 174, 151 E.R. 370.

The case of *Proud* v. *Bates* (1865), 34 L.J. (Ch.) 406, 13 L.T. 61, decided by Wood, V.C. (afterwards Lord Hatherley), was re-affirmed at least by Lord Hatherley himself in *Duke of Hamilton* v. *Graham* (1871), L.R. 2 Sc. App. 166. The first of the two grounds of the decision in *Proud* v. *Bates* seems to me to be directly applicable here.

I am not entirely satisfied with the result and would have preferred to have found the law to be otherwise. But I think the case is settled by authority.

After all it is a question of the true interpretation of the document. It seems to me that we are bound to interpret it as granting an estate, a leasehold estate, in everything mentioned as being granted, and that the words which appear to be limitations upon the use are really only a method of describing the area granted. That, on the face of the grant, was uncertain as to the surface, but it was clearly rendered quite certain by the acts of the parties. See Fry on Specific Performance, 5th ed., p. 170, para. 346: also *Schobert* v. *Pittsburg Coal Co.* (1912), 27 Am. & Eng. Ann. Cases 1104.

I take this opportunity of suggesting that references handed in by counsel should be more carefully checked as to volume and page because I have wasted much time by being utterly misled by the references given us.

With regard to the two tons of pea slack coal per day my opinion is that it was the plaintiff's duty to remove this practically day by day. I do not say that an omission for a day or two to exercise the right would destroy the right to the coal for those days, but certainly any substantial delay which would allow the slack to accumulate and deteriorate ought in my opinion to be held to be a surrender of the right during the period of delay.

Technically I think the plaintiff would be entitled to damages for the days on which he got only pure slack coal instead of the mixture called pea slack to which he was entitled, but I do not find any evidence which would enable one to arrive at any amounts, and in any case I gathered that that exact point was not now being pressed.

With regard to the deposit of refuse I also am unable to find any ground for liability for damage, at least at present. At the determination of the lease or even earlier if the plaintiff is so advised, I think he should be considered as at liberty notwithstanding the present judgment to raise by a new action the question of an infringement of his rights in that regard.

I would allow the appeal with costs and dismiss the action with costs. There should be no costs of the cross-appeal.

BECK, J.A.:—This is an appeal from the judgment of Simmons, J., at the trial.

The action was for an injunction and for damages. An injunction was granted; damages refused.

The action arises out of a lease made by the plaintiff Little to the Western Transfer & Storage Co. Ltd. in trust for the Western Coal Co. Ltd., a company then about to be formed. The lease is as follows:—

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Beck, J.A.

"Western Transfer & Storage, Limited
Edmonton, Alta., February 16th, 1918.

I, James B. Little, the registered owner of the coal and surface rights of River Lot numbered twenty (20) of the Edmonton Settlement, containing twenty-six (26) acres, Title No. ..... do hereby lease to Western Transfer & Storage, Limited, in trust for the Western Coal Company, Limited, to be formed, all the said coal together with the right to work the same and together with such portion of the surface rights as may be necessarily interfered with in the working of the mine, to be held by the said Western Transfer & Storage, Limited, as tenant for five (5) years from this date with the right of renewal for a further period of five (5) years upon the same terms, at a royalty rental of thirty (30c.) cents per ton for all coal mined exceeding three (3) inches in size and a royalty of ten (10c) per ton for all coal mined, size 1 inch to 3 inches, royalty to be paid by the 10th of the following month.

No royalty is to be paid for coal mined which is less than 1 inch in diameter, but I am to have the right to take delivery of two (2) tons of pea slack coal per day for each and every day during which the mine is in operation.

Commencing when the mine is ready for operation, the tenant shall mine at least six thousand (6,000) tons during the first year, and at least ten thousand (10,000) tons in every subsequent year.

The tenant agrees that it will remove any mine timbers from our old workings, and will leave nine (9) foot pillars.

All disputes between landlord and tenant shall be settled by the arbitration of three persons, one to be chosen by the landlord, one by the tenant, the two arbitrators so chosen to choose a third.

Witness as to Jas. B. Little: J. S. Oliphant. James B. Little.

Witness as to Western Transfer: L. C. Stevens. Western Transfer & Storage, Limited. Per C. W. Rickard, Secretary."

One Rickard is the secretary and treasurer of the Western Transfer & Storage Co. and president and manager of the Edmonton Collieries Ltd., the company in trust for which the lease was taken, the proposed name "The Western Coal Company Limited" having been refused upon application for incorporation.

One Duggan, a mining engineer, was formerly manager and subsequently advising engineer of the Edmonton Collieries. I shall refer to the two companies indifferently as the company.

Shortly after the signing of the lease the company's officials came to the conclusion that it would be unprofitable to sink a

shaft on the leased land if they were limited to the extraction of the coal under the leased land. They therefore went to see Little about this difficulty. There were two properties adjoining the leased land, known as the Fraser property and the Humberstone property. The evidence of Duggan is to the effect that the conversation, at which were present himself, Rickard and Little, was substantially as follows:—

Rickard said that in view of the insufficient quantity of coal on the leased land the company could not go on under the lease, unless they got more coal; that Rickard suggested getting the Humberstone property; that Little immediately suggested that they should get the Fraser property; that Little then telephoned to Fraser saying that the men who were leasing his land were with him (Little) and it would be a nice time for him (Fraser) to get his land in as well and that it would help to pay his taxes; that Little then said Fraser was ready to talk business. Duggan's evidence is to the same effect.

Little and his wife admit a conversation, evidently the one referred to. They both say that the Fraser property was spoken of, but that it was Mrs. Little who telephoned Fraser and she says that Fraser answered that Rickard was to go up to Fraser's house.

I think that the evidence of Rickard and Duggan as to what took place at this conversation must be accepted as substantially correct and that substantially it amounts to this: that the company having got the lease from Little found, on further investigation, that it would be unprofitable to operate under the lease unless the company could acquire an additional coal lands, the Fraser or Humberstone properties or at least one of them; that this situation was put to Little and that he himself approved of this proposal and himself got the company's officers in touch with Fraser.

Little's coal area is, as stated in the lease, 26 acres; that of Fraser about 12 acres; that of Humberstone about 4 acres.

As a result the company obtained leases from both Humberstone and Fraser. After getting these leases the company commenced operations.

The company started operations by sinking a new shaft on the Little property. There was already on the property an old shaft which it was considered by the company to be inadvisable to work, and this was acquiesced in by Little. This old shaft had been put down by the Ritchie Company some 5 or 6 years before and that company had abandoned the work. The new shaft was commenced on July 4, 1918, and I think it must be

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found as a fact on the evidence that the conversation above referred to regarding the Humberstone and Fraser properties took place some time in May, that is before the commencement of the sinking of the new shaft.

Coming to the construction of the lease, it will be observed that Little is recited to be the registered owner of "the coal and surface rights" of his 26 acre piece. This it seems to me suggests and indicates a parity of title between the coal rights and the surface rights, and when, after this recital, the thing leased is stated to be "all the said coal" I think the proper construction is that the character of the title to the coal was of a like character to that which would have been given upon a lease of the surface; namely, a lease of the property—the stratum or strata—in which the coal was imbedded, and not merely an easement to take the coal.

This distinction is important and was made much of in the argument, because one of the important questions arising in the case is this: The defendant company made a shaft on the Little property and after commencing to take out coal therefrom made a tunnel into the Fraser and Humberstone properties and as part of their ordinary operations were conveying coal, not only from the Little property but also from these two other properties through the tunnel and up the shaft on the Little property. And I think the question whether the defendant company was entitled to do this depends upon the previous question whether the company acquired under the Little lease property in the strata below the surface in which the coal was contained or on the other hand the company acquired merely a privilege, servitude or easement, that is, merely the right to take away the coal.

Before discussing the decisions upon this question it is advisable to construe a further portion of the lease, namely, the words: "Together with such portion of the surface rights as may be necessarily interfered with in the working of the mine."

These words, it may be observed, are preceded by the words "together with the right to work the same." The presumption is that the words in question are not mere surplusage but are intended to have some further effect. The intention is expressed to lease a "certain portion of the surface rights" and what follows is not the expression of the purpose for which the lease is made but of the quantity of land leased; and in my opinion, therefore, the effect of the lease is a lease of, and not a mere grant of servitude over, so much of the surface as comes within the description.

Taking the plans Exs. 2, 3 and 8 and applying the evidence

to them we find that surrounding the shaft there is a parcel of land fenced around containing about one acre (Little 23, 24). On this acre are the shaft, the tipple and the mine buildings, and it is this acre only which the company has made any use of. On the west is Government Ave. or 92nd St., a main highway, but the fenced-off acre is reached by a lane about 200 ft. in length from Government Ave. On the north is a garden—"Chinaman's garden," divided from the acre by shale and a fence. On the south east and west are for the most part fences, besides other indications of boundaries by lanes and buildings. These fences appear to have been put up before or immediately after the commencement of the company's operations under the lease. Rickard says that the fence on the east was an old fence, there before the company started work; that on the south side Little put up a fence in 1921 or 1920, and before that there was no fence "except as those tenants who have their houses and were squatted on Mr. Little's land built a little garden fence there"—these houses facing on the street—Water Street and the back of them being toward the mine property—most of them had fenced off the rear end of the pieces of land they occupied.

Rickard says: (45) "That acre is necessary for the working of the Little mines." (45) Little says: "That acre is needed for the mine, yes." (31) The clear inference from all the evidence is that "such portion of the surface rights as may be necessarily interfered with on the working of the mine" was quite definitely fixed by Little and the company concurring upon the delineation of the acre, that is by actual agreement and by possession in accordance therewith. Thereby the generality and indefiniteness of the description was reduced to a certainty.

In *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256, Warrington, J., discussed the cases bearing on the distinction between a grant which was effective as a grant of mineral strata and a grant of a mere right to take the mineral. I think he makes the distinction quite clear. These decisions dealt with cases of grants, exceptions and reservations, but clearly the distinction depends, not on any such ground but solely on the ground that what was granted, excepted or reserved was or was not in such terms as to constitute on the one hand the grant of a stratum or on the other the grant of a mere right.

The decisions are also discussed in 17 Camp. Rul. Cas., *sub-tit.* Mines and Minerals, sec. 1, Mineral Property. The proposition derived from the cases so far as the point now under consideration is concerned is thus stated (see Rule to Cases No. 5 and No. 6, 17 Camp. Rul. Cas. p. 452):

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"Where the owner of the freehold of inheritance grants the mines (opened as well as unopened) under his land to one, and the land excepting the mines to another, the effect is to carve out the land in superimposed layers; the grantee has the property and exclusive right of possession in the whole space occupied by the layer containing the minerals; and, after the minerals are taken out, is entitled to the entire and exclusive use of that space for all purposes." (See *Eardley* v. *Granville* (1876), 3 Ch. D. 826.)

The right which the company claims of working the Fraser and Humberstone mines from the Little mine is what is known as the right of "outstroke," a term well understood in relation to the law of mines and minerals. See e.g. 20 Hals. p. 558, sec. 1415.

The question of the right to exercise this right depends on the distinction already emphasised. If the lessee owns the property in the stratum containing the coal, this right of outstroke exists in the tenant, so far as regards the stratum both before and after it has been worked. Similarly with regard to the surface, the right to carry over it "foreign" minerals depends upon the rights of the lessee in the surface. If it is a mere easement to carry away the minerals mined upon the leased property, that right would not convey with it the right to transport over it foreign minerals. But if I am right in the interpretation and effect of the lease of the surface in this case, then the lessees had and have the right to transport the coal taken by outstroke from the Fraser and Humberstone property. In my opinion they have that right.

See generally 27 Cyc. *tit.* Mines & Minerals pp. 681, 687-689, 698-9. Lindley on Mines 3rd ed., vol. 1, secs. 9, vol. 3, secs. 812, 813. 17 Campbells Ruling Cases, MacSwinney on Mines, Quarries & Minerals, 4th ed. p. 239.

There is an additional aspect of this question raised upon the evidence namely that the lease from Little to the company was actually executed before the plan of the workings—the making of such plans being obligatory by law—was found; that when it was found, the company realised that the Little property could not be profitably worked alone; that the company was so dissatisfied as practically to threaten to throw up the lease—probably making some claim that Little had misled them; that consequently a dispute or a difference arose sufficient to form the consideration for a further agreement; that in the result an agreement was made authorising the company to acquire the two adjacent properties with the clear implication, though den-

ied by Little, that these latter should be worked in conjunction with the Little property. I think this is established by the evidence.

For the reasons indicated I am of opinion that the plaintiff was not entitled to the injunction granted at the trial whereby the company was perpetually enjoined from carrying coal raised or procured from mines beyond the limits of the plaintiff's property, through or over the 26 acres.

There remains the question of damages in respect of the coal which the plaintiff was entitled to under the term of the lease, reading: "But I am to have the right to take delivery of two tons of pea slack per day for each and every day during which the mine is in operation."

There was a claim raised at the trial for the rectification of this clause, on the ground that the words should be "pea coal" and not "pea slack coal" but this claim is expressly abandoned by the plaintiff's factum on this appeal.

The question of damages depends on the question whether the plaintiff, in order to be entitled to the two tons a day, was bound to demand delivery of it. What the plaintiff's counsel says about this claim is this, as they put it in their factum: The mine was in operation 838 days entitling the plaintiff to 1676 tons. Of this he received 930 tons, leaving him still entitled to 746 tons. According to the plaintiff the reason why he did not go each day to get his two tons was because of the dispute between himself and the defendants as to whether he was entitled to pea coal or pea slack and that he let the matter stand for a considerable time while endeavoring to get a Board of Arbitration to settle this question. These 746 tons have been sold by the defendants at prices varying from $2.25 to $3 a ton and the defendants refused to pay any of this amount to the plaintiff saying that unless he called for his coal each day he forfeited his right to it. Plaintiff's counsel submits that this is not the law and that as the defendants have been caused no inconvenience by the plaintiff's failure to take out the coal each day the plaintiff is entitled to a similar amount of coal or to payment for the value thereof.

Counsel for the company put it in their factum thus: "The plaintiff reserved this right to take slack for the purpose of burning brick. For over a year he did not exercise this right. He subsequently removed more than two tons per day. The defendants never refused to deliver whatever coal he required except that at first he had to be content with other coal on two or three occasions because the pea slack was not available. The plaintiff admits he was never refused coal. Plaintiff's evid-

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ence:—"Q. What I am coming at is this. On your examination I asked you this question, 'Were you ever refused delivery of pea slack coal'? and you said 'No.' Is that correct? A. No. Q. That is not correct? A. Yes that is correct."

So does his son.

"Q. Never mind what was charged up to you, I am just asking a plain question. Have you ever taken your wagon for a load of coal and come back empty? A. No. Q. You never did? A. No. Q. They were always willing to give you coal but they claimed that you would be owing them for what you took in excess of two tons? A. Yes."

The lease entitles the plaintiff to take delivery of this coal. He has always exercised this right and has never been refused coal. Until this right is infringed the plaintiff's claim is premature. If and when the plaintiff is refused coal or sued for slack delivered in excess of two tons per day, the question of interpretation will arise.

It seems to me that the proper meaning of the clause is that Little, the lessor, must exercise his "right to take delivery" of the two tons of coal each day and that if he omits to do so, he cannot make up the quantity on subsequent days. I agree however with the observations of my brother Stuart in relation to this.

As to the past it seems that the accounts are practically square and that our decision will be applicable only to the future.

In the result therefore I would allow the appeal with costs. There are practically no additional costs owing to the notice of cross-appeal, and I therefore would give none.

HYNDMAN, J.A.:—I concur in the result arrived at by Beck, J.A.

I merely wish to add that it is with some regret I feel compelled to do so as I think had Little taken the precaution to call in his solicitor a very different agreement would have been drafted safeguarding his rights and interests, including some of the items of which he now complains.

Though the present agreement was drafted by the lessee's representative and signed by Little during a temporary illness, no allegation of fraud is set up and rectification is not asked for.

The case therefore must be decided on the terms of the document as it stands. That being so, in my humble opinion, there can be no other result than that arrived at by my brother Beck.

Appeal allowed.

THE KING v. PARIS.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Barry and Grimmer, JJ. March 3, 1922.

NEW TRIAL (§II—5)—FELONY—RIGHT OF ACCUSED TO BE PRESENT DURING WHOLE OF TRIAL—CR. CODE, R.S.C. 1906, SECS. 943, 1014, 1015.

A prisoner on trial for murder has the right to be present during the whole of his trial, and where after the jury has retired the trial Judge directs that the accused be taken back to jail, and then in his absence directs the jury to be brought into Court and gives them other instructions than those given in the presence of the accused, the accused is entitled to a new trial, whether such instructions have affected his substantial rights or not.

[*The King* v. *McDougall* (1904), 8 Can. Cr. Cas. 234, 8 O.L.R. 30, followed. See Annotation 1 D.L.R. 103.]

MOTION under sec. 1015 of the Cr. Code from the refusal of the trial Judge to state a case on an application under sec. 1014 of the Cr. Code, on a conviction for murder. Conviction quashed; a new trial ordered.

G. H. Vernon, K.C., for motion.

J. P. Bryne, Attorney-General, contra.

HAZEN, C.J.:—John Paris was tried and found guilty of murder at a recent sitting of the King's Bench Division at the city of Saint John presided over by Chandler, J. and was sentenced to death. Some weeks after the trial, application was made to Chandler, J. by counsel acting for Paris for a reserved case under the provisions of sec. 1014 of the Cr. Code. The Judge refused to state a case, and it appears from the report, which was subsequently submitted to this Court by him, that he had doubt as to his jurisdiction to do so. The prisoner's counsel thereupon, under the provisions of sec. 1015 of the Cr. Code, moved this Court at a recent day in this term for leave to apply, and the Court, being of the opinion that Chandler, J. had not been ousted of jurisdiction because his Court had adjourned, granted that leave on two grounds, as follows:—

(1). Was the trial Judge in error in recalling the jury for further instructions, after the jury had retired to their room to consider their verdict, and then further instructing and recharging them when the accused Paris was not present in Court or represented there by counsel? And the second point has reference to the instructions of the Judge to the jury upon the accused's defence of an alibi.

The facts of the case as they appear before the Court, and as they appear on the record, are that on the afternoon on which the Judge charged the jury, the jury retired to their jury-room at 5.45 p.m., and it is stated in Court that the jury asked the permission of the Judge to have their supper before enter-

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ing upon their deliberations, and that permission was granted to them. The Judge then, or immediately afterwards, remanded Paris to jail, and he was taken back to the jail from the court house. At 7.50 p.m. the jury was recalled by Chandler, J. to the court room for further instructions. There is no question at all that when these further instructions, which were of an important character, were given Paris was not present in the court room. In his report Chandler, J., says to the best of his recollection Mr. Vernon was present, but Mr. Vernon has filed an affidavit in this Court, in which he distinctly states he was not present during the time that Chandler, J., was recharging the jury, though he was present subsequently when the jury came into the court room again, at their own request, and asked that some further portions of the evidence might be read to them. He was present then. Paris was not present on either occasion.

Chandler, J., in the report which he made first to this Court, and which he asks should be read in connection with the stated case, had this to say with regard to the matter:—

"In the first place I may say that when the jury retired to consider their verdict at about 6 o'clock in the evening of the 2nd day of December last, I directed that the accused, John Paris, should be taken back to the jail in the city of Saint John in which he had been confined previous to the trial. Shortly after 7 o'clock in the evening of the same day, I directed that the jury should be brought into Court, in order to give them some instructions which I deemed it necessary and advisable to give them, and I did instruct the jury in the manner set out in the record in this case. Before directing the jury to be brought in, I asked one of the officers of the Court to communicate with Mr. Vernon, and ask him to be present, and my recollection is that Mr. Vernon was present when I gave the jury these additional instructions." Mr. Vernon stated in his affidavit he was not present at that time. After expressing some doubt as to his jurisdiction to act at that time under sec. 1014 of the Cr. Code, R.S.C. 1906, ch. 146, he cites the section and says:—

"As to the first question which I am asked to reserve—I do not think that it was absolutely necessary to have the accused in Court when I gave further instructions to the jury, after they had been sent out to consider their verdict—as I did. I do not think that the presence of the accused, when such instructions were given, was necessary nor do I think that any useful purpose could have been served, so far as the accused was concerned, by bringing him down from the jail to the Court

House to hear these instructions given to the jury."

The Judge then goes on and says:—

"Section 943 of the Cr. Code is as follows:—'Every accused person shall be entitled to be present in Court during the whole of his trial, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable. 2. The Court may permit the accused to be out of Court during the whole or any part of any trial, on such terms as it thinks proper.' It seems to me, that I did permit the accused to be out of Court after the jury retired to consider their verdict, and nothing was said at the time that I gave these additional instructions, by counsel on either side, as to the necessity or desirability of having the accused in Court, nor was his absence from Court referred to in any way. I cannot see that any substantial wrong or miscarriage was occasioned by the omission to have the accused in Court when the jury were brought in for further instructions, even if the presence of the accused at the time was technically necessary."

I may say that the Court cannot for one moment agree with Chandler, J. when he says it seems to him that he permitted the accused to be out of the Court after the jury retired. There was no permission about the matter: permission implies the idea of a request. In this case the prisoner, without any request of his own, without any option himself in the matter at all, was sent back to jail and was prevented from being present at the time that Chandler, J. recharged the jury.

Section 943 in our Cr. Code, which I have just read, is practically a crystallisation of the common law under which a trial cannot take place in the absence of the accused. This principle is reaffirmed by the statute which says that every accused person shall be entitled to be present in Court during the whole of his trial with the two exceptions: first, if he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable; and, second, the Court may permit him to be out of the Court on such terms as it thinks proper. It is not contended for a moment here that Paris misconducted himself so as to interrupt the proceedings, and in the opinion of this Court no permission was granted such as contemplated by the statute.

Many authorites have been cited to the Court on the argument, some of which I will refer to. As to the fact that the prisoner is entitled to be present in Court we have of course the statute itself which I have just read, and there is no doubt whatever that the charge to the jury is as much a portion of

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the trial as the giving of evidence or any other step that is taken. It is laid down in Archbold's Criminal Pleading, Evidence & Practice, 26th ed. p. 173, that no trial for a felony can be had except in the presence of the defendant, and this statement of the law is substantiated by Roscoe and other writers dealing with criminal matters and criminal law. There is a case *The King* v. *McDougall* (1904), 8 O.L.R. 30, 8 Can. Cr. Cas. 234. The judgment is that of Anglin, J., now a Judge of the Supreme Court of Canada. The headnote is, "That unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request and with the permission of the Court, the trial of a person accused of felony cannot proceed in his absence." In the course of his judgment, Anglin, J., 8 Can. Cr. Cas. at p. 238, cites the point taken that the County Court Judge had no jurisdiction to proceed in the absence of the accused as proposed, and says, "This objection is, in my opinion, well taken. Section 660 of the Code is as follows:"—and he then reads that section which is practically the same section in the Act to which I have previously referred, at present sec. 943. "By sec. 535," he says at p. 238, "the former distinction between felonies and misdemeanours is abolished and proceedings in respect of all indictable offences are required to be conducted in the same manner. Section 660 clearly applies to and governs trials for both classes of offence. But if choice had to be made between the procedure formerly applicable to felonies, trials for which, according to the best authorities, could never proceed in the absence of the accused, and that followed in regard to misdemeanours, which, according to some authorities, permitted of the trial being had in the absence of the defendant: Archbold's Criminal Pleading and Evidence, 21st ed., p. 163, but according to others did not even in such cases countenance that course: *Rex* v. *Streek* (1826), 2 Car. & P. 413, I should not hesitate to hold that the former practice governing trials for felonies must now, by virtue of sec. 535, prevail in all cases. Otherwise a man might be tried and convicted of a capital offence when lying unconscious in bed," I may say I concur with that view of Anglin, J's. The other view was strongly urged upon us to-day by the Attorney-General and at the time when the matter was more fully argued about a week ago.

I would also call attention to a number of cases that are reported in the United States reports. One of these cases is peculiarly in point—both are very much so—and they are in line with the judgments in cases in many of the States of the Amer-

ican Union. There is some little difference in the statutes, but it seems to me the same principles should prevail and the reasons given certainly appeal to my judgment. In the case of *Bonner* v. *State of Georgia* (1881), 67 Ga. 510, it is laid down:—

"In a criminal case the prisoner has the right to be present in person throughout the trial. Therefore, for the Judge to recharge the Jury while the prisoner was absent and in confinement, although his Counsel may have been present and kept silent, was error." Jackson, C.J., says:—

"Without scanning this entire record, we are of the opinion that a new trial must be granted, on the ground that the Court erred in recalling the Jury and recharging them at their request, in the absence of the Defendant, who was at the time in custody and confinement; though his Counsel were present, but silent." In that case it will be seen that the jury were recharged at the jury's request, while in the present case they were recalled by Chandler, J. The Chief Justice goes on to add:—"The presence of the prisoner is necessary to his legal trial from the beginning to the end of that trial before the Jury. And such practice was the rule and practice at common law."

In the case of *Roberts* v. *The State* (1887), 111 Ind. 340, it was determined that:—

"In a criminal prosecution, where the offence charged is punishable by death, or by confinement in the State prison or county jail, the defendant must be personally present during the trial, unless he in some way waives the right, and if any substantial part of the trial is had in his absence without his consent, notwithstanding the presence of his counsel, it is such an error as requires a reversal of the judgment on appeal. . . . Instructing the jury is part of the trial, and if the jury, after retirement, are called back into the court-room, and an erroneous instruction withdrawn or corrected by a statement of the Court, in the absence of the defendant, who is charged with a crime of the class above mentioned, it is error." The facts in the case, as stated by Zollars, C.J., at pp. 341-342, were: "After the jury retired and had had the case under consideration for some time, the trial court had them recalled to the court-room and having stated to them that he had given the above instruction, repeating it, instructed them further, as follows: 'I want to say to you, that I guess this is not correct, and you will disregard it. It is a question for the jury to determine the nature of the crime, and the punishment they will inflict therefor!' The foregoing was clearly an instruction. To withdraw a charge given, and instruct the jury that it is not

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the law and should be disregarded by them, is as much an instruction as the giving of the charge in the first place. Here, not only was the instruction withdrawn as not being the law, but the jury were further instructed that it was for them to determine the nature of the crime and the punishment to be inflicted. When the jury retired in the first place, appellant was returned to the county jail. He had no notice that the jury were to be recalled, nor that they were recalled for further instructions, and was not present when they were recalled and the further instruction given. Was the giving of the instruction in his absence such error as requires the reversal of the judgment? The statute provides, Sec. 1786, R.S. 1881, that no person prosecuted for any offence punishable by death or by confinement in the State prison, or county jail, shall be tried unless personally present during the trial. In such cases, the presence of the defendant's counsel does not meet the requirement of the statute. He must be personally present, unless he in some way waives that right. Such is the positive requirement of the statute. No court can dispense with it. If the trial, or any substantial part of it, is had in the absence of the accused without his consent, the statute is violated and his rights invaded. Such an invasion cannot be regarded by the courts as a harmless error. Instructing the jury is clearly a part of the trial. If one instruction may be given in the absence of the accused and without his knowledge, there is no good reason why the whole of the instructions may not be given in his absence and without his knowledge. And if this court, looking to one instruction so given, may say that the giving of it in the absence of the accused did not affect his substantial rights, and was, therefore, a harmless error, there would seem to be no good reason why, looking to all of the instructions in the case, given in the absence of the accused, the giving of them did not affect his substantial rights, and was, therefore, a harmless error. To treat such errors as harmless would be to entirely overthrow the statute."

There are many more cases of a similar character referred to in the Encyclopedias, where cases of this kind are grouped together, but I think it is not necessary to quote any further, and in my opinion and I believe that of my brother Judges, Chandler, J. was in error in charging the jury in the absence of the prisoner and in the absence of the prisoner's counsel. Now, admitting this to be the fact, it is contended by the Attorney-General, and is suggested by Chandler, J. in his report, that no substantial wrong or miscarriage of justice took place in con-

sequence, and that, therefore, this conviction should be sustained. The section of the Cr. Code referring to this is 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: Provided that if the court of appeal, is of the opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted."

And it is contended by the Attorney-General, having regard to all the evidence in the case, which he contends the Court should examine and consider, that no substantial wrong was done because the prisoner was not present when the jury was charged by Chandler, J., and that the provisions of sec. 1019 should prevail, and the appeal should be dismissed.

This was clearly a case where something not according to law was done at the trial. The prisoner has the absolutely and undoubted right to be present during the whole of that trial: he was deprived of that right, and I find it very difficult, in fact impossible, to come to the conclusion, where he was deprived of an absolute right given to him by the law of the land, a right which has existed for generations, that it could be said that no substantial wrong was done him by the denial of that right. To my mind, the position is different from that in which some question might have been improperly asked which in the opinion of the Court did not affect the trial at all, or in which some charge might be made by the Judge which in the opinion of the Appeal Court did not in any way affect the trial or cause any substantial wrong or injustice to be done. If the prisoner could be excluded from the court room when the Judge was charging the jury, he could with equal right be excluded from the court room when the witnesses were giving their evidence, and thus not have the opportunity of instructing his counsel with regard to the cross-examination of these witnesses. I can see no difference in principle, and I cannot bring my mind to the conclusion that no substantial wrong or miscarriage might have been done by the Judge charging the jury in the accused's absence. Neither he nor his counsel were present, and however correct the charge of the Judge might have been in point of law, yet the prisoner had no opportunity whatever of challenging the Judge's charge, of calling his attention to what he had

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said and asking him to modify it in any way, or to charge the jury in some other respect, and that being the case, as I have said, I do not see how it can be said that no substantial wrong or miscarriage of justice might have occurred as a result of charging the jury in the absence of the prisoner and of his counsel.

I would refer to the case of *The King* v. *Allen* (1913), 14 D.L.R. 825, 22 Can. Cr. Cas. 124, 41 N.B.R. 516, and that of *Allen* v. *The King* (1911), 44 Can. S.C.R. 331, the headnote of which is as follows:—

"By sec. 1019 of the Cr. Code it is provided that 'no conviction shall be set aside or 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, ... unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.' *Held*, reversing the judgment appealed from ((1911), 16 B.C.R. 9), Davies and Idington, JJ., dissenting, that where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did, in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the Court of Appeal may order a new trial."

In giving judgment, Fitzpatrick, C.J., said this at p. 334:—

"The only question as to which a doubt existed in my mind at the argument, was whether the improper admission of this evidence was an irregularity so trivial that no substantial wrong or miscarriage was thereby occasioned, there being other sufficient evidence of guilt. The majority in the Court below thought that the irregularity was trivial, that no harm was done the prisoner and that by reason of the provisions of sec. 1019 of the Canada Criminal Code the appeal should be dismissed . . . . My difficulty is to say to what extent the jury, or any one of them may have been influenced by the questions put to the prisoner on cross-examination by the Crown prosecutor. There are many reported cases in which convictions have been quashed on the ground that illegal evidence was admitted—often reluctantly in view of the clear guilt of the accused. The law on this express point was laid down quite recently in England by the Court of Criminal Appeal in *Rex* v. *Fisher*, [1910] 1 K.B. 149, 26 Times L.R. 122." And then he discusses certain questions and proceeds 44 Can. S.C.R. at pp. 336-337: "The

underlying principle of both is that, while the Court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no substantial wrong or to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here—the existence of previous threats—and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that in our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached?" And I would say in this case, can we say the mistake, in charging the Jury without the Prisoner or his Counsel being present, without their having an opportunity of asking this Judge to modify or change his charge in any respect, did not influence the Jury in the conclusion which they reached? In the same case, Anglin, J., referring to the previous sec. 1019 of the code, said at p. 361: "But it is said on behalf of the Crown that under sec. 1019 of the Cr. Code the conviction should not be set aside unless the court is satisfied the jury *must* have been influenced in reaching their verdict by the matter improperly put before them. There being other evidence sufficient to support the conviction, it is manifestly impossible to say that the jury *must* have acted upon, or were in fact influenced by, the matter which now forms the subject of the appellant's objection. On the other hand, it is equally impossible to say that the minds of the jury *may* not have been, or were not in fact, affected prejudicially to the appellant by matter so pertinent to the main issue before them—impossible indeed to say that it may not have been this matter which with some juryman turned the scale against the defendant."

Several other cases were cited to us this morning from the Court of Criminal Appeal. In the case of *Rex* v. *Willmont* (1914), 10 Cr. App. R. 173 at p. 175, 30 Times L.R. 499:—"The trial must take place in public, and the accused is entitled to the assistance of his counsel in all its proceedings, and to hear any directions or advice given to the jury. The whole direction must be by the judge in the full light of publicity." And this case, decided in 1914, the judgment being that of the

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Chief Justice of England, that the trial must take place in public and the accused is entitled to the assistance of his counsel in all its proceedings, and to hear any directions or advice given to the jury, is to my mind very much in point in the present case.

For these reasons, in my opinion, on the first ground that is reserved, the appeal should succeed and a new trial should be granted. I make no reference to the second point deeming it unnecessary to do so in view of the conclusion I have arrived at in regard to the first.

BARRY, J.:—With what Hazen, C.J., has just said I entirely concur. The principle that a man cannot be tried for a felony behind his back or in his absence, was a principle recognised by the common law long before it was embodied in the provision now found in sec. 943 of the Cr. Code. The principle seems always to have been regarded as fundamental. The right of being present during the whole of his trial being a right now accorded to accused persons being tried for felony upon indictment, by the express language of the statute, no further authority is required to support it. *The King* v. *McDougall*, 8 Can. Cr. Cas. 234, 8 O.L.R. 30. It follows that if the accused is absent during any part of the Judge's charge to the jury, which is a most important part of the proceedings, there is a plain contravention of this wise and salutory rule, and the accused is deprived of a real right, a right accorded to him both by the common law and by statute.

By express constitutional or statutory provision in many of the United States, and at common law in the absence of a statute, it is essential to a valid trial and conviction on a charge of felony that defendant shall be personally present, not only when he is arraigned, but at every subsequent stage of the trial, unless he may and does waive his right to be present. According to this rule, it is said that the defendant should be present during the argument of counsel; when the case is finally submitted to the jury; when the Court charges the jury and (as in the circumstances of the present case) when they are recharged or given additional instructions after retirement; and when sentence is pronounced. For the penultimate proposition there are cited 27 reported judicial decisions, from 16 different States of the Union; 16 Corp. Jur. p. 815, note (41) to para. 2067; two of which, *Roberts* v. *The State*, 111 Ind. 340, and *Bonner* v. *State of Georgia*, 67 Ga. 510, were cited by counsel for the accused and are referred to by the Chief Justice in his judgment.

As to the first ground urged on the appeal, I cannot bring myself to think that there was not, by the absence of the accused during a part of the Judge's charge to the jury, some substantial wrong or miscarriage thereby occasioned on the trial. The conviction having, therefore, to be quashed upon that ground, it may not be necessary to say anything in regard to the other. But inasmuch as the question has been squarely raised by the reserved case and is one that is likely often to arise in the future, as it has arisen in the past, it is important to the administration of the criminal law that some consideration should be given to it and some conclusion reached in regard to it. After having given the Judge's charge a careful consideration and examined the authorities cited at the Bar as well as some that were not cited, I have come to the conclusion that the charge falls short of what appears to be the requirements of such a charge.

Upon the question of reasonable doubt, the Judge charged the jury:—

"I want to tell you this; it is your duty as jurymen sitting here to give the accused the benefit of any reasonable doubt that exists in your mind as to his being the man who killed this little girl. That is not merely a fancied doubt or one conjured up, or for which you cannot give a reason. If you really entertain any reasonable doubt as to the guilt of this man, you will find him not guilty; it is your duty to do that if you do entertain that reasonable doubt, a doubt which reasonable men are justified in entertaining, not merely a doubt which you conjure up for the purpose of avoiding responsibility in this case, because you are sworn to try this case according to the evidence. But after hearing that evidence and in the exercise of your best judgment, you arrive at the conclusion, a reasonable conclusion, that you doubt as to whether this man committed this act or not, then under these circumstances it will be your duty to acquit the accused, because the law throws this protection around any accused person and says the Crown must make out the guilt of the accused beyond any reasonable doubt."

That is all the trial Judge said upon this question. And, although with a great deal of care and accuracy he went through and analysed the evidence adduced by the accused in support of his defence of *alibi*, he said nothing in regard to the law applicable to the subject, and gave them no instructions as to what their course should be in case they entertained any doubt as to the sufficiency of the proof adduced in support of

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this defence, excepting of course what he saw upon the questions of reasonable doubt generally.

As a charge upon the question of reasonable doubt generally, that is, as applicable to the whole defence, this direction is not objected to by counsel for the defence. But in the second ground reserved for the opinion of this Court (points (a) and (b) which may, conveniently, be discussed and considered as one) counsel does object to the absence of specific instructions in regard to the defence of *alibi* and to the failure of the trial Judge to give precise and explicit instructions to the jury upon the question of that particular defence.

The law of England has ever been tender of the right of accused persons when being tried upon indictment, and in reading the present day decisions of the Courts of that country, and of the Canadian Courts too, for that matter, one cannot fail to be struck with what appears to be a growing tendency to extend rather than restrict the protection thrown around those accused of crime. When it is remembered that an *alibi*, if established, is a perfect defence, and that non-direction may, in some instances, amount to mis-direction, the importance of stating to the jury the law upon the subject, and directing them as to what their course should be upon the question of reasonable doubt, becomes apparent.

The defence of *alibi* must be left expressly to the jury; it is not for the Judge to say that it is broken down. In *Rex* v. *Emilio Rufino* (1911), 7 Cr. App. R. 47, the accused was charged with and convicted of the theft of a pair of field-glasses from a shop. The real defence set up was an *alibi*. Delivering the judgment of the Criminal Court of Appeal, Bankes, J. said at p. 49:—

"That was a question for the jury. But the learned Judge expressed himself very forcibly, saying, 'here is a man who has set up an *alibi* which is no *alibi* from any possible point of view.' We feel that having regard to this direction and to the missing link in the chain of evidence, the Court cannot allow this conviction to stand."

A jury is not entitled to disregard strong evidence of an *alibi*, except on stronger evidence. *Re Chadwick, Matthews and Johnson* (1917), 12 Cr. App. R. 247; *Rex* v. *William Murphy* (1921), 15 Cr. App. R. 181. It is said also that it is not sufficient to direct the jury on the law of a case; they are entitled to the Judge's assistance on the facts; and where the defence is an *alibi* the jury should be directed that they cannot convict unless they definitely reject it. *Rex v. Thomas Finch* (1916),

12 Cr. App. R. 77. In that case, Avory, J., said at p. 79:—"There was a strong case of *alibi* made out by the defence, but the Assistant-Recorder in his summing up did not tell the jury that they must be satisfied that this defence was unsound before they convicted the appellant. The jury should have been told that if they should find that in one or more of the instances where the appellant was alleged to have committed offences, the defence had proved this to be impossible, there would be sufficient ground for their acquitting the appellant upon the whole indictment."

If this be a correct statement of the course to be followed by a trial Judge in charging the jury upon a defence of *alibi* then it is fairly obvious, I think, that in the present case the charge fell short of the legal requirements, for the trial Judge charged the jury in none of these ways nor indeed in any way approaching them. Had it not been for these later decisions I should have felt disposed to agree with the argument of the Attorney-General this morning, and to conclude that the general remarks of the trial Judge upon the question of reasonable doubt would apply to the defence of *alibi* as well as to the other questions at issue on the trial but after reading the thoughts to which I have referred I do not feel at liberty to do so.

I agree that there must be a new trial. Conviction set aside.

GRIMMER, J.:—I agree with the conclusion reached by the other members of this Court, as to the first ground reserved in this case.

I was strongly inclined to think the difficulty with which we were met could be removed or overcome by the provisions of sec. 1019 of the Cr. Code, but upon an examination of the authorities, so far as I have been able to consider them, and in fact upon a more careful examination of the section of the Code referred to, I am reluctantly forced to the conclusion, it does not avail or furnish the necessary assistance to relieve the situation, and there must be a new trial.

I am also very strongly of the same opinion in respect to the *alibi*, as outlined by my brother Barry.

In my opinion, as I understand the law, the trial Judge should have directed the jury in the first instance that they must accept or reject the alleged *alibi*. In case they accept the same it of course follows the accused would be discharged, but if it was rejected, they would then proceed to the consideration of the evidence and form their conclusion as to the guilt or innocence of the prisoner.

I therefore agree there must be a new trial.

Conviction set aside; new trial ordered.

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REX. v. HEIGHTON (1).

Nova Scotia Supreme Court, Harris, C.J., Russell, Chisholm, Mellish and Rogers, JJ. May 4, 1922.

ALIENS (§III—21)—NOVA SCOTIA TEMPERANCE ACT 1918 (N.S.), CH. 8—INSPECTOR UNDER—ELIGIBILITY OF ALIEN—NATURALIZATION ACT 1920 (CAN.), CH. 59—CONSTRUCTION.

One who has by naturalization become a citizen of the United States cannot while thus the citizen of a foreign country be appointed an inspector under the provisions of the Nova Scotia Temperance Act 1918 (N.S.), ch. 8, sec. 22.

MOTION for an information in the nature of a *quo warranto* to determine the eligibility of defendant, a naturalised citizen of the United States of America to hold the office of Inspector for the town of Pictou under the provisions of the N.S. Temperance Act, 1918 (N.S.) ch. 8. Motion granted.

J. J. Power, K.C., for the relator.

J. M. Stewart, K.C., and *H. P. McKeen*, for defendant.

HARRIS, C.J.:—An application has been made to the Court for an information in the nature of a *quo warranto* calling upon David Heighton to shew by what authority he claims to exercise the office of inspector for the Town of Pictou under the provisions of Part 1 of the N.S. Temperance Act 1918 (N.S.) ch. 8.

David Heighton was born in Nova Scotia and was a British subject: subsequently, he went to live in the United States and there became naturalised, whereby, it is contended that he is to be deemed to have ceased to be a British subject (See 1919 (Can.) ch. 38, sec. 14) and an alien.

The ground upon which the application is based is that Heighton being an alien is incapable of being appointed to any office of trust.

It is contended that he is so disqualified (a) At common law. (b) By virtue of the Act of Settlement, 12-13 Wm. III 1700, ch. 2, sec. 3.

It is perhaps more convenient to deal first with the question as to the Act of Settlement. It has to be borne in mind that at common law, birth within the realm, and not descent from English ancestors, was the test of nationality.

Piggott on Nationality, vol. 1, 1907 ed., p. 41, says:—

"Every person born within the realm was a British subject and every person beyond the realm was an alien."

There were, it is true, certain exceptions to this rule, such as the children of the King, the children of Ambassadors, or of the King's soldiers or persons born under the flag, as on a British ship, but we do not need to concern ourselves with the exceptions, but only with the general rule.

If we have in mind the general rule, the wording of 1700 (Imp.) ch. 2, sec. 3 is the more easily understood. It provides as follows:—

"3. No person born out of the Kingdoms of England, Scotland, or Ireland, or the Dominions thereunto belonging (although he be naturalised or made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust either civil or military."

The statute does not, I think, apply to the present case because Mr. Heighton was born in Nova Scotia, *and* the statute is by the very words restricted to persons born out of the Kingdoms or the Dominions.

That statute is, I think, a recognition of the common law, and it provides that even if a person born out of the Kingdom is naturalised or made denizen, still he shall not be capable to be of the privy council or a member of either House of Parliament or to enjoy any office or place of trust *unless he was born of English parents.*

Before the Act of Settlement there had been Naturalisation Acts and doubts arose as to the construction of sec. 3 of the Act of Settlement, and by statute 1 Geo. 1, 1714 (Imp.), ch. 4. after reciting these doubts, it was enacted:—

"That it was not the intent and meaning of the said Act, that the said clause, or any thing therein contained, should extend, nor shall the said clause be construed, adjudged, or taken to extend to disable or incapacitate any person, who at or before his Majesty's accession to the Crown was naturalised, to be of the Privy Council, or a member of either House of Parliament, or to take or enjoy any office or place of trust, either civil or military, or to take or have any grant of lands, tenements, or hereditaments from the Crown, to himself, or any other in trust for him.

2. And for the better preserving the said recited clause in the said Act of the twelfth year of the late King William the Third, entire and inviolable: Be it further enacted by the authority aforesaid, that no person shall hereafter be naturalised, unless in the bill exhibited for that purpose there be a clause or particular words inserted to declare, that such person shall not thereby be enabled to be of the Privy Council, or a member of either House of Parliament, or to take any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown, to himself, or any other person in trust for him; and that no bill of naturalisation shall hereafter be received in either House

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of Parliament, unless such clause or words be first inserted or contained therein."

In dealing with the question as to whether or not an alien is disqualified at common law from holding an office of trust it is to be observed that there seems to be a dearth of authority which is probably to be accounted for by the fact that the subject-matter was dealt with in England in 1700 (Imp.) ch. 2, and the reports of cases decided previous to that are very limited in number. In Taswell-Langmead, English Constitutional History, 6th ed. p. 523, note 3, it is stated: "By the Common Law aliens were incapacitated from holding land or any public office and even from exercising any civil rights."

In *Calvin's* case (1608), 7 Co. Rep. 1a at p. 18b, 77 E.R. 377, in speaking of the reasons why an alien is not capable of holding lands, the Judges are reported as having said:—

"It followeth next in course to set down the reasons, wherefore an alien born is not capable of inheritance within England, and that he is not for three reasons. 1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm (the sinews of war, and ornament of peace) should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. Which three reasons do appear in the statute of 2 H. 5. cap. and 4 H. 5 cap ultimo. But it may be demanded, wherein doth that destruction consist; whereunto it is answered: first, it tends to destruction *tempore belli*; for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth, as was excellently shadowed by the Trojan horse in Virgil's Second Book of his Æneid, where a very few men in the heart of the city did more mischief in a few hours, than ten thousand men without the walls in ten years. Secondly, *tempore pacis*, for so might many aliens born get a great part of the inheritance and freehold of the realm, whereof there should follow a failure of justice (the supporter of the commonwealth) for that aliens born cannot be returned of juries for the trial of issues between the King and the subject, or between subject and subject."

The most, if not all of these reasons apply with equal force against an alien being allowed to hold any office of trust. The case is a most elaborate exposition of the law regarding aliens and as the Reporter says, it was heard or "argued" by all the Judges of England.

It is most significant that in many of the statutes such as that of 1714 (Imp.), ch. 4, already referred to, we find the power to hold offices or places of trust and the power to hold lands

dealt with as if they were both things equally denied to aliens.

In the *State of Iowa* v. *Van Beek* (1893), 19 L.R.A. 622 at p. 625 the Court adopted what had been laid down in *State ex rel Off* v. *Smith* (1861), 14 Wis. 539 at p. 542:—

497.):—

"As to all such governments it is an acknowledged principle which lies at the very foundation, and the enforcement of which needs neither aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered, and its powers and functions exercised, only by them, and through their agents."

In 2 Stephens Commentories on the Laws of England 14th ed., at p. 440 the author in speaking of the effect of the Naturalisation Act of 1870 (Imp.), ch. 14, after pointing out its provisions with regard to the holding of real estate by an alien says:—

"This provision is not retrospective *nor does it qualify an alien* for any office or for any municipal, parliamentary or other franchise."

In 1 Hals. *sub. tit.* Rights and Duties of Aliens at p. 308, sec. 679, it is said that:—

"Aliens are incapable of being members of the Privy Council or of either House of Parliament or of enjoying any office or place of trust."

The author, however, cites as authority the case of *Rex* v. *De Mierre* (1771), 5 Burr. 2787, 98 E.R. 463, in which case the decision of Lord Mansfield appears to be based upon the legislation and not upon the common law.

I think there can be no doubt that at common law an alien could not hold an office of trust.

The case of *Rex* v. *De Mierre, supra*, shews that the rule applies to constables and by sec. 28 of Temperance Act, 1918 (N.S.), ch. 8.

"Every inspector shall have all the authority conferred by any statute of this Province on constables, special constables, police officers, or other peace officers etc."

The powers conferred upon inspectors under that Act are important, including the enforcing and carrying out of the provisions of the Act, the right to visit chemists, druggists, physicians and vendors and examine certificates, prescriptions and registers, and there is every reason I think for saying that such powers should not be exercised except by British subjects, which Heighton ceased to be on becoming naturalised in a foreign country (1919 (Can.), ch. 38, sec. 14).

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I think the application should be granted.

RUSSELL, J.:—In the case of *Rex* v. *De Mierre*, 5 Burr. 2787, 98 E.R. 463, it was held by the Court of King's Bench that the office of constable was an "office of trust" within the meaning of the Act of Settlement 1700 (Imp.), ch. 2, and of the private Act of Naturalisation which governed the decision in that case. The statute of 1714 (Imp.), ch. 4, confirming the constitutional provisions of the Act of Settlement contained a provision that no bill for the naturalisation of any person should be received without a clause disqualifying him from sitting in Parliament or enjoying the prohibited offices or places of trust. The private Act by which the defendant and others were naturalised complied with this provision and the question arose whether the defendant who had been appointed a constable could refuse to serve. It was held that he could do so because he was ineligible for appointment. Lord Mansfield, delivering the judgment of the Court, said that the office of constable was clearly a civil office of trust.

The inspector appointed under the provisions of the Nova Scotia Temperance Act 1918 (N.S.), ch. 8, has under sec. 28 of the Act, all the authority conferred by any statute of the province on constables, special constables, police officers or other peace officers and may execute a summons or warrant issued upon an information laid by himself. If the ordinary constable holds an office of trust it seems to me that an inspector clothed with these very wide and exceptional powers must *a fortiori* come within the definition.

In Taswell-Langmead's Constitutional History of England 6th ed., p. 523, note 3, it is said that by the common law aliens were incapacitated from holding land or any public office and even from exercising any civil rights. The Act of Settlement provided in sec. 3 that, even though naturalised, no person born out of the Kingdom of England, Scotland, Ireland or the dominions thereunto belonging, unless born of English parents, should be capable of enjoying any office or place of trust, either civil or military.

The first series of the R.S.N.S. 1851, ch. 32, provided for the Naturalisation of Aliens but was silent as to the consequences of naturalisation. I would infer that this was the first statute of this Province on the subject from the fact that, in the long list of statutes repealed because of the revision and consolidation, R.S.N.S. 1851, 1st series at p. 500, ch. 170, sec. 9, there is none that refers to the subject. In the corresponding chapter of the second series there is a section still in the statutes of

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the Province (R.S.N.S. 1900, ch. 136, sec. 1), enacting that aliens may "take, hold, convey and transmit real estate." I know of no other statute of the Province affecting the status or civil rights of an alien.

There is an Act of the year 1798, referred to in Murdoch's Epitome, vol. 1, and adequately summarised by the author. So far from conferring any rights or privileges, it provides for imprisonment, fine and banishment of an alien who remains in the Province without a permit from the Governor. This Act, Murdoch says, "is an annual one and has been continued yearly down to this time." The preface to Murdoch's volume is dated 1832. The first revision bears date 1851 and I suppose this statute continued in force or was re-enacted from year to year during the intervening period. It is not mentioned in the repealing clause of the first series. The question why is of antiquarian interest only and has no bearing upon the present inquiry.

The statute 1914 (Can.), ch. 44, repealed by the Naturalisation Act of 1919 (Can.), ch. 38, but revived and amended by 1920 (Can.), ch. 59, enacts that a British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalisation or by any other formal act, becomes naturalised therein, shall thenceforth be deemed to have ceased to be a British subject.

This seems to be the last word on the question. Whether Dominion legislation could affect a question as to the property or civil rights within this province of an alien by birth, or of one who had ceased to be a British subject by virtue of the statute last cited, may be a fine question.

It is not necessary to decide it here, because there is no statute either of the Province or of the Dominion that effects to confer upon one placed in the position of the defendant the capacity to hold such an office. I am, therefore, of opinion that the application for an information in the nature of a *quo warranto* must be granted.

CHISHOLM, J.:—This is an application for an information in the nature of a *quo warranto* to test the right of one David Heighton to exercise the office of inspector for the town of Pictou under the N.S. Temperance Act 1918 (N.S.), ch. 8. His right to exercise the said office is challenged on the ground that he is an alien. Heighton was born in Nova Scotia, and some years ago went to the United States of America where he became naturalised as an American citizen and resided for a time. He now resides in Nova Scotia, but is still an American citizen.

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It may be convenient here to quote the sections of the Act, which contain the principal powers conferred on an inspector:—

"28: Every inspector shall have all the authority conferred by any statute of this Province on constables, special constables, police officers, or other peace officers, and may execute a summons or warrant issued upon an information laid by himself.

29: Every inspector shall have the right to visit chemists, druggists, physicians, and vendors, and their premises, and examine and make copies of their certificates, prescriptions and registers of sales and shall see that the same are properly filed and recorded."

The contention of the applicant is that Heighton is exercising an office or place of trust and is disqualified from so exercising it on account of being an alien. I think the office of inspector under the N.S. Temperance Act is analogous to that of constable of a ward in London, in regard to which, Lord Mansfield, in *Rex* v. *De Mierre*, 5 Burr. at p. 2790, 98 E.R. 463, said:—"The office of constable is clearly a civil office of trust." No statute has been pointed out to us making an alien eligible for such office, nor any authority establishing such qualification at common law. An alien has no political rights, it appears, except those expressly conferred by statutes or other laws of the country. No authority exists for the proposition that an alien has a right to enter British territory: *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272. It is pointed out in Pollock & Maitland's History of English Law, vol. 1, p. 464, that in early days, two and only two great classes of aliens, had, as a matter of fact, to be considered, namely, Frenchmen who were making claims to English lands, and whose claims were not regarded with favour; and merchants, who did not want land or want to settle, and without respect to whom it appears to have been the policy of the nation to relax as much as possible the severity of the law. We find in Magna Charta, art. or sec. 41, the following [See also McKechnie's Magna Charta, 1905 ed. at p. 464.]

"All merchants shall have safety and security in coming into England, and going out of England, and in staying and in travelling through England, as well by land as by water, to buy and sell, without any unjust exactions, according to ancient and right customs, excepting in time of war, and if they be of a country at war against us; and if such are found in our land at the beginning of a war, they shall be apprehended without injury of their bodies and goods until it be known to us, or our Chief Judiciary how the merchants of our country are treated who are found in the country at war against us; and if ours be in safety there, the others shall be in safety in our land."

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With the right to bring his wares into England, the right to sue in respect of them naturally followed. With respect to the right to sue, Lord Sumner in *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262, at p. 291, says: —

"A historical inquiry into the steps by which alien friends were admitted to sue in the King's Courts would be of great interest, though I doubt if all the necessary material is yet available. I assume that there was a time when the goods of the alien friend were at the King's mercy. It seems to have been so at the time of the Great Charter, and even in 1295 by command of the King a sheriff seized all the wool and other merchandise of alien traders and kept them as forfeited to the King's use, and all the remedy asserted was an action for the return of the price, which the aliens had paid to the English subjects, who had sold the wool (Select Cases before the King's Council, Selden Society, 1918, p. 13)."

In *Wells* v. *Williams* (1697), 1 Ld. Raym. 282, 91 E.R. 1086, it was held that an alien enemy commorant in England by license of the King and under his protection may maintain debt upon a bond, though he did not come with safe conduct. The reason is given:—

"The necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens . . . Commerce has taught the world more humanity."

It is stated in 1 Hals. p. 306, that while in the country the alien friend has a temporary and local allegiance to the Crown to the same extent as a British subject which allegiance is founded in the protection he enjoys for his person, his family and effects during the time of his residence.

The development of the law is thus summarized in *Johnstone* v. *Pedlar* by Viscount Cave who says, [1921] 2 A.C. at p. 276:—

"In early times an alien had no rights in public law, and in private law his rights were much restricted. It was laid down by Littleton (s.198) that an alien could bring no action, real or personal, but as regards an alien ami this proposition was disputed by Coke, who said: 'In this case the law doth distinguish between an alien, that is a subject to one that is an enemy to the King, and one that is subject to one that is in league with the King; and true it is that an alien enemie shall maintaine neither reall nor personall action, *donec terræ fuerint communes*, that is, untill both nations be in peace; but an alien that is in league, shall maintain personall actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but

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he cannot maintaine either reall or mixt actions': Co. Litt. 129*b*. Certainly Littleton's rule was not recognised by the law merchant or in Chancery; and before the end of the sixteenth century it was established that at common law an alien friend could own chattels and sue on a contract or in tort in the same manner as a British subject: Dyer 2*b*. No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given: *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272: and having landed, he may be deported, at least if a statute authorises his expulsion: *Att'y-Gen'l for Canada* v. *Cain*, [1906] A.C. 542; and see *In re Henry Adam* (1837), 1 Moo. P.C. 460, 12 E.R. 889. But so long as he remains in this country with the permission of the Sovereign express or implied, he is a subject by local allegiance with a subject's rights and obligations; Hale's Pleas of the Crown vol. i. p. 542: *Calvin's* case (1608), 7 Co. Rep. 1a, at p. 6a, 77 E.R. 377: *De Jager* v. *Att'y-Gen'l of Natal*, [1907] A.C. 326: *Porter* v. *Freudenberg*, *Per* Reading, C.J., [1915] 1 K.B. 857 at p. 869, including the right to sue the King's officer for a legal wrong."

And Lord Atkinson, [1921] 2 A.C. at p. 283, said:—

"By the common law of this country an alien enemy has no rights. He could be seized or imprisoned and could have no advantage from the laws of this country. He could not obtain redress for any wrong done to him in this country; *Sylvester's* case (1702), 7 Mod. Rep. 150, 87 E.R. 1157. The Crown may no doubt grant a licence to an alien enemy to reside in this country, which imports a licence to trade here, but in the absence of such a licence the property of an alien enemy may be seized for the use of the Crown: *The Johanna Emilie* (1854), 1 Spinks Ecc. & Ad. 317, 164 E.R. 183, 2 Eng. Pr. Cas. 252. But while in this country with a licence any alien enemy may bring an action: *Wells* v. *Williams*, 1 Ld. Raym. 282, 91 E.R. 1086; *Janson* v. *Driefontein Mines*, [1902] A.C. 484 at p. 506. A mere non-interference with an alien enemy does not imply a licence to reside and trade. It is necessary for him to shew that he resides in this country with the full knowledge and sanction of the Government: *Boulton* v. *Dobree* (1808), 2 Camp. 163. Aliens, whether friendly or enemy, can be lawfully prevented from entering this country and can be expelled from it: 1 Blackstone, 259; *Att'y-Gen'l for Canada* v. *Cain*, [1906] A.C. 542. And at any time the Crown may revoke its licence expressed or implied to an alien to reside: *The Hoop* (1799), 1 Ch. Rob. 196 at p. 199. In Vattel's Law of Nations, Book 2, p. 173, sec.

108, it is stated that a friendly alien can at any time leave the country, the Government have no right to detain him, except for a time and for very particular reasons, as, for instance, the apprehension in war, lest such foreigners acquainted with the state of the country and of the fortified places should communicate knowledge to the enemy."

Then with respect to public office, in an anonymous case No. 64, in (1469), Jenk. 130, 145 E.R. 91, the general principle is stated that an alien is not capable of an office; but by the common law an alien was capable of a benefice in England for the Church is one throughout the world: but at this day that cannot be without the King's license by the statutes made 25 Edw. III; 10 R. II.

In *Anthony* v. *Seger* (1789), 1 Hag. Con. 9, 161 E.R. 457, it was held that an alien could not be elected a churchwarden, and Sir William Scott, at p. 10 said:—

"An alien born has no right, as has been determined here concerning the claim of an alien naturalised to this office, and so, elsewhere, with respect to the offices of constable or overseer, *as not the smallest portion of authority in this country can be regularly intrusted to an alien.*"

In the *Middlesex Election* case (1804), 2 Peek 1 at p. 118, it was held that an alien could not vote, and it was held in an earlier case, *Monmouth Election* case (1624), Glanv. 120 and in later cases such as the *County of Tipperary Election* (1875), 3 O'M. & H. 19, that an alien could not be a member of Parliament. In the *Monmouth Election* case, it was observed at p. 122:—

"To have a voice or interest in making laws for the kingdom is not committed to foreigners, who cannot but retain a special affection to their proper birthplace and incline to favour the same, in such occasions as may occur concerning their nation; nor is it fit that persons not equally obliged to, or interested in, the state of this kingdom should be admitted to the secret and great council of the same."

There is the same disqualification as to service on juries down to 1870 (Imp.), ch. 77, the Juries Act, when by sec. 8 aliens domiciled in England for 10 years or upwards, if in other respects duly qualified, were made liable to serve on ordinary juries.

In an old case in New York, *Borst* v. *Beecker* (1810), 6 John. (N.Y.) 332, it was decided that aliens though freeholders etc., were not qualified to serve as jurors as they were not "good and lawful men" within the meaning of the statute.

By reason of his being an alien and holding an office of trust,

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I am of opinion that the inspector is not qualified to serve.

The application should be granted.

MELLISH, J.:—The license inspector although appointed by municipal authority under the N.S. Temperance Act, is nevertheless, I think, an officer of the Crown, and he is an *officer* as distinct from a *servant*. His tenure is not during pleasure but for a fixed period and during good conduct. There is much to be said in favour of the view that such an office cannot be held by an alien and I think the order should be granted on the relator's filing the requisite affidavit.

ROGERS, J.:—The question raised by this application is an important one and should receive in the public interests the fullest consideration. The Attorney General's Department appears to have advised that the respondent was not for the reason urged ineligible for the appointment to the office of inspector under the Temperance Act, 1918 (N.S.), ch. 8, and I think that upon the present motion it is sufficient for me to say that the question is a debatable one and that the filing of an information should be allowed in order that the case may go down to trial and the issues be determined in due course by a judgment which will be appealable to the highest court. In *Rex* v. *Carter* (1774), 1 Cowp. 58, 98 E.R. 966, a question was sought to be raised in *quo warranto* proceedings as to whether an infant was capable of being elected a burgess and Lord Mansfield, without expressing an opinion, made the rule *nisi* for leave to file an information absolute in order that the question which was one of doubtful law and a "very considerable question" might "receive a full and final determination." The Court "were clearly of opinion that they ought not to decide so material a question in this summary mode." In *Rex* v. *Godwin* (1780), 1 Doug. (K.B.) 397, 99 E.R. 255, where the point raised was "a new one," a similar practice was followed.

For these reasons, I deliberately refrain, at this stage, from reaching any definite opinion upon so new and so very considerable a question, though I agree that leave to file an information should be granted.

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Nova Scotia Supreme Court, Chisholm, J. August 11, 1922.

ALIENS (§ III—21)—NOVA SCOTIA TEMPERANCE ACT—INSPECTOR UNDER—PUBLIC OFFICE—ELIGIBILITY OF ALIEN—NATURALIZATION ACT, 1920 (CAN.), CH. 59—CONSTRUCTION.

The office of Inspector within the Town of Pictou, Nova Scotia, under the Nova Scotia Temperance Act, 1918 (N.S.), ch. 8, is a public office and an alien and American citizen is disqualified from being appointed to such office under the Naturalization Act. The

matter must be dealt with on the state of facts existing when the proceedings were instituted.
[*Rex* v. *Bathurst* (1903), 5 O.L.R. 573, applied.]

INFORMATION in the nature of a *quo warranto* exhibited against the defendant, calling on him to show by what authority he holds and exercises the office of inspector under the Nova Scotia Temperance Act, in the town of Pictou, in the County of Pictou.

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

J. McG. Stewart, for defendant.

CHISHOLM, J.:—These proceedings have been begun by the filing of an information in the nature of a *quo warranto*. (Simon Lott of Pictou, in the County of Pictou, being the relator), calling on the defendant, David Heighton, to shew by what authority he exercises the office, the same being claimed to be a public office, of inspector within the town of Pictou, under the provisions of the N.S. Temperance Act, 1918 (N.S.), ch. 8.

The defendant in his defence denies that the said office is a public office. He alleges that he was duly appointed to the office by the council of the town of Pictou, and that he exercised the office; but he denies that he did so without legal warrant or had usurped the same.

The Attorney-General in his reply alleges that defendant at the time of his appointment was not a British subject and was an alien and American citizen and, as such, was disqualified from being appointed to said office or of holding the same, at common law, or alternatively under the Naturalization Act, 1914 (Can.), ch. 44, revived and amended by 1920 (Can.), ch. 59, or alternatively both at common law and under the Act of Settlement.

The following admission of facts was made under order granted herein on June 13, 1922:—

"(a). That the defendant David Heighton was born at River John, Province of Nova Scotia, Dominion of Canada, in the Dominions of His Majesty the King of Great Britain and Ireland, in the year 1879, of British parents, and continued to reside in the county of Pictou until in or about the year 1900.

(b). That in or about the year 1900 the defendant, David Heighton, left the Province of Nova Scotia and proceeded to the United States of America, and there on the 3rd day of September, A.D., 1906, in the State of Illinois, in the said United States of America, having renounced all allegiance and fidelity to His said Majesty the King of Great Britain and Ireland, and thereupon in the said State of Illinois before a lawful authority thereupon became a naturalized citizen of the United States of

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America, and was by said authority permitted to take and did take the oath and allegiance to the constitution of the United States of America.

(e). That in or about the year 1915 the defendant returned to Canada and has since continuously resided in British Dominions and pursuant to application made on that behalf became a naturalized British subject on or about the 28th day of April, 1922, pursuant to the terms of the Naturalization Act then in force in the Dominion of Canada.

(d). That the salary provided by and annexed to the office of said inspector by the town council of the Town of Pictou on the defendant's appointment as inspector and to be paid to him by said town was a salary of one hundred dollars per annum, and in addition he was to receive from said town council one-half of all fines collected and to be paid twenty-five dollars for each conviction as a third offence."

When the defendant became a citizen of the United States in 1906, the statute in force in Canada, touching the case, was R.S. C. 1886, ch. 113, sec. 7, of which was as follows:—

"Any British subject who has, at any time before or at any time after the fourth day of July, one thousand eight hundred and eighty-three, when in any foreign state and not under any disability, voluntarily become naturalized in such state, shall from and after the time of his so having become naturalized in such foreign state, be deemed, within Canada, to have ceased to be a British subject, and shall be regarded as an alien."

This section in the next consolidation is sec. 12, R.S.C. 1906, ch. 77, and appears in substance the same in sec. 12 of the statutes of 1914 (Can.), ch. 44. The effect of this, I think, is to have made the defendant, by his naturalization in the United States an alien for all purposes. It was urged that he was not an alien at common law; not an alien under the Act of Settlement. That, however, does not meet the case, in my opinion. By his own act and by our statute he became an alien; and in becoming an alien he became subject to all the disabilities of an alien. If by statute his act makes him an alien, I do not understand that by so becoimng an alien he is subject only to the disabilities created by statute.

On this point, I am not unmindful of the opinions expressed by the majority of the Court *in banco*, although, strictly speaking, I suppose, these opinions may not bind the trial Judge.

Then it is urged that defendant resumed his British nationality on April 28, 1922, and before the information herein was filed, which was May 10. The plaintiff contends that the matter is to be dealt with on the state of facts existing when the proceedings

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were instituted, and relies on *Rex* v. *Bathurst* (1903), 5 O.L.R. 573, where one of the defendants after service of notice on him, disclaimed office. Falconbridge, C.J. K.B., held that the disclaimer was *nihil ad rem*, and added: "The matter is to be dealt with on the state of facts existing when these proceedings were launched."

See *The King* v. *Warlow* (1813), 2 M. & S. 75, 105, E.R. 310.

There will be judgment for the plaintiff.

Order for ouster of defendant.

REX v. MARTIN.

Nova Scotia Supreme Court, Criminal Sittings, Harris, C.J. October 10, 1922.

COSTS (§I—12)—CRIMINAL LIBEL — ACQUITTAL — RIGHTS TO COSTS — CR. CODE R.S.C. 1906, CH. 146, SEC. 1045—N.S. CROWN RULES 28, AND 158—DISCRETION OF TRIAL JUDGE.

Where on a charge of criminal libel the accused enters a plea of "not guilty" only and after trial is acquitted he is entitled under sec. 1045 of the Cr. Code, and Nova Scotia Crown Rule 28 to the costs of the action including the costs of the preliminary examination. The costs will be taxed under Crown Rule 158.

MOTION under sec. 1045 of the Cr. Code and Crown Rule (N.S.) 28 for costs on the acquittal of the defendant on a charge of criminal libel. Motion granted.

The facts of the case are as follows:—

The defendant was indicted by the Grand Jury of the county of Halifax at the March sittings 1922 before Chisholm, J. for that he did at Halifax in the county of Halifax on the 11th day of August, 1921 unlawfully publish without legal justification or excuse a libel likely to injure the reputation of R. H. Wood, by exposing him to hatred, contempt or ridicule or designed to insult the said Wood, of or concerning whom it was published, &c.

The party alleged to be thus libeled was an officer in His Majesty's dockyard at Halifax and the proceedings were instituted in his behalf by an information laid before a Justice by J. P. Blakeney, another officer of the Royal Canadian Mounted Police at Halifax. The trial was postponed to the October Sittings, 1922 at Halifax before Harris, C.J. when the prisoner entered a plea of "not guilty" only and after a trial he was acquitted.

John J. Power, K.C., for the defendant, moved under sec. 1045 Criminal Code and Crown Rule 28 for costs as the defendant had been acquitted on his single plea of "not guilty" and

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including the costs of the preliminary examination and cited Short and Mellor's Crown Office Practice (ed. 1890) p. 245; *Reg.* v. *Latimer* (1850), 15 Q.B. 1077, 118 E.R. 767; *R.* v. *Patteson* (1874), 36 U.C.Q.B. 129; *R.* v. *Fournier* (1916), 28 D.L.R. 379, 25 Can. Cr. Cas. 430, 25 Que. K.B. 556; and *Reg.* v. *Steel* (1876), 1 Q.B.D. 482, 13 Cox C.C. 159.

Andrew Cluney, K.C., *contra.*, submitted that if the Court had any discretion, costs should be refused.

The Chief Justice took time to consider and subsequently orally decided that under the Code sec. 1045 and Crown Rule 28 he had no discretion as the Code and the rule gave the defendant the costs asked for and following the English practice laid down in Short and Mellor (*supra*) he made an order referring the taxation of these costs to C. F. Tremaine, taxing master, at Halifax.

The costs were taxed on notice to the prosecutor at $188.61, this bill being made up of $171.15 allowances to solicitor and counsel under Crown Rules 158, and $17.46 disbursements.

Crown Rule 28, (Nova Scotia) is as follows:—"If on any indictment or information in the Supreme Court by a private prosecutor for the publication of any defamatory libel, judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information, and upon a special plea of justification to such indictment or information if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea."

Crown Rule 158 Nova Scotia is as follows:—"Order LXIII of the Rules of the Supreme Court (costs) and the provisions respecting costs and fees of solicitors and counsel mentioned therein and the provisions in force in Nova Scotia respecting sheriff's fees, shall, as far as applicable, apply to all civil and criminal proceedings on the Crown Side."

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Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. October 7, 1922.

TAXES (§IIIB—116)—LEASE OF MINERAL INTERESTS—RIGHT OF PROVINCE TO TAX FOR SCHOOL PURPOSES—NO APPORTIONMENT BETWEEN TAXES PROPERLY IMPOSED AND THOSE IMPROPERLY IMPOSED—NOTHING TO SHEW SPECIAL INTEREST ASSESSED—INVALIDITY OF WHOLE ASSESSMENT—FAILURE TO APPEAL FROM—RIGHT TO OBJECT TO VALIDITY IN ACTION TO RECOVER.

Under sec. 2 of the School Assessment Ordinance, O.C. 1915 (Alta.) ch. 105, as amended 1917 (Alta.) ch. 43, power is given to the Province to assess interests of different kinds including gas and oil rights, but, in doing so, the formalities and requirements prescribed by O.C. 1915 (Alta.) ch. 105 and amendments must be followed, and the amount of the assessment is a matter exclusively within the jurisdiction of the Court of Revision and the District Court Judge in appeal therefrom, but where the person assessed is seized of an interest in only one of several kinds of minerals, and in addition to being assessed as to this interest is also assessed for other minerals which he does not own and in which he has no interest, and no apportionment is made between the two interests, or where there is nothing whatever in the roll to indicate any special interest or estate in the land as being the subject of assessment, the whole assessment will be set aside as illegal and invalid, and the person so assessed is not precluded from objecting to the validity of the assessment in proceedings before the Appellate Division on appeal from the trial Judge in an action to recover the amount of the taxes and penalties for non-payment, by failure to appeal from the assessment under the procedure laid down in the Ordinance.

[*Smith* v. *Rur. Mun. of Vermilion Hills* (1914), 20 D.L.R. 114, 49 Can. S.C.R. 563; affirmed by Privy Council, 30 D.L.R. 83 [1916] 2 A.C. 569, applied as to jurisdiction to assess.]

APPEAL by plaintiff from the judgment of the trial Judge in an action brought to recover certain taxes together with the statutory penalties for non-payment. Affirmed.

W. Beattie, for appellant.

H. P. O. Savary, K.C., for respondent.

STUART, J.A.:—The plaintiff is a consolidated school district organized under sec. 40 *b* of the School Ordinance North West Territories Ordinances, O.C. 1915 (Alta.), ch. 75 (as amended 1913 (Alta.) (1st sess.) ch. 19, sec. 4.), and possessing certain powers of taxation and assessment under the School Assessment Ordinance, O.C. (Alta.) 1915, ch. 105.

The defendant is an incorporated company which, with respect to a number of parcels of land situated within the school district, was the owner or holder of certain rights granted to it, or, to its assignors, by certain documents issued in the name of the Crown by the Dominion Government, which documents are each on its face, entituled "Petroleum and Natural Gas

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Lease No. . . . . ", and recite that the person to whom the lease is issued is called "the lessee," and that "the lessee having applied for a lease . . . . of the petroleum and natural gas rights" in certain lands the Minister "has granted such application." The documents then, in the operative part, witness that "in consideration of the rents and royalties hereinafter expressed and contained His Majesty doth grant and demise unto the lessee for the sole and only purpose of mining and operating for petroleum and natural gas and of laying pipe lines and of building tanks, stations, structures thereon necessary and convenient to take care of said products, all and singular that certain parcel or tract of land &c" (describing the same according to section, township and range) . . . . "to have and to hold the same unto the Lessee for the term of 21 years &c . . . . yielding and paying therefor during the first year of the said term unto His Majesty the clear yearly rent or sum of 25 cents . . . . for each and every acre of land comprised within the said lands, and for each subsequent year of such term the rent or sum of 50 cents . . . . and also rendering and paying to His Majesty a royalty at such rate as may from time to time be prescribed by order of the Governor-General in Council in natural gas products . . . . and also such royalty on petroleum products . . . . . as regulations may prescribe &c &c."

In the years 1919, 1920, and 1921 the assessor of the district, in making up his assessment roll placed thereon the descriptions of the various parcels of land within the district, with respect to which the defendant held the documents whether they are to be called leases or licenses, to which I have referred, and also placed the defendant's name thereon as that of the person assessed, although in some cases the name of the defendant's assignor seems to have been inserted. But as to this latter nothing material is involved. The defendant, as I understand it, does not question the assessment on this ground.

On the roll for the year 1919 at the top of the column which has the heading "name of ratepayer" but above that heading there are written the words "mineral rights." For this year, the roll has no column making any distinction between real and personal property, although the form given in the Ordinance has separate columns for "real property" and "personal property." Possibly, in that year, there was no intention of assessing "personal property" and so no column was considered necessary in the form of roll secured by the assessor. At any rate, there is a column with the heading "property assessed" and in this column there is inserted opposite the different

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names, whether of the defendant or its assignors, a description by sections, half sections or quarter sections, of the various parcels of land. There is, in this column, no reference to the particular interest or estate of the defendant which is being made the subject of assessment. Were it not for the words "mineral rights" above the first column, it would appear as if the whole interest or estate in the different parcels was being assessed.

On the roll for 1920, there is no reference whatever to "mineral rights." There is not a word to indicate that any special estate or interest is being assessed. Apparently, the whole interest is assessed.

The roll for 1921 has, however, separate columns provided for "description of real property" and "description of personal property." Under the first heading the descriptions of the various parcels of land by sections &c, are placed without any reference to any special interest. Then in the column headed "description of personal property" the words "mineral rights" are written upon each line opposite the description of each separate parcel.

This completes, as well as I can state it in words, the method of assessment adopted on the three yearly rolls. But I ought to add that on each roll the various parcels of land are also assessed to other persons, apparently with respect to the fee simple in the surface rights, although there is nothing stating this specifically.

Upon the rolls a certain valuation was placed upon each parcel with respect to which the defendant was assessed. There was also in each year an assessment of certain chattel property owned by the defendant.

With respect to the chattel property, the defendant appealed, in one year at least, to the Court of Revision, but its appeal was dismissed and there was no further appeal. There was never any appeal taken with respect to the other property, that is the real estate, assuming it to be properly so called.

Assessment notices were sent to the defendant and also tax notices, stating the amount of the taxes due from it according to the rate fixed. The defendant did not pay, and on March 10, 1922, the district began this action, seeking recovery of the amount claimed and of penalties for non-payment.

The action was tried at Lethbridge on June 7, 1922. The trial Judge gave judgment against the defendant for the sum of $1,141.87, being the amount of the taxes against the chattel property and penalties for non-payment, but dismissed the claim so far as it related to the other taxes.

From this judgment the plaintiff district has brought this

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appeal. There is no cross-appeal by defendant with respect to the $1,141.87 and it is stated that that sum has been paid.

Two grounds of defence are advanced by the defendant. First, it is claimed that the property assessed is not legally assessable at all for two reasons, viz., (*a*) because it does not come within the meaning of the words of the School Assessment Ordinance, O.C. 1915 (Alta.), ch. 105 which state what property is assessable and (*b*) because the company is taxed under the Corporation Taxation Act, 1907 (Alta.), ch. 19, upon the amount of gas it produces from the lands in question and is, therefore, entitled to the protection of sec. 18 of that Act, which forbids the imposition of any "similar" tax by any "municipality."

Secondly, it is claimed that the defendant was in fact assessed with respect to property which it did not own inasmuch as the assessor acted as if the defendant owned the coal rights as well as the petroleum and gas rights and in fact assessed the coal rights to the company.

It was this second ground of defence that was sustained by the trial Judge in giving judgment for the defendant. He therefore found it unnecessary to deal with the other grounds.

By sec. 2, sub-sec. 5, of the School Assessment Ordinance, O.C. 1915 (Alta.) ch. 105, a consolidated school district is to be deemed a village district for the purposes of the ordinance, i.e., for assessment purposes.

By sec. 26 it is enacted that "All property real and personal in any village district not herein declared exempt from taxation shall be subject to assessment and taxation for school purposes."

By sec. 27 it is enacted that "As soon as may be in each year the assessor shall prepare an assessment roll for the district in which shall be set down according to the best information available a list of all taxable property in the district with the names of the occupants and owners if such can be procured and such roll may be in form E in the appendix hereto."

Section 29 enacts that "Land and personal property shall be assessed to the person in occupation or possession thereof, unless in the case of a non-resident owner, such owner shall in writing require the assessor to assess him alone for such property."

There is no statutory definition of the expressions "real property" and "personal property" contained in the ordinance, either directly or by referring to the School Ordinance, pursuant to sec. 2, sub-sec. 1, which says that "all words, names and expressions shall have the same meaning as is expressly

or impliedly attached to them by the School Ordinance."

But the word "land" is interpreted by sec. 2, sub-sec. 6, of the School Assessment Ordinance, O.C. 1915 (Alta.), ch. 105 added by amendment by sec. 2, 1917 (Alta.), ch. 43, as follows:—

"6. The expression 'land' means lands, messuages, tenements, and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, and whether such estate or interest is legal or equitable, together with all paths, passages, ways, water-courses, liberties, privileges, easements, mines, minerals, and quarries appertaining thereto, and all trees and timber thereon and thereunder lying or being, and without in any way restricting the generality of this description land shall also include for the purpose of this Ordinance the interest of an owner or lessee of mineral rights."

In my opinion, there can be no doubt that the rights of the defendant in the various parcels of land in question held by them under the documents referred to come within the interpretation of the word "land" as given in this definition. It may, no doubt, be a question whether the documents held by the defendant are technically "leases" and whether the defendant is strictly "a lessee" even though these terms are used in the documents. The absence of a right of *exclusive* possession may perhaps be material upon that question. But I do not think it is necessary to decide such a question here. The documents were issued by the Dominion Government under sec. 37 of the Dominion Lands Act, 1908 (Can.), ch. 20. That section says that "Land containing . . . . . petroleum, natural gas, coal . . . or other minerals, may be sold or *leased* &c" and also that the regulations relating thereto may provide for the disposal of "mining rights."

The right to extract petroleum and gas is there clearly considered to be a "mineral right."

The case of *Barnard-Argue-Roth, etc, Co.* v. *Farquharson*, 5 D.L.R. 297, [1912] A.C. 864, 28 Times L.R. 590, 23 O.W.R. 90, was decided upon the words of a deed given in 1867 and the principle of decision adopted, which in that case excluded "natural gas" from the meaning of the expression "mines and minerals" as used in the deed, was that the meaning and intention of the parties *at that time*, must be the guide. Here, however, we have a statute of the year 1917. We should, I think, in such case, be guided by the principle of the decision in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1888), 13 App. Cas. 657. In that case Lord Macnaghten at p. 690 said:

"It has been laid down that the word 'minerals' when used in a legal document, or in an Act of Parliament, must be under-

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stood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning."

This, indeed, was exactly what was done in the *Farquharson* case, *supra*. The general principle was clearly recognized in both cases but in both there was discovered something in the context or nature of the case which, in the opinion of the Judicial Committee should control its meaning.

In *Ontario Natural Gas Co.* v. *Smart* (1890), 19 O.R. 591, Street, J., adopting the principle laid down by Lord Macnaghten, held that a Municipal Act, R.S.O. 1887, ch. 184, sec. 565, which enacted that "the corporation of any township or county wherever minerals are found, may sell, or lease, by public auction or otherwise, the right to take minerals found upon or under any roads over which the township or council may have jurisdiction," authorised the municipality in granting a lease of natural gas rights and that "minerals" should be there interpreted in its widest sense as including natural gas. This decision and the reasons therefor were confirmed and adopted on appeal, (*sub nom. Ontario Natural Gas Co.* v. *Gosfield* (1891), 18 A.R. (Ont.) 626).

In the present case, I can see nothing in the context or in the circumstances which would make it necessary to restrict the wide general meaning of the words "mineral rights."

In view, therefore, of the origin of the defendant's right resting upon sec. 37 of the Dominion Lands Act 1908 (Can.), ch. 20, I think it cannot be doubted that the defendant should be considered as a "lessee of mineral rights" within the meaning of the interpretation clause.

But, I think there are also other expressions contained in the interpretation clause which would cover the defendant's rights under its leases. Certainly, these rights if not actual leases are "privileges" or "easements" appertaining to the lands in question.

It is, however, pointed out by counsel for the defendant, and much stress is laid upon the point, that secs. 26 and 27 of the School Assessment Ordinance, which is above quoted and which contain, taken together, the enactment as to what property should be placed upon the assessment roll, do not use the word "land" at all, so that the definition of that term in the amendment of 1917 is of no assistance and of no avail to the plaintiff. As I have observed, the words "real and personal property" of sec. 26 are nowhere interpreted.

But, in my opinion, this objection cannot be sustained. It is perfectly obvious to my mind that the statute has used the words

"real property" and "land" as synonymous and as being interchangeable. This seems to me to be clear from the way the Legislature proceeds to speak in sec. 29. Instead of following the terminology of sec. 26 and saying "Real and personal property shall be assessed &c," as one would expect, sec. 29, O.C. 1915 (Alta.) ch. 105, proceeds to say "*land* and personal property shall be assessed &c." In these circumstances, I think the Court should put the same interpretation upon the expression "real property" as the statute expressly gives to the word "land" and that it would not be right to restrict the meaning of "real property" in sec. 26 to the usual sense in which that term is used in the law books and in other statutes. The whole statute must be read together and the meaning of its various terms decided in the light of the language of the whole statute. Of course, under the general rule, a leasehold interest is not real estate but there appears in this case to be good reason for considering it as being covered by the term "real estate" in the context in which it is used in the statute.

Furthermore, I do not think we should be justified in disregarding the words of sec. 29 taken even by themselves. That section declares that "land . . . . . shall be assessed" in a particular way. But, in declaring that "land" shall be assessed in that particular way it also must, I think, be considered as plainly declaring that "land," in the sense given that word by the interpretation section, *shall be assessed*.

I am unable to assent to the validity of the contention presented to us that the defendant does not own the petroleum or natural gas, that it owns only what it produces or extracts and brings to the surface and that, therefore, it is not assessable with respect to the petroleum and natural gas. The fallacy lies in this, that it is not at all the physical substance, petroleum or gas which is assessed. Rather it is the interest, the privilege or the rights owned and enjoyed under its leases by virtue of which it is entitled, if it sees fit, to extract those physical substances, which is made subject to assessment and which was attempted at least to be assessed. That right, interest, or privilege, whatever its value, and whether ever exercised at all or not, is by the statute treated as itself a piece of property which may be assessed. The defendant is clearly the "owner" of that right.

But it is suggested that it is a non-resident owner and is not in occupation or possession within the meaning of sec. 29. Section 27, however, says that the names of the owners or "occupants" must be placed on the roll. The word "occupant" is defined by sec. 2, sub-sec. 14 of the School Ordinance O.C.

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1915, (Alta.) ch. 75, made applicable to the School Assessment Ordinance by sec. 2, sub-sec. 1 thereof, as including "the person entitled to the possession thereof and the leaseholder or holder under agreement for lease." In my opinion, although the word "occupant" is not used in sec. 29, the expression "the person in occupation or possession thereof" should be given the same meaning. Indeed, without reference to sec. 2, sub-sec. 14 of the School Ordinance at all, it seems very clear to me that where there is no person in physical possession the person entitled to the possession is the person in possession. And here again, there should be no confusion made by thinking entirely of physical things and of this or that portion of the tangible soil where physical operations may be carried on. The property assessable is the right to extract petroleum and gas and to go upon the actual land wherever necessary for that purpose. That right is in the possession of the person entitled to and enjoying it. Moreover, it is a right which can be exercised only upon the land itself and that, therefore, is where the right is situated. Any other view would mean that a man with his residence outside the district but enjoying a 10 year lease for farming purposes of a section of land, in the district could not be considered as in possession of the land or of a right located within the district.

On the other hand, I think that it would be quite proper to disregard the definition of "land" and to say that in any case the right of the defendant is "personal property" in general sense of that word as used in the common law. And, in my opinion, it would still be properly considered as "*in the district.*" It is only on the land itself alone that the right can be exercised. If the City of Calgary, where the defendant's head office probably is situated, imposed a personal property tax and assumed to assess the defendants with respect to all their petroleum and gas leases throughout the Province, I imagine the defendant would hasten to argue, and would be perfectly right in arguing, that this particular personal property was not situated in Calgary. The case of *Re J. D. Shier Lumber Co. Assessment* (1907), 14 O.L.R. 210, while presenting some analogous problems, arose under a statute under which personal property was not assessable at all.

But there is another section of the School Assessment Ordinance, not referred to upon the argument, but which my brother Clarke has observed, which seems to set the whole matter at rest. Section 26, in stating what property is assessable, also specifies a large number of exemptions. Sub-section (2) says:—

"The property exempt from taxation under the provisions of this Ordinance shall be—1. all the property of His Majesty or &c" . . . 3. "Where any person is the occupant of or *interested* in any property mentioned in either of the two preceding clauses otherwise than in an official capacity the occupani or *person interested shall be assessed in respect thereof* but the property itself shall not be liable beyond the interest of the person assessed."

Here, then, we have an express direction that the interest of the defendant in certain property, that is the mineral rights, which is "held by His Majesty" shall be assessed or rather that the defendant being interested in them in some form shall be assessed with respect to that interest. This Consideration if sound really renders the whole foregoing discussion as to the nature of the property and of the defendant's interest quite immaterial. It would seem however to be rather in conflict with the opinion of Harvey, C.J. in *Town of Coleman* v. *Head Syndicate* (1917), 11 Alta. L.R. 314, which was upheld on appeal though not reported.

For those reasons, though aside from the question arising under the Corporation Taxation Act to which I shall next refer, I think the property or the right or interest of the defendant under their leases was legally assessable.

The Corporation Taxation Act was passed in 1907 (Alta.), ch. 19. It was passed, as sec. 3 states, "for the purposes of adding to or supplementing the revenues of the Crown in the Province of Alberta," that is, it imposed certain taxes upon certain corporations for the purposes of the provincial revenue. It imposed a tax of $1,000 upon the head office of every bank and of $125 upon every branch office of a bank. Insurance companies were to pay a tax of 1% on their gross premiums received in respect of Alberta business. Loan companies were to pay a tax of one-half of 1% on their gross income. Land companies were to pay a tax of 40 cents for every thousand dollars invested in real or personal property. Trust companies were to pay one-half of 1% of their gross income. Street railway companies were to pay a tax proportionate to their mileage of track. Telegraph companies were to pay a tax of 1% of their gross revenue. Telephone companies were to pay a tax upon each telephone instrumeat rented. Every company supplying gas in any city for illuminating purposes was to pay a tax of $500. Express companies were to pay a tax of 1% of their gross revenue and electric lighting companies were to pay a tax of a lump sum varying according to the population of the cities, towns or villages in which they operated.

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Such is the general character of the taxes originally imposed by the Act 1907 (Alta.) ch. 19. Then by sec. 18 it was enacted that

"Where a company or corporation pays the tax by this Act imposed no similar tax shall be imposed or collected by any municipality in this Province, and no company made liable to taxation by this Act, nor any of its agents shall require any license, authorisation or permit of any municipality for doing business in the municipality or for establishing agences therein."

An amendment, immaterial here, was made by 1921 (Alta.) ch. 5, sec. 30.

Then in 1918 (Alta.) ch. 31 the statute was amended by adding a clause relating to natural gas companies. It reads as follows (sec. 4):—

"(*n*) Every company or corporation other than a municipal corporation ,supplying or dealing in natural gas shall be subject to a tax of one-quarter of a cent for every 1,000 cubic feet of gas flowing, drawn or pumped from or produced by a well owned, leased, occupied or operated by such company."

In the same year, 1918, sec. 3 (*k*) was by a slight amendment, made to read (see sec. 3, ch. 31):—

"Every company or corporation, other than a municipal corporation in any city in the Province supplying gas for illuminating or other purposes for gain, shall pay a tax of $500."

The original exemption from municipal taxation given by sec. 18, of course, exists in favour of a company paying a tax under this new section. It was admitted that the defendant had in fact paid the provincial tax thus imposed for the years in question, viz., 1919, 1920, and 1921.

The first question, therefore, is whether the tax imposed by the plaintiff district upon the defendant's leasehold interests in the lands in question, can be properly described as a tax "similar to that imposed for the purpose of the provincial revenue. It is, of course, rather strange that rights or obligations with respect to taxation should be made to depend upon a question of "similarity" for there are undoubtedly varying degrees of similarity. For this reason it is obviously difficult to decide what exactly is intended by the expression. The choice ranges from the one extreme of saying that it means "exactly alike" or "similar" in the sense of being completely the same, to the other extreme of saying that it would apply wherever there is any quality of likeness at all, although all other qualities or elements in the tax may be quite unlike. In my opinion, however, the proper way to interpret the expression is to treat it as meaning

"of the same *general* nature or character." In this way, I think that we avoid both the extremes to which I have referred and we ought, I also think, to avoid them, for clearly neither would be proper to adopt.

Now by looking over the taxes imposed by the Act, as I have shortly described them, I think one general characteristic will be found in them all, except the tax imposed by sec. 3 (*k*), 1918 (Alta.) ch. 31, sec. 3, that is the lump sum of $500. They are taxes laid in one way or another upon the volume of business carried on by the corporation. Another possible exception to this is the case of banks, although even there the imposition of a tax of $1,000 upon a head office and a tax of $125, on every branch office suggests the same idea. In the case of a corporation supplying natural gas, the tax is proportionate to its business, because no such company will allow gas to flow from its wells if it is not selling that gas to consumers and getting paid for it.

The question, therefore, is whether a tax upon the leasehold interest of a company under which it possesses the right to extract petroleum and natural gas from the soil and which interest has to be valued by the assessor in the same way as any piece of real estate can properly be considered as a tax of the same general nature or character as a tax substantially laid upon or made proportionate to the volume of business which it carries on? In my opinion, it cannot be so considered. The one is essentially a business tax, a tax upon the volume of its business, the other is a property tax, a tax upon property owned and possessed by it. The one depends upon the corporation carrying on its business, the other does not. If the corporation ceases to produce gas, the one tax ceases, but the other remains, whether any gas is extracted or not, and whether the corporation does any business or not.

As was said by Cameron, J. A., in *Dominion Express Co.* v. *City of Brandon* (1911), 20 Man. L.R. 304, at p. 309.

"It is clear that the basis of the Provincial tax wholly differs from that of the municipal tax. In the former case it is irrespective of property and concerns the privilege or franchise of doing business within the Province while the City tax is in respect of the occupation of real estate for business purposes."

See also *Dominion Co.* v. *City of Regina* (1911), 4 S.L.R. 34, *Canadian Northern Express Co.* v. *Town of Rosthern* (1915), 23 D.L.R. 64, 8 S.L.R. 285.

Moreover, the corporation tax makes no reference to petroleum at all, while the leases give the defendant the right to extract petroleum as well.

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If any other view were adopted it seems to me that land companies upon which, under 1907 (Alta.), ch. 19, sec. 3, sub-sec. (*ee*) a tax of 40 cts. is imposed for every $1,000, invested in land in the Province would be exempt from paying all land taxes to municipalities.

The ground of distinction I have adopted may, no doubt, be said not to apply to the $500 tax imposed by sec. 3 (*k*). That at least does not vary with the amount of business. But still the other distinctions exist. It is a tax "irrespective of property" and is obviously a flat tax in the nature of a license fee though not so called. This appears to me to be the reason why sec. 18 forbids any "license or permit" being enacted by any municipality. But the school district made no such requirement. It simply assessed property in the usual way according to its value.

For these reasons, I think sec. 18 of the Corporation Tax Act, 1907 (Alta.), ch. 19, gives no exemption from municipal taxation of the leasehold interests of the defendant. It is, therefore, in my opinion, unnecessary to decide whether or not a consolidated school district comes within the meaning of the word "municipality" as used in that section.

There remains the question as to the validity of the assessment as it was in fact made, if made at all, upon the assessment rolls.

In the first place, the nature of the examination of the chief witness, the assessor Johnson, at the trial suggests one initial consideration to my mind. Much was made at the trial by counsel of the fact that the assessor Johnson, who acted in 1919 and 1921 but not in 1920, stated in his evidence that he included in the "mineral rights" assessed to the defendant the right to mine the coal under the land as well as to take out petroleum and gas. But, in my opinion, it is improper thus to take his oral testimony as to what he meant and what he thought when making the assessment as of any relevancy in deciding the question. The assessment is made, and must be made, upon the assessment roll in writing. We must, in my view, take what we find there written and, giving it a proper interpretation without resort to extraneous oral testimony, decide whether it affords a description of the property sufficient in the circumstances to give validity to the assessment. It is not what the assessor *thought*, but what he entered on the roll, which constitutes the assessment. No doubt what he thought had much to do with the value which he arrived at but with the question of value we have here, in any case, nothing to do.

The situation with regard to 1919 may be described shortly

thus. The defendants owned a right to take petroleum and gas out of the lands in question under the documents, called leases, which have been already described. The assessor put the defendant's name on the roll as the "name of ratepayer" but placed above it the words "mineral rights." Under the caption "property assessed" a bald description by sections, half sections &c. was given. Notices of assessment were sent stating that "mineral rights" were assessed. If there was an insufficiency or error in this description a Court of Revision could, undoubtedly, under O.C. 1915, (Alta.) ch. 105, sec. 38 and possibly also 41, have corrected the error or omission if any appeal had been taken. But no appeal was taken. Can the defendant now resist a personal action for the recovery of the tax as a debt upon the ground of misdescription or insufficiency of description?

In my opinion, there is no doubt that the roll should be interpreted as indicating that the defendant was being assessed only with respect to "mineral rights," or, to use the alternative expression, that "mineral rights" appertaining to the parcels mentioned were alone being assessed to the defendant. It would no doubt have been clearer if the words "mineral rights" had been placed next or under the heading "property assessed" instead of over the column assigned for the "name of ratepayer." But as the roll stands it is perhaps more accurate to understand the words "mineral rights" as intended to be read with and qualify the word "assessment" which follows it on the same line, both being quite above the captions of the various columns, and to treat the whole page as being by itself stated to be a "mineral rights assessment."

It is to be observed that the misdescription, if any, is not of area but of interest or estate. There is no misdescription of the *area* of the land with respect to which the defendant is assessed. The misdescription, if any, is of the *extent of its interest* in that land.

One can quite see the possibility of conjuring up some niceties of thought in regard to the problem. An ordinary tenant in occupation to whom the whole land was assessed might raise the complaint "You have assessed me as if I owned the fee simple. I own only a limited estate. Only a term of years. You have assessed me for property I do not own. Hence your assessment is invalid." Of course the answer in such a case lies in sec. 29, which says that "land" shall be assessed to the "occupant." No attempt is ever made in practice, I believe, to assess an ordinary tenant with respect to his leasehold in-

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terest only and to value that by itself, though apparently it might be done. But in the search for subjects of taxation the Legislature has seen fit to fasten upon certain special interests in land as it has done in sec. 26 sub-sec. 3, and in the added interpretation clause with respect to land by specifying "the interest of an owner or lessee of mineral rights." It is this which now forces upon the Court the question of the sufficiency of a description, not of area, but of the special interest which is being made the subject of taxation.

In my opinion, a misdescription or an insufficiency in the description of the extent of a special interest in a definitely described piece of land ought not necessarily to be considered as equally serious with a misdescription or insufficiency of description of the area itself. Generally speaking, the latter description is much easier of ascertainment. It will hardly ever involve an interpretation of a document while the extent of a person's special interest may depend upon the ambiguous words of a grant. Must we then expect or exact as much certainty and particularity upon the roll in describing the extent of the special interest or estate assessed as in describing the area? In my opinion, we should not. Once the area is accurately described the person assessed knows very well the extent of his interest therein or, at any rate, he is likely to know it much better than the assessor.

With much respect, I do not think it is proper to interpret the roll as containing an assessment to the defendant of *all* the mineral rights in the land in question. Fairly read, I think the roll says "The (defendant) company is assessed with respect to *its* (not "*the*") mineral rights in the following lands." Put in this way, it will be seen that the question turns upon a very narrow difference in shade of meaning. What word are we to understand before "mineral rights"? Should the word be "its" or "the"?

Even if there were an error it would be a very slight one in any case and would clearly be removed by the curative clause added in 1917 (Alta.) ch. 43, sec. 2, as sec. 96 *b* of the Act, which reads as follows:—

"96 *b*. No proof shall be necessary in any court of law or equity on, from and after the lapse of one year after the 31st day of December in any year in which taxes have been levied to establish in respect of such taxes that all or any of the provisions of this Ordinance with respect to assessment and taxation have been complied with and the production of the assessment roll as finally passed shall be conclusive evidence in a court

of law or equity that all the provisions of the Ordinance respecting assessment or taxation respectively have been fully complied with, and after such lapse of time no court of law or equity shall hold any assessment or taxation made or levied under this Ordinance invalid unless it is established to the satisfaction of the court that the person or property assessed was not liable to be assessed or that the rate of taxation levied was in excess of the amount allowed by law and in the latter case if the court shall adjudge the assessment or taxation invalid it shall only be deemed invalid to the extent of the excess."

This section seems to stand alongside of sec. 40 which is also a curative section. But sec. 40 seems to be inapplicable because it does not appear that the roll was ever in 1919 "finally passed by the court" O.C. 1915 (Alta.), ch. 105, (i.e., the Court of Revision) or "certified by the secretary as passed." We do not know even that the Court of Revision ever sat in 1919 at all. Apparently, from sec. 40 it is not required to sit unless there are some appeals to hear. In any case, the roll is not certified; so that sec. 96 *b* alone can be resorted to. It may be a question what the phrase "as finally passed" should be held to mean in this section. Possibly it refers to sec. 40 and should be held to mean "as finally passed by the Court of Revision." I do not understand, indeed, why sec. 40 was allowed to remain when sec. 96 *b* was enacted, because they plainly cover the same subject, and, in some respects, they are inconsistent, for example, with respect to the "lapse of one year." My opinion is that we should apply and interpret sec. 96 *b* without reference to the retention or existence of sec. 40. It seems to me that we must consider the roll as having, at some time, reached the stage of having been "finally passed." Moreover, I do not think the phrase "as finally passed" is significant except in the sentence in which it occurs. It affects neither the first sentence nor the last of the enactment, and these have very strong curative declarations.

There was no question raised in argument before us as to the authenticity of the rolls which were put in evidence.

There was in 1919 undoubtedly a *de facto* assessment as distinguished from no assessment at all. The decision of the Supreme Court of Canada in *C. & E. Townsites Ltd.* v. *Wetaskiwin* (1919), 51 D.L.R. 252, 59 Can. S.C.R. 578, decides that in such a case a curative section is applicable and will, if using sufficient language for the purpose, save the assessment.

But I do not mean to admit or agree that resort to the cur-

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ative provisions of sec. 96 *b* is really necessary. In my opinion, the assessment is sufficient as it stands.

The provisions of sec. 27 with respect to what the assessors place on the assessment roll are not nearly so stringent as in the Ontario legislation dealt with in some of the cases. I find nothing in it stating that the exact extent of the ratepayers' estate or interest in the property must be definitely specified. And, in my opinion, it was sufficient to state, as I think was stated, that the defendant was being assessed with respect to certain mineral rights under the lands described without defining them with legal accuracy. The defendant did own "mineral rights" and any question of the extent of those rights was, I think, a matter to be considered when a valuation came to be placed upon them and with the correctness of that valuation it was for a Court of Revision to deal.

If it were considered necessary to state with strict legal accuracy the extent of the ratepayers' estate in the property, I fear the whole assessment would be invalid, because one of the ordinary ratepayers, who are assessed generally with regard to different quarter sections, might then successfully argue "You have assessed me generally in respect to this quarter section. That means the whole fee simple without reservations. I do not own the whole interest in that land. The Crown has reserved the mineral rights. Therefore, you have assessed me for property which I do not own. You should have specified the extent of my interest by saying 'fee simple less all mineral rights.'"

There are, of course, provisions in the School Assessment Act which treat the assessment roll as a piece of documentary evidence and no doubt it is so with regard to certain things. But I see nothing to justify the view that the entry of the description of taxable property in pursuance of the provisions of sec. 27 is merely evidence of some extraneous act of the assessor which is the act of assessing. In my opinion, when the assessor obeys sec. 27 and enters a description of taxable property on the roll, that, in itself, constitutes the act of assessing the property, so far as that act is distinct from the act of placing a value upon it. To admit parol evidence, even of the assessor, to explain what he meant by the description which he inserted, is not admitting evidence of extraneous facts (unless the thought of the assessor is such) but it is admitting evidence to interpret the meaning of a written document of a very formal character, more formal, indeed, even than an agreement *inter partes* which, in most cases at least, is only evidence of the extraneous fact of

agreement. This course would lead directly to the permission of the correction of errors on the assessment roll by this Court and make us a Court of Revision at once because the assessor could always then give evidence of his thought and intention, and we should have his mental intention constituted as the act of assessing instead of the act of inscription on the roll directed to be done by sec. 27.

It may be said that there is an ambiguity in the expression "mineral rights" but I do not think it is a latent one, if properly an ambiguity at all, because it is apparent on the face that it is a general term and may, as I have said, mean either "all the mineral rights" or "the defendant's mineral rights." It is, if anything, a patent ambiguity and in such case extrinsic evidence is not admissible to explain it according to the well known rule. But aside from this, I incline to the view that the rules of evidence as to latent or patent ambiguities are not applicable to such a public document as an assessment roll in any case.

I think, therefore, that it was and is for the Court to interpret the expression and I would interpret in the sense I have stated. Supposing an assessor assessed a man's "household furniture" under a personal property tax provision and placed a value on it. Could it be said that it would be open to the ratepayer to defend a suit for his taxes by calling the assessor and getting him to testify that he included a piano under that term which, in fact, did not belong to the ratepayer but belonged to a boarder in whose possession it really was, and so escape all liability for the tax? In my opinion, it would not be so open but the ratepayer would be told that he should have appealed upon the value placed upon his "household furniture." The area being correctly described, I think the case before us is exactly similar to the example I have suggested. It is merely begging this whole question to speak of what was "really assessed."

This view of the point does not appeal to the other members of the Court and for this reason, and also because it seems contrary to the view of an Ontario Divisional Court expressed in *Canadian Oil Fields Co.* v. *Village of Oil Springs* (1907), 13 O.L.R. 405, I do not feel great confidence in its correctness. But I have decided to put it forward for consideration. It may be that it is all a matter of words after all and that the inclusion of non-assessable property in the property valued when making the valuation was itself an illegality which should defeat the action.

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I would also point out that in *Pearce* v. *Calgary* (1915), 23 D.L.R. 296, Walsh, J., expressed a very strong opinion in favour of the view that where there is merely an action against the person to recover the taxes as a debt and no remedy against the land has been applied or is involved, there is no need for so great a degree of particularity in the description of the property. If this view were to be adopted, there would be little, if anything, more to be said. But while I feel that great weight must be attached to the opinion of that Judge and while the view, in itself, rather strongly appeals to me, I do not think it is necessary here to say whether it should be fully approved or not. The assessment for 1919 can, and for the reasons I have given should, in my opinion, be considered as valid.

Going to the year 1921 we find that upon the roll, practically the same entries are to be found. In that year, the form contains separate columns for "real property assessed" and for "personal property assessed." In the former, the parcels of land are described while opposite these and in the same line but in the column for "personal property" the words "mineral rights" occur throughout, being written in full upon the first line and obviously repeated by *ditto* marks in the succeeding lines. I think we should impute the same meaning to this roll as in the case of that for 1919 and that nothing in the way of a real distinction is involved in the appearance of the heading "personal property assessed."

Most of what I have said with regard to 1919 will, therefore, apply. But the curative clause sec. 96 *b* (added by 1917 (Alta.) ch. 43) is in this case inapplicable because the year had not elapsed when the action was begun and tried. Even without it, however, I think the assessment was perfectly good. And we have, in this instance, letters from the defendants showing that it knew quite well or at least plainly considered that it was being assessed merely for petroleum and gas rights. Their letters distinctly say so. As pointed out in *C. & E. Townsites Ltd.* v. *Wetaskiwin*, 51 D.L.R. 252, there was no misleading of the ratepayer and no real injustice. And I may add that if the defendant knew so well what it was being assessed for in 1921 it very probably knew quite as well in 1919, when the notices were the same.

With regard to 1920, however, I have, after much hesitation, reached another conclusion. In that year there is nothing whatever upon the roll to indicate any special interest or estate in the land as being the subject of assessment. The various sections and quarter sections are entered in the column for "property

assessed" in exactly the same way as these same sections and quarter sections are found elsewhere upon the roll as being assessed to other ordinary ratepayers. I see no justification for putting one interpretation upon the language of the roll in one place after one name and another interpretation upon the same language in another place after another name. Here again I think we could not have resorted to the oral testimony of the assessor even if there had been any. But the assessor for 1920 was not even called as a witness. We are, therefore, perforce restricted to the roll itself. Even the notices for that year were not produced.

It is true that the valuations are different and this might give a hint that there was some hidden difference in the property assessed. My view is that if a special interest such as is referred to in sec. 26, sub-sec. 3, or an interest in mineral rights under a lease as referred to in the interpretation section added in 1917 is to be made the subject of assessment, there must be at least some indication on the roll that this is being done,—an indication which does appear on the rolls for 1919 and 1921.

My hesitation in the matter is due to the suggestion that in each case, viz., in the case of the ordinary ratepayer and in the case of the defendant, the person assessed does own some interest in the land, and that it is only that interest, whatever it is, which is to be treated as assessed. But, for myself, I think the commonly understood practice ought to count for something in our consideration of the matter. And there can be no doubt whatever that in the ordinary case a simple entry of a farmer's quarter section after his name on the assessment roll is well understood to mean that he is assessed for the ordinary fee simple in the land less the usual reservations made by the Crown. And if that is the meaning which is to be attributed to such an assessment in one case, the same meaning ought to be attributed to it in another case. The result here will, therefore, be that the defendant was on the face of the roll assessed for something which it did not own at all.

And yet even as against this there is the argument as to the existence of jurisdiction. In *London Mutual Ins. Co.* v. *City of London*, 15 A.R. (Ont.) 629, the Ontario Court of Appeal used language which appears to say quite clearly that where the assessor has jurisdiction to assess then the only remedy is by appeal to the Court of Revision. But I observe that in that case there was no question but that the money in respect to which the assessment was made did belong to the person objecting. Burton, J.A., said "Now it is not disputed that the Insurance Company were resident within the municipality, and

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had personal property. The case is *primâ facie* brought within the statute, the assessment is on its face good, and the jurisdiction attaches."

Cooley on Taxation, 3rd ed. vol. 2, p. 1470, says:—

"It is not an excess of jurisdiction, however, if the officer erroneously includes in his estimate property not belonging to the person assessed or not within the district, *the party himself being subject to the jurisdiction.*"

It will be admitted, of course, that there could be no proceeding taken to condemn the property itself, if it had been assessed to a person who did not own it. The real owner could properly object. But this is a personal action for taxes due as a debt. Surely there here must be some sort of jurisdiction *over the person* on account of residence before the jurisdiction is such as to necessitate a resort to an appeal to the Court of Revision. I find nothing in the ordinance making any class of persons as such subject to the jurisdiction and taxable on account of residence. And I apprehend that the defendant is not resident in the plaintiff district in any case. I have, therefore, very much doubt whether a municipality or school district has jurisdiction to impose a personal liability upon a non-resident by assessing him in respect of property within the district which he does not own.

Section 27 O.C. 1915 (Alta.), ch. 105, says that "the assessor shall . . . . set down . . . . a list of all taxable property in the district with the names of the occupants and owners, if such can be procured &c." I doubt very much whether for the purpose of laying a foundation for personal liability for taxes the assessor has the power to insert the name of a person who is not the owner of the property at all and so force him to appeal so as to get rid of the liability, particularly when the ordinance does not appear to give any personal jurisdiction, at least over non-residents.

Furthermore, it appears, as I have said, that in 1920, these same properties were assessed to other persons, although for different amounts and moreover, that in many cases the taxes seem to have been paid.

For these reasons, I think the defendant is not personally liable for the taxes imposed in the year 1920.

I would, therefore, allow the appeal with costs with respect to 1919 and 1921 and direct judgment to be entered for the taxes for those years and for the penalties, but would not disturb the judgment as to 1920.

HYNDMAN, J.A.:—The right of the Province to enact legislation authorising the taxation of interests in land, the fee

simple of which remains in the Crown, was fully, and I think finally dealt with affirmatively, in *Smith* v. *Rur. Mun. of Vermilion Hills* (1914), 20 D.L.R. 114, 45 Can. S.C.R. 563, and in *Calgary & Edmonton Land Co.* v. *Att'y-Gen'l of Alberta* (1911), 45 Can. S.C.R. 170.

That the power to assess interests of different kinds, as in this case gas and oil rights, was conferred by sec. 2 of 1917 (Alta.) ch. 43, I have no doubt. That section enacts:—

"The expression 'land' means lands, messuages, tenements, and hereditaments, corporeal and incorporeal of every nature and description, and every estate or interest therein, and whether such estate or interest is legal or equitable, together with all paths, passages, ways, water-courses, liberties, privileges, easements, mines, minerals, and quarries, appertaining thereto, and all trees and timber thereon and thereunder lying or being, and without in any way restricting the generality of this description, land shall also include for the purpose of this Ordinance the interest of an owner or lessee of mineral rights."

If the plaintiff then had the power to assess the gas and petroleum rights which admittedly the defendant company seized or possessed of, and in doing so, followed the requirements and formalties prescribed by the School Assessment Ordinance, (O.C. 1915 (Alta.) ch. 105) and amendments thereto, then it seems to me impossible for the defendant company to escape liability for the taxes imposed.

The question of the amount of the assessment cannot be considered by this Court being a matter exclusively within the jurisdiction of the Court of Revision and an appeal therefrom to the District Court Judge as provided in the ordinances. (*Town of Macleod* v. *Campbell* (1918), 44 D.L.R. 210, 57 Can. S.C.R. 517.)

The liability of the owner to a personal action for validly imposed taxes is also settled in *Smith* v. *Vermilion Hills*, 20 D.L.R. 114. Anglin, J., at p. 123 said:—

"I see no reason why the legislature may not authorise the recovery in its own Courts of a personal judgment against the owner, *wherever resident*, for arrears of taxes levied upon an interest in lands situate within the Province. The judgment will be enforceable only against property of the defendant within the Province. It can be enforced against his person only if he sould come within the provincial boundaries."

Assuming then that the defendant company is seized of an interest in only one out of several kinds of minerals comprising the mineral rights, (and which is the fact here), not having appealed from the assessment under the procedure laid down in

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the ordinance, can it at this stage object to the payment of the taxes inasmuch as he has discovered he was assessed, not only for that which he owns, but also for coal which he does not own? I think under all the circumstances here it can.

It is I think admitted that any attempt to recover taxes from a person not the owner of the property assessed would be unsuccessful.

If the defence can show that it had been in fact assessed as owner of coal rights along with gas rights, no apportionment being made as between them, it seems to me the question then is, not merely one of "too high or too low," but one which goes directly to the jurisdiction of the taxing power—viz: ownership of the interest taxed.

The defendant might, I think, properly say: true I am the owner of the gas rights for which I am willing to pay taxes but if you assess my gas along with coal in which latter I have no interest under the general description of, "mineral rights" and do not differentiate between them so that I may know at how much you value the gas, and how much the coal, I must take exception to payment of anything at all on the ground that the assessment is illegal and invalid.

Had the assessor when making up his roll been careful to describe the property of the defendant company as "gas and petroleum rights" I do not think any question could now be raised as to validity or amount.

That description however is not what appears, but merely the expression "mineral rights." This of course is vague and indefinite especially in view of the well known fact that many different kinds of minerals exist in and under lands in this Province. In such circumstances of ambiguity it seems to me the defendant should not be precluded from going behind the roll itself to prove that he was not in fact the owner of what was intended to be comprised in the interest noted therein. It is not a case of objecting to the quantum of the assessment but that of excepting to the thing assessed for which or part of which the company is taxed.

In *Toronto R. Co.* v. *Corp'n. of the City of Toronto*, [1904] A.C. 809, Lord Davey, at p. 815 said:—

"It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers

in assessing property which was not by law assessable. In other words where the assessment was *ab initio* a nullity they had no jurisdiction to confirm or give it validity."

I would infer from this that all other questions are left open and may be set up by way of defence in an action of this nature.

The curative provisions of the statute, in my opinion, can be effective only in cases where the jurisdiction existed to assess the person legally liable.

With respect to the admissibility of evidence to show what was intended to be assessed after the roll is completed it seems to me the municipality can hardly complain if, owing to doubt and confusion caused by their own omission or carelessness to properly describe the real interest of the defendant, it should be competent for the defendant to prove to the Court that he was not the owner of the interests really assessed. On the contrary, it would seem just and equitable that if the defence can establish by satisfactory testimony that there was in fact included in the assessment, property not owned by the defendant, the latter should be allowed the opportunity to do so.

Suppose, for example, that on receipt of notice of assessment, the company appealed on the ground of excessive assessment, and, appearing before the Court of Revision, was there informed that it was not the "gas and petroleum" rights, but, the coal rights, for which it was assessed,—surely it would be competent for them to say: If that is the case we will not further press our appeal before you, but will resist payment of the taxes if sued for, and set up the defence of non-ownership in the coal which you say you mean by "mineral rights."

If, in such circumstances, evidence could be given of what was intended to be included in the expression "mineral rights," why should not evidence be admissible also in the case at Bar with the object of showing that at least a portion of the mineral rights for which the defendant was assessed was coal, in which they had no interest.

As I observed before, it is not a question of "too high or too low" but one affecting ownership of property and liability for assessment and going straight to the jurisdiction of the taxing authority.

The learned trial Judge found as a fact that not only gas, but coal also was included in the assessment. That being so, for the foregoing reasons I would hold that the defendants are not liable for the taxes for the years 1919 and 1921; and with respect to the taxes for 1920 adopting in addition the reasons of my brother Stuart, I would hold they are not liable for that

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year also.

I would dismiss the appeal with costs.

CLARKE, J.A.:—The action was brought to recover the sum of $8,417.50 for taxes claimed by the plaintiff from the defendant for the years 1919, 1920 and 1921, together with the statutory penalties for non-payment.

The trial Judge allowed the claim for the taxes claimed in respect of property assessed to the defendant other than mineral rights and there is no appeal in respect thereof. He disallowed the whole claim for taxes in respect of mineral rights and his decision in that respect is the subject of the present appeal.

I have read the written opinion of my brother Stuart and agree with him that the interests acquired by the defendant under its leases from the Crown are mineral rights, liable to assessment and taxation by the plaintiff, and that such liability is not affected by the Corporation Taxation Act 1907 (Alta.), ch. 19—but I am inclined to agree with the trial Judge that the plaintiff in this action is seeking to recover taxes in respect of mineral rights in respect of coal not owned by the defendant but by the Crown, which clearly are exempt from taxation.

I find no positive evidence that the coal rights are still in the Crown, but I infer that such is the fact as stated by the trial Judge—and as I understand it, so treated by both parties, both at the trial and on the appeal. If, however, I am wrong in this, I would allow the plaintiff to produce evidence of the facts as to ownership of the coal rights before this Court, before judgment is finally given, and if it should turn out that the coal rights are not still in the Crown, I would further consider the question of the liability of the defendant for taxes in respect of property assessed to the defendant but owned by other persons.

The assessment of the defendant in each of the 3 years in question covers 20 parcels of land aggregating 10,420 acres and extending north and south for 10 miles. The assessment in 1919 and 1920 is at the uniform rate of $20 an acre, aggregating $208,400, and in 1921 at the uniform rate of $25, an acre, aggregating $260,500, and the taxes claimed for the 3 years, exclusive of penalties, amount to $6,356.20. In many instances, the assessment of the defendant is greater than that of the owner of the surface rights.

At the time of the 1919 assessment, no gas or petroleum had been discovered in the school district, but 2 wells, Nos. 1 and 3, were being sunk, the former on n.w.¼ of sect. 31-9-17, w4, and the latter on n.w.¼ sect. 6-10-17 w4., which would be within a

mile of each other. The former became a producing well. The latter was a dry hole and was abandoned in June, 1920. The only other well, No. 6, located about a mile south east of No. 1, on s.w. ¼ 32-9-17 w4., had been recently commenced at the time of the trial. In 1920 and 1921 there was an assessment of wells Nos. 1 and 3, but in 1921 the assessment against No. 3 was struck off. The taxes upon these wells were paid, and no question now arises in respect of them.

Mr. Johnson, the assessor for 1919 and 1921 and the present chairman of the School Board, gave evidence at the trial, and stated that there is coal underlying the lands in that part of the country and mines were being operated in the school district, and also gave the following evidence:

"The Court:—Then how did you arrive at this assessment. A. I enquired as to what the coal rights were being leased for in our district and based my assessment on that basis. Q. So that your assessment so far as this defendant company is concerned was based entirely upon the coal rights and the coal lands value they had in that district? A. Yes—but I might say as I understand it, for instance the defendant company owning the gas and petroleum rights, if they did not own the coal rights also they would in any event exclude anybody leasing over them or under them. Q. That might be perfectly true? A. So that we figured that they really owned them. Q. You assessed them as if they owned the coal rights? A. Yes. Q. That is you assessed them for something which they did not own and knowing perfectly well that they did not own them? A. Simply because somebody else could not use them under their lease. Q. You told me how you arrived at your assessment? Tell me again the basis on which you determined their assessment under these leases? A. Well we had no specific case of people owning gas that we could get at other than the mineral rights that was owned by companies that were operating in our district and which we figured on on assessing. Q. Well you were assessing coal rights weren't you? A. Yes—that is the only thing we had to go by. Q. And you assessed them as if they were the owners of the coal under this assessment? A. Yes. Q. And your assessment of this company was based on your belief that they did own the coal? A. Yes—and the gas and petroleum."

It seems to me the only conclusion from this evidence is that coal which was a known quantity was the substantial part of the assessment. It is difficult on any other theory to account for so enormous an assessment.

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BARNWELL CONSOLIDATED SCHOOL DISTRICT No. 15 v. CANADIAN WESTERN NATURAL GAS, LIGHT, HEAT AND POWER CO.

Clarke, J.A.

The duty of the assessor imposed by sec. 30 of the School Assessment Ordinance was to estimate the defendant's property at its actual cash value. This he has not done, in my opinion, but rather, if it can be said he has estimated it at all, it was not at its value but at the value of some other property not owned by the defendant.

My brother Stuart is of opinion that the roll is conclusive that the mineral rights set down thereon are the mineral rights owned by the defendant and that, in the absence of an appeal to the Court of Revision, the defendant is without redress. It does not appear to me the law is so rigid.

Section 33 of the School Assessment Ordinance requires the assessor before handing over the roll to the secretary, to make an affidavit which shall be inscribed upon the roll that the statements contained therein are correct to the best of his knowledge and belief, and provides that the roll when so verified shall be *primâ facie* evidence of the statements therein contained. I can find no such affidavit in any of the rolls for the years in question, and even if made, the roll appears to afford only *primâ facie* evidence. If, therefore, the setting down in the roll of the name of the defendant and of the words "mineral rights," as the property assessed might be construed *primâ facie* as a statement that the mineral rights assessed are those not exempt from taxation, it seems to be implied that proof may be given apart from the roll to shew that in fact the rights assessed are so exempt. The plaintiff gets no benefit from sec. 40, sub-sec. 3, as none of the rolls have been certified by the secretary, even if such a certificate would have any curative effect in case of exempted property, and sec. 96 *b* contemplates that, notwithstanding its sweeping provisions, the question of exemption from taxation is still left open, which is in accordance with the decision in *Toronto R. Co.* v. *Corp'n. of the City of Toronto*, [1904] A.C. 809.

It is argued, however, that, in any event, the taxes for 1920 should be allowed, as it is not shewn that the assessment for that year covered coal rights. The only evidence of assessment for that year is that of Johnson, who was shewn what purported to be an assessment roll for that year, ex. 2, and stated it was the 1920 roll. It is not authenticated either by the affidavit of the assessor or the certificate of the secretary. The burden is on the plaintiff to prove, either by oral evidence or the production of a roll so authenticated as to be received in evidence, that the taxes claimed are properly payable by the defendant, and in this I think it has failed. It appears to me quite apparent that the assessor of 1920 has not made any original

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assessment but has mainly copied the assessment roll of 1919. Indeed, the first five pages of the roll are marked "Taken from 1919 Roll." It is true these words do not appear on the page containing the defendant's assessment, but the lands are described in the same order, and the amounts set opposite are identical with those of 1919, and these amounts are so great as lead me to the conclusion that they do not represent the value of natural gas and petroleum rights alone, which are very speculative, and for all that appears other than No. 1, which is separately assessed, may have little actual value, but are based upon the value of coal rights which were of known value as in the case of the other years.

If I knew of any way whereby the Court could ascertain the value of the defendant's mineral rights so as to fix the amount of taxes payable in respect thereof, I would follow it, but I know of no procedure whereby that can be done, and it follows that the whole assessment must fail.

Subject to the question of further evidence as to the title to coal rights, I would affirm the judgment below and dismiss the appeal with costs.

Appeal dismissed.

CITY OF OTTAWA v. NANTEL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford, Middleton and Lennox, JJ. November 18, 1921.

TAXES (§VI—220)—MEMBER OF BOARD OF RAILWAY COMMISSIONERS—APARTMENT IN OTTAWA—HOME AND FAMILY IN PROVINCE OF QUEBEC — RESIDENCE WITHIN MEANING OF ASSESSMENT ACT, R.S.O. 1914, CH. 195—EXEMPTION UNDER 10 EDW. VII. CH. 121 (ONT.)—LENGTH OF TIME FOR EXEMPTION.

The income of a member of the Board of Railway Commissioners who has an apartment in Ottawa where he resides whenever his official duties require his attendance in the city, but having his dwelling house and home in the Province of Quebec, is assessable under sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195. If as an employee of the Government resident in the city he was exempt from the payment of such income tax, under 10 Edw. VII. ch. 121 (Ont.), that Act was only in force for 10 years from the beginning of 1910 to the end of 1919, and the income for 1920 is not exempt.

APPEAL by defendant from a County Court judgment in an action brought by the Municipal Corporation of the City of Ottawa, against the Honourable Wilfred Bruno Nantel, to recover taxes amounting to the sum of $214.90, claimed to be due in and for the year 1920, on his income as a member of the Board of Railway Commissioners for Canada. Affirmed.

The judgment appealed from is as follows:—

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Meredith, C.J.C.P.

"The defendant was appointed to the Board of Railway Commissioners in 1914. Prior to his appointment thereto, he was a member of the Federal Cabinet. For many years past, commencing at the time he became a Minister of the Crown down to the present day, he has been occupying a suite of furnished apartments at the Roxborough Apartments, in the city of Ottawa, where he has been staying whenever his official duties required his attendance here. Occasionally his wife occupied the said apartments with him when she came to Ottawa on temporary visits.

Before the defendant became a Minister and for a long time previous thereto, he had a dwelling house and a home at St. Jerome, in the Province of Quebec, which he has never relinquished but continues to occupy with his wife and family, at all times when his presence at the Capital is not needed. Since his appointment to the Commission, his wife has very seldom stayed with him at Ottawa, and he spends his week-ends, his vacations, and any time not devoted to official duties, with her at St. Jerome.

The law provides that a Railway Commissioner shall reside at Ottawa or within 5 miles therefrom. In 1918, the plaintiffs, alleging that the defendant was not within the class of persons exempted by a certain agreement, assessed him on his income as Railway Commissioner; but, upon an appeal to the Court of Revision, the assessment was vacated on the ground of non-residence.

In 1919, he was likewise assessed on his income, and again the assessment was set aside by the Court of Revision, on the same ground as in the previous year, but the ruling of the Court was reversed on appeal to the County Court Judge, His Honour Judge Gunn, who held that Mr. Nantel was a resident of Ottawa.

The head office of the Railway Commission is in St. George Ward, and the defendant is assessed there, though the Roxborough Apartments, where he resides, are situate in another part of the city, called the Central Ward. He is also nominally assessed in the latter ward for his furnished apartment, but the taxes are paid by the landlord."

The learned County Court Judge gave judgment for the plaintiffs for the recovery of $214.90 and costs.

C. A Seguin, for appellant.

F. B. Proctor, for respondents.

MEREDITH, C.J.C.P.:—This case has been argued before us, and seems to have been looked upon, throughout, as if the defendant could not be liable to taxation in Ontario in respect

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of his income, if he really resides in Quebec; but of course that is not so.

Under sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195, "all income derived either within or out of Ontario by a person resident therein, or received in Ontario by or on behalf of any person resident out of the same, shall be liable to taxation.

The income in question was received by the defendant in Ontario by himself, and so comes clearly within that enactment.

There is nothing in secs. 12 and 13 to save the defendant from such taxation; and under them the defendant may, and probably must, be taxed at Ottawa, because his place of business is there. He is a member of a Board the offices of which are permanently there; and there the income in question was received and no doubt placed to his credit in a bank at Ottawa.

So, assuming, as I do, that the defendant does not reside at Ottawa or elsewhere in Ontario, the income in question is liable to taxation under the provisions of the Assessment Act. No one has suggested that that legislation is *ultra vires* of the Province: see *Re City of Windsor and McLeod* (1921), 64 D.L.R. 397, 50 O.L.R. 305.

Then are the plaintiffs prohibited from imposing the tax in question by sec. 1 (2) of an Act respecting the City of Ottawa, 10 Edw. VII. ch. 121, which provides, among other things, that the Corporation of the City of Ottawa "shall not assess or levy or collect any tax from any person resident in the said city in the service or employ of the" Government of Canada "in respect of the income of such person derived from such occupation, for a period of 10 years from the said 9th day of December, 1909?"

The defendant is admitted to be in such service; but on his behalf has been urged, with much force, that he is not a person resident in Ottawa, that his only place of residence is in the Province of Quebec.

If so, he is not within the protection of this enactment: but: even if not so, the Act is not, in my opinion, applicable in any way to taxation for the year 1920. It was plainly intended to cover 10 years only, the years 1910 to 1919 inclusive. The prohibition is against income taxation for a period of 10 years from the 9th day of December, 1909: all such taxation is for a calendar year at a time; there could, therefore, be no relief from taxation for the broken part of the month of December, 1909: it should begin and could begin its first year on the 1st day of January, 1910: and end on the 31st day of December of the 10th of the 10 years—1919.

The Act does prohibit assessment as well as levy and collec-

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tion; but that must mean assessment for the purpose of taxation in one of the prohibited 10 years; it cannot mean assessment for an 11th year.

Therefore each ground of this appeal fails, in my opinion, and consequently the appeal should, in my opinion, be dismissed.

LATCHFORD, J.:—The facts as found by the learned trial Judge are not questioned on this appeal.

The appellant is a person in the service of the Government of Canada, and, if liable to be assessed upon his income for 1920, is liable for the amount claimed in this action.

The agreements and legislation under which the Hon. Mr. Nantel claims to be exempt from taxation on his income appear as schedules to ch. 121 of 10 Edw. VII. (Ont.), and in sec. 1 (2) of that Act. As amended by statutes not material to be considered, the agreements are declared to be subsisting, valid, and binding, except in so far as they may be altered by a certain agreement authorised to be made, and "shall continue so to be for a period of 10 years from the 9th day of December, 1909, but shall then lapse and become void and no longer have any force or effect" (sec. 1(1)).

The agreement so authorised is to be upon the terms of an order in council of the 9th December, 1909, set forth as schedule C to the said Act. Certain annual payments are to be made by the Government to the city for a period of 10 years extending from the 1st July, 1909, to the 1st July, 1919.

Whether or not a formal agreement was executed does not appear. Not improbably the statutory enactment, embodying as it did the order in council, was regarded by the city and the Government as sufficient.

Looking at the purpose of the agreement and statute, so far as they affect persons in the Dominion Civil Service, it is plain that they were intended to exempt such persons from taxation upon their income for a period of 10 years extending from the end of 1909 to the end of 1919. The words used to express this purpose seems to me not to have been very happily chosen, and have led to one of the contentions on which this appeal is based.

It is asserted that the city did assess the appellant prior to the 9th day of December, 1909, in violation of the final clause of sec. 1 (2), which provides that the Corporation of the City of Ottawa "shall not assess or levy or collect any tax from any person resident in the said city in the service or employ of the said Government" (the Government of Canada) "in respect of the income of such person derived from such occupation for a period

of 10 years from the said 9th day of December, 1909."

The preparation of the assessment rolls for any year is made in the preceding year.

If "assess," used as it is in the statute disjunctively with the words "levy" and "collect," means the entry on the collector's roll, the completion of the roll by its deposit with the city clerk, and its confirmation by the Court of Revision, all happening prior to the 9th December, 1919, the appellant and other members of the Dominion Civil Service would be immune from taxation on income not for 10 but for 11 years. To give that meaning to the statute would be contrary to the express limitation of the agreement to a period of 10 years, and in manifest violation of the purpose the city and Government had in view in entering into the agreement. I therefore consider that "assess" as used means "impose a liability to be taxed"—which was not done prior to the 9th day of December, 1909, but in February, 1920, when the by-law imposing the rate for that year was passed.

The other ground of the appeal is that the trial Judge erred in holding that Mr. Nantel was during 1920 a resident of the city of Ottawa.

With exceptions not material to be considered here, all income derived either within or out of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same, is, by sec. 5 of the Assessment Act, liable to taxation.

The appellant has been found to be a "person resident" in Ottawa in this Province, within the meaning of sec. 5, and therefore has been held liable to pay a tax upon his income to the City of Ottawa.

The finding that he is such a resident is based upon decisions as to the meaning of the words "resident," "residence," and "resides," upon the fact that since his appointment in 1914 to the Board of Railway Commissioners, as well as for some years previously when he was a member of the Dominion Government, Mr. Nantel occupied a suite in an apartment house in Ottawa, and the further fact that he is required by the Railway Act as such Commissioner to reside in the city of Ottawa or within 5 miles of it.

Decisions as to "reside" and its derivatives are not of much assistance. The cases shew that the words as used in a particular collocation or context have widely different meanings. The requirement of the Railway Act as to residence in (or near) Ottawa may well be regarded as satisfied by such occupancy of

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such apartments in the city as Mr. Nantel maintains, and yet that occupancy may not constitute him a person resident in Ontario within the meaning of the Assessment Act, when the fact is that he has his chief place of residence—his hearth and home, his *lares* and *penates*— at St. Jerome in the Province of Quebec. Had he a similar home in one municipality in Ontario outside the city of Ottawa, he would, under sec. 12, be assessed for income in that municipality. Residence is, however, not the only basis of liability for the taxation of income—sec. 5 also provides that "*all income.....received in Ontario by.....any person resident out of the same shall be liable to taxation,*" subject to exceptions which do not apply here.

The appellant is paid at Ottawa. He there receives the income for which the city did not assess him until 1920, and the fact that he is or may be really resident out of Ontario is immaterial.

I therefore think the appeal fails.

MIDDLETON, J.:—Appeal by the defendant from the judgment of His Honour Judge Constantineau in an action to recover taxes upon the income of Mr. Nantel as Railway Commissioner for the year 1920.

The Assessment Act, R.S.O. 1914, ch. 195, sec. 5, makes liable to assessment, *inter alia*, "all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same."

If Mr. Nantel is resident in Ontario, then his income is taxable. If he is not resident in Ontario, he is not liable unless the income is "received in Ontario."

Section 12, dealing with the place within Ontario where the assessment is to be made, describes it as "the municipality in which he resides." So that no municipality is authorised to impose an income assessment in the absence of residence.

One would expect that "residence" would in the Act always have the same meaning; but, when it is borne in mind that sec. 5 contemplates the assessment of persons resident out of Ontario in certain cases, it seems necessary to attribute some meaning to the expression "the municipality in which he resides," found in this auxiliary clause, which will not defeat and render futile the main provision of the statute.

The word "reside" is very flexible and has more than once been said to be incapable of exact definition. The duty of the Court in interpreting any statute where the word is found is to attribute to it such meaning as will best give effect to the legislative will.

Some things have been made quite clear by decided cases. Residence is quite distinct from domicile, and any attempt in statutes such as this to treat the words as equivalent must almost inevitably defeat the object of the statute. A foreigner may reside here many years with his wife and family, and yet retain his domicile of origin. The change of domicile depends upon the will of the individual, and no Legislature ever intended the liability to bear the burden of taxation properly attributable to residence to depend on the volition of the person to be taxed. A man may have several residences, but it follows from the rule of construction that there is a presumption against an intention to impose a double burden of taxation upon any individual, and so discriminate against him that a meaning must be sought which will avoid this consequence. This meaning is found, so far as sec. 5 is concerned, if the residence for the purpose of that section is taken to be the chief home of the individual in question, his "settled abode," the home of his wife and children, the place of his *lares and penates*, as distinguished from the place where he eats and sleeps when absent from home on official business, or a "summer-home" only occupied for a season. These places are residences for many purposes, but not such residences as would render him liable for taxation in each place, if all should be in the Province.

It follows that Mr. Nantel is resident out of Ontario within sec. 5, and so is liable for taxation only upon his income received within Ontario.

Coming then to the question whether, under sec. 12, Ottawa can be regarded as the municipality within which Mr. Nantel resides, so that it may assess him on the income he receives in Ontario as Railway Commissioner, it is clear that there is no such right unless "residence" has here some other meaning than that I have given it in sec. 5. I think it has. In sec. 5 the Legislature, speaking with reference to persons over which it has jurisdiction, divides them into persons resident in Ontario and persons not resident in Ontario, and I have concluded that when a man has more residences than one the chief residence governs. Under sec. 12 the point to be determined is, what municipality in Ontario is to impose the tax? I conclude that the meaning to be attributed to the legislative answer to this question "that municipality of Ontario in which he resides" is "that municipality in which his chief residence in Ontario is." This is the same answer as must be given in the case of a resident of Ontario. One residing, in the sense I have indicated, in Toronto, but having a summer residence or temporary residence elsewhere in the

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Province, must be assessd at Toronto, his chief place of residence within the Province.

I do not think this question is solved by the fact that Mr. Nantel has a residence in Ottawa, sufficient to answer the requirements of the Dominion Act regarding the residence of Railway Commissioners. Nor am I in any degree helped by the fact that his residence might well qualify him as a voter. I prefer to interpret this Assessment Act by its own provisions. Far less assistance is obtained from cases based on other legislation in the United States and England. The true light must be found within the statute. All else only increases the darkness.

There remains the question as to the special Act. The argument is that the legislation which purports to confirm the agreement by which, in consideration of certain payments by the Government during 10 years, the salaries paid to civil servants should for the like period be exempt from income tax, has the effect of giving to the civil servants an exemption from taxation for at least 11 years. This is based upon the words used in the Act 10 Edw. VII. ch. 121, sec. 1 (2), which are that the Corporation of the City of Ottawa shall "not assess or levy or collect any tax" from civil servants "for a period of 10 years from the said 9th day of December, 1909."

Ten years' exemption has been granted. The 11th year is claimed, because, it is said, some part of that which the ratepayer calls "assessment" took place before the 9th December, 1919, though it culminated in the imposition of taxes for 1920. There are two answers. The action of the municipality which is forbidden is that contemplated by sec. 297 (1) of the Municipal Act, which requires the council of the municipality to "assess and levy" a sum sufficient to provide for the outgoings each year. This was not done within the prohibited period. The preparation of the assessment roll, though sometimes called "assessment," is not the assessment here contemplated.

Secondly, nothing that was in fact done before the 9th December, 1919, could possibly be regarded as an assessment.

By no possible stretch of imagination could it be presumed to have been intended that 11 years' exemption from taxation was contemplated.

The appeal should be dismissed with costs.

LENNOX, J., agreed in the result.

Appeal dismissed with costs.

DUNCAN v. COOPER.

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Saskatchewan Court of King's Bench, Bigelow, J. September 27, 1922.

TROVER (§II—31)—CONVERSION OF GOODS—DAMAGES—PLAINTIFF PARTY TO FRAUDULENT TRANSACTION.

A plaintiff cannot succeed in an action for damages for conversion of goods when in order to succeed he must rely on a fraudulent transaction to which he was a party.

ACTION for damages for conversion of a Ford car. Action dismissed.

D. Buckles, K.C., and *J. W. Thompson*, for plaintiff.

A. McWilliams, for defendants.

BIGELOW, J.:—The plaintiff's action is for damages for conversion of a Ford car. The defendant Cooper, on January 1, 1920, when the registered owner of certain land and a building thereon, leased it to the plaintiff by the month at a rental of $25 a month. On February 20, 1920, Cooper transferred the land in question to the plaintiff, and at the same time plaintiff transferred the land back to Cooper. Plaintiff's transfer was registered January 20, 1921, and defendant's transfer was registered March 9, 1922. Cooper's object in transferring to the plaintiff was because he was apprehensive that the city of Swift Current would sue him personally for taxes on this land. The transaction was entered into to prevent the city of Swift Current suing Cooper for the taxes for the time being. It was never intended that the plaintiff should be the owner of the land. Although he was the registered owner for a time, Cooper always had the transfer back from plaintiff.

After this transaction, the plaintiff continued to pay rent as before, and seizure of the car was made for rent due for January and February, 1922.

The plaintiff alleges that the transaction was a fraud against the city of Swift Current, and, therefore, the Court should not assist the defendant. But if it was a fraud, which I do not decide, the plaintiff was as much a party to the fraud as the defendant, and for the plaintiff to succeed, it must be held that the whole transaction was a fraud, including the transfer back to Cooper. In other words, the plaintiff must rely on a fraud to which he was a party. No man can set up his own fraud as a cause of action, any more than as a defence. That being so, the plaintiff's action must fail.

On the argument, there was some question about the bailiff's fees on the sale being excessive; but there is nothing in the statement of claim claiming that, and it is not made a cause of action. Plaintiff's action is dismissed with costs. The defendant W. W. Cooper Co. will have judgment for $117.94, being the amount

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claimed in the counterclaim, less $20 rent of cottage which was paid after the action was begun, together with interest as claimed and costs.

Judgment accordingly.

EARL v. GRAND TRUNK PACIFIC R. Co.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Clarke, JJ.A. October 23, 1922.

RAILWAYS (§IV—96)—SWITCHING OPERATIONS—FAILURE TO PROVIDE WATCHMAN—ORDER OF BOARD OF RAILWAY COMMISSIONERS—INJURY TO PERSON CROSSING TRACK—NEGLIGENCE OF PERSON CROSSING—RIGHT TO RELY ON WATCHMAN—LIABILITY OF COMPANY.

The failure of a railway company to provide a watchman at a railway crossing, and to confine its switching operations to the hours permitted by an order of the Board of Railway Commissioners, is negligence which renders the company liable for injuries to a person crossing the track caused by his being struck by an engine during such switching operations, although such person saw the engine approaching, and was negligent in not dismounting from his bicycle in time to make sure of avoiding the accident.

APPEAL by defendant from the trial judgment (1922), 66 D.L.R. 401, in an action claiming damages for personal injuries caused by being struck by defendant's train. Affirmed.

N. D. Maclean, K.C., and *A. F. Duncan*, for appellant.

I. B. Howatt, K.C., and *R. E. McLaughlin*, for respondent.

STUART, J.A.:—The reasons for judgment given by the trial Judge, Harvey, C.J. (1922), 66 D.L.R. 401, while in my opinion quite sufficient, are also, in my opinion, not nearly as strong as they might have been against the defendant. There can be no doubt that a switching operation was going on. That being so the defendant company had no right on the highway at all under the order of the Board of Railway Commissioners. They were law-breakers pure and simple. And yet they cast up contributory negligence against the plaintiff. If the action had been framed in trespass for assault and battery I am not sure that it would not have succeeded.

If the plaintiff had not admitted that he thought the train was going to cross the track I think the company would have had no right to use his seeing of the train while still in the yard, even though it was moving north easterly, as a basis for attributing negligence to him. The whole quality of the defendant's action was changed the moment its train left its own property where it was acting legally, and passed upon the highway where it had no right even to be, much less to move against a lawful traveller on the highway.

The plaintiff, however, admitted that he assumed that the train was going to cross the highway. Yet even then the complete illegality of the defendant's act ought in my opinion to

have some serious bearing upon the decision to be given as to ultimate negligence and the real cause of the accident. This was not a case of a mere omission by some servant of the company to fulfil some statutory regulation as to the *method* of operating a train at a crossing such as the omission to ring a bell or blow a whistle. Rather it was the case of the defendant's train being sent upon the highway by the deliberate order, as it must have been, of some responsible official who had knowingly directed an affirmative, but wholly illegal, act to be done. In such circumstances I feel great reluctance in going very far with any doctrine of contributory negligence.

The rule requiring the presence of a watchman was applicable only when the defendant was lawfully using the highway. Here again I feel reluctance in appearing to condone the illegality of the defendant's act by proceeding to discuss the whole problem on the assumption that it was acting lawfully except possibly with regard to the watchman.

In such circumstances I think if there is any doubt as to the real cause of the accident, that is, unless it is absolutely plain that the plaintiff's negligence was the *causa causans* the problem should be resolved against the defendant. Certainly when unlawfully sending a switching train over the highway the defendant should at least have observed the precautions laid down by the Board as necessary even when such trains were to be permitted to cross. In my opinion they should have used greater precautions.

I would dismiss the appeal with costs and the cross-appeal without costs. I can see no good reason for interfering with the amount of damages awarded either in one direction or the other, but I would allow the amendment to the notice of appeal asked for by the defendant.

BECK, J.A. concurs with CLARKE, J.A.

CLARKE, J.A.:—Appeal by the defendant from judgment of Harvey, C.J., 66 D.L.R. 401. I would allow the amendment to the notice of appeal asked for by the defendant.

For the reasons given by the trial Judge with which I think no serious fault can be found I would affirm the judgment appealed from and dismiss the appeal with costs and the cross-appeal without costs.

Appeal dismissed.

Upon the application to settle the formal judgment STUART, J.A., delivered the judgment of the Court as follows.

STUART, J.A.:—Upon the application to settle the formal judgment herein, counsel for the plaintiff, respondent, asked that,

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in view of the amendment which the appellant was allowed to make in its notice of appeal, the respondent be allowed to amend his notice of cross-appeal so as to make it contain, not only a notice of cross-appeal, but also a notice of an application to be allowed to adduce new evidence, in the shape of a few additional questions from the examination of discovery of the defendant's officer, which had not been put in at the trial and which, so it was alleged, would tend to shew that the operation of the train in question was a switching operation. It should be stated that counsel for the respondent did contend upon the argument that if the appellant's amendment was to be allowed he should be allowed in the circumstances to read these additional questions as bearing upon the exact point raised by the proposed amendment to the notice of appeal, although these questions had not been formally introduced in evidence at the trial. We are of opinion that the granting of the appellant's application made it proper to entertain the respondent's motion to introduce this new evidence even though no formal notice of such application had been given. In view, however, of the opinion we all held that there was already sufficient evidence to shew that the operation was a switching operation, we did not think it necessary to deal with the respondent's application to introduce the new evidence, but are all of the opinion that the application should be treated as having been properly before us. We do not think that there should be any reference made in the formal judgment to either application. Our reasons for judgment, including this memorandum, will shew how we treated both applications. The appellant is, no doubt, at liberty to take out a separate order granting the amendment of its notice of appeal but we see no real reason why this should be considered necessary.

ELFORD v. ELFORD; Re NATIONAL TRUST.

Saskatchewan Court of King's Bench, Bigelow, J. October 17, 1922.

TRUSTS (§IIC—59)—MONEY DIRECTED TO BE HELD IN TRUST PENDING APPEAL—DECISION IN FAVOUR OF PLAINTIFF—APPLICATION BY SOLICITOR TRUSTEE FOR DIRECTIONS—FINDING OF COURT—CONFLICTING CLAIMS—PAYMENT INTO COURT PENDING DECISION ON CONFLICTING CLAIMS.

Where in an action the Saskatchewan Court of Appeal has given judgment in favour of the plaintiff and set aside certain transfers and vested the title in certain property in the plaintiff, and pending the judgment of the Supreme Court of Canada on appeal from its decision has made an order that all the rents accruing should be paid to a trust company in the names of the solicitors for the parties, and the Supreme Court of Canada af

firms the decision of the Saskatchewan Court, the proper course is for the solicitor for the plaintiff to apply to a Judge of the Court of King's Bench in Chambers by originating summons for a decision as to what is to be done with the money held in trust. Rules 550 and 551 not being confined to the administration of estates alone but covering any trust. Where the solicitor asking for directions claims a lien on such money for solicitor's fees and there is evidence of an assignment of the moneys by the plaintiff, the Court, while finding that the money belongs to the plaintiff under the judgment, will order it paid into Court pending decision on the conflicting claims.

[See *Elford* v. *Elford* (1922), 69 D.L.R. 284, affirming (1921) 61 D.L.R. 40, 14 S.L.R. 363.]

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APPLICATION for directions as to the disposition of certain moneys held in trust.

Russell Hartney (in person) for applicant.

John Feinstein, for himself as co-trustee and for the defendant.

BIGELOW, J.:—By a judgment of the Court of Appeal on August 5, 1921, in the action above referred to, judgment was given for the plaintiff setting aside certain transfers and vesting title in the plaintiff (1921), 61 D.L.R. 40, 14 S.L.R. 363. An appeal against this judgment was taken to the Supreme Court of Canada (See 69 D.L.R. 284), the honourable Chief Justice of the Court of Appeal made an order providing *inter alia* "that all the rents accruing from the date of the judgment of this honourable Court until the disposition of the appeal by the Supreme Court of Canada be paid in to the National Trust Co. in trust in the name of Russell Hartney and John Feinstein, to abide the decision of the Supreme Court of Canada." On June 27, 1922, the Supreme Court of Canada affirmed the judgment of the Court of Appeal and dismissed the appeal. Under the order partly quoted above, $1,624.21 has been paid to the National Trust Co. in trust in the names of Russell Hartney and John Feinstein. Mr. Hartney, one of the trustees, now applies to me in Chambers by originating notice to decide what is to be done with this money. Notice was served on Mr. Feinstein, the co-trustee, who appeared personally as trustee and for the defendant. Mr. Feinstein opposes the motion, contending that this money cannot be dealt with until the Supreme Court of Canada or our Court of Appeal deals with this specific question. I cannot agree with that contention. On August 5, 1921, the Court of Appeal set aside the transfers (61 D.L.R. 40). The plaintiff was then entitled to the properties in question and the rentals therefrom. The defendant appealed to the Supreme Court of Canada, and had he been successful these rents would have gone to him. To prevent any injustice to the

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defendant, I suppose, these rents were deposited in trust to await the decision of the Supreme Court of Canada. I cannot see any question but that the moneys in question belong to the plaintiff.

A more serious question seems to me to be whether this is the proper procedure, or whether an application should be made in the case itself to the Court of Appeal. I am of opinion that this application is a proper one. One of the trustees asks for advice as to what is to be done with the money. Rules 550 and 551 do not, in my opinion, refer to the administration of estates alone, as contended by Mr. Feinstein, but cover any trust. I would decide then that the money in question belongs to the plaintiff.

But the matter is complicated by the fact that Mr. Hartney claims a lien on the money for solicitor's fees and disbursements, and is further complicated by the fact that in one of Mr. Hartney's affidavits he states, that he is informed by Melzina Bodenchatz, of the city of Saskatoon, that she has an assignment of the said moneys from the said Mercie A. Elford, but she is willing to forego her rights under the said assignment should the said moneys be applied in paying the taxes on the property in question.

No order should be made for payment to Mr. Hartney on account of his solicitor's lien without a notice to the plaintiff, and there was no such notice. I have a note made at the argument that 'Mr. Hartney is willing that this money should be paid direct to the plaintiff.' But Mr. Hartney, as trustee, has notice that Melzina Bodenchatz has an assignment of this money from the plaintiff. That is sufficient to prevent payment to the plaintiff without further inquiry. The money should not be paid to Melzina Bodenchatz without proof of the assignment. With this notice, the trustees, in my opinion, would not be justified in paying the money to the plaintiff without notice to Melzina Bodenchatz to come in and prove her claim. I think the best solution is that the trustees pay this money into Court to the credit of the cause, with a suggestion that Melzina Bodenchatz claims the money under an assignment and that Mr. Hartney claims a solicitor's lien on part of it. The defendant certainly has no interest in the money. Consents can then be obtained as to payment out, or if this is not possible, the necessary notices can be given and the conflicting claims decided.

The defendant will pay the costs of this application.

Judgment accordingly.

REX v. LIMERICK; Ex parte MURPHY.

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New Brunswick Supreme Court, Appeal Division, Sir J. D. Hazen, C.J., White and Grimmer, JJ. November 18, 1921.

INLAND REVENUE (§I—10)—OFFICERS OF—PROSECUTIONS UNDER INLAND REVENUE ACT, R.S.C. 1906, CH. 51, ONLY BY REVENUE OFFICERS—CERTIORARI—QUASHING SUMMARY CONVICTION WHERE INFORMANT NOT QUALIFIED TO PROSECUTE UNDER ACT—INLAND REVENUE ACT.

Only officers of Inland Revenue are competent to institute proceedings for the enforcement of the Inland Revenue Act R.S.C. 1906, ch. 51 and amendments. A summary conviction for illegally possessing a still for manufacturing spirits will be quashed on certiorari if the informant was not an Inland Revenue Officer under federal law although he was both a provincial constable and an inspector under the provincial Liquor Prohibition law.

[Inland Revenue Act R.S.C. 1906, ch. 51, secs. 12, 80, 91 and 138, considered.]

C. D. Richards shews cause against an order nisi for certiorari, to quash a summary conviction under the Inland Revenue Act.

J. B. Dickson in support of order.

The judgment of the Court was delivered by

GRIMMER, J.:—An order for certiorari returnable before this Court was made by Barry J. upon the following grounds:—

1. The Magistrate had no jurisdiction to try the said offence; (*a*) As the information was not laid by an officer of the Inland Revenue Department; and (*b*) As such penalty or forfeiture to which the accused was liable exceeded $500. 2. The said conviction discloses no offence in law. 3. The evidence discloses no offence in law.

At the hearing of the argument sub-sec. (*b*) of the first ground was abandoned.

The conviction, which was dated August 22, 1921, imposed a penalty upon the defendant Murphy for "that he did at the Parish of Kingsclear, in the County of York on July 29, 1921 have upon his premises a part or portion of a still or apparatus suitable for the manufacture of spirits without having a license so to do," and adjudged him to pay a fine of $200, with $45.05 for costs or to be imprisoned in the common jail for the term of twelve months.

The information was laid by one Fraser Saunders, a Provincial constable and inspector under the Intoxicating Liquors Act but not an officer of the Department of Inland Revenue. At the hearing the magistrate's jurisdiction was challenged because the informant was not an officer of the Inland Revenue Department, and it was claimed it was plain that under sec. 12, 83 and 138 R.S.C., 1906, ch. 51, being an Act respecting the Inland Revenue, the provisions thereof could only be enforced by

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an officer of the Department. At the argument before this Court that being one of the grounds upon which the writ issued it was renewed with the further contention that the Act being purely a revenue measure it could only be enforced by officers of the Department. This I think is the only substantial ground of appeal in the case.

By referring to the Act respecting the Inland Revenue already quoted it is found that by sec. 9 thereof it is made to apply to the whole of Canada, and by section 10 a department is created called the Department of Inland Revenue, which is to be presided over by the Minister of Inland Revenue. Section 12 provides that the Governor in Council may from time to time appoint officers and other persons to carry out the Act and all other Acts relative to the matters and things placed under the control and management of the Department, and all Orders in Council or regulations made thereunder, and may assign the names of such officers and persons and grant them such salaries or pay as he may deem reasonable, etc. Section 138 provides that all forfeitures and penalties under the Act, after deducting the expenses in connection therewith shall, unless it is otherwise expressly provided, go to His Majesty for the public uses of Canada, and by sec. 139 that all such sums paid or received for any penalty or forfeiture under the Act or any part thereof belonging to His Majesty shall be paid to the Minister of Finance and shall form part of the consolidated revenue of Canada. Sections 71 to 91 prescribe the powers and duties of the officers of the Department, providing under sec. 80 that inspectors of inland revenue and all persons appointed under the Act or employed for the purposes of the Act or upon any duty imposed by the Act shall be known as officers of inland revenue, and sec. 91 provides that all Justices of the Peace, mayors, bailiffs, constables and all persons serving under His Majesty by commission, warrant or otherwise, and all other persons whomsoever shall aid and assist every officer of inland revenue in the due execution of any act or thing authorised, required or enjoined by the Act or any other Act.

The words in these sections are direct and clear, and there can be no doubt that the Act is framed solely and exclusively for the protection and benefit of the revenue of Canada, and that special officers are named and provided to enforce the provisions of the Act. I am therefore clearly of the opinion that in the cases arising under the Act, officers of inland revenue

and they only can enforce the provisions thereof. Neither do I think that regular words are required to exclude proceedings to enforce the Act being taken by persons other than officers of inland revenue.

The informant in this case was not an officer of the Inland Revenue Department nor was any pretence made on the part of the prosecution that he was such, or any evidence offered or given that he was authorised to take the proceedings. If it was intended that anyone might institute proceedings for violation of the Act, then there would be no need of secs. 12 and 91. The statutes provide a number of offences and how these are to be punished, as well as the persons who shall enforce the penalties and provisions of the Act, and no authority is conferred upon any other person or persons to act.

For these reasons I am of the opinion that the rule must be made absolute to quash the conviction.

Conviction quashed.

LEADERS CLOAK Co. v. RINDER.

Ontario Supreme Court, Middleton J. December 31, 1921.

JUDGMENT (§IF—48)—MOTION FOR — RULE 62 (ONT.) — MASTER IN CHAMBERS—JURISDICTION.

A motion for judgment under Rule 62 (Ontario Rules), may in an action in the Supreme Court properly be made before the Master in Chambers.

Mere anxiety on the part of the plaintiff and fear that delay may jeopardise his recovery is not enough to entitle him to judgment under Rule 62 (Ont. Rules), it not being shewn that the defendant is about to make any fraudulent disposition of his property.

AN appeal by the plaintiffs from an order of the Master in Chambers dismissing a motion for summary judgment under Rule 62*.

N. Phillips, for the plaintiffs.

D. W. Markham, for the defendants.

MIDDLETON, J.:—The Master in Chambers gave no reasons for judgment, but, I am told, held that the motion was not properly made before him; that it should have been made in Court; and, secondly, that the case had not been brought within Rule 62.

With reference to the first point, I am told that the Master preferred the annotation to this Rule in Holmested's Judica-

*62. Where a writ is specially indorsed and some special reason for urgency is shewn the plaintiff may, at any time, by leave, serve notice of motion for judgment. Such leave may be given *ex parte* and subject to such directions, as to the service of the notice of motion and filing and service of the affidavits and otherwise, as may seem just.

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ture Act, p. 411, and the views expressed in an anonymous article in (1920), 56 C.L.J. 101 to my judgment in *Oliver* v. *Frankford Canning Co. and Presqu'Isle Canning Co.* (1920), 47 O.L.R. 43.

It may be that what was there said was dictum only. I thought it was more—but, without repeating, I now adopt it and determine that the Master was in this respect wrong and that he had jurisdiction.

The author of the anonymous article adds nothing save to point out that, in his view, when Rule 207 (8) refers to Rules 57-62, the intention is that Rule 62 shall be excluded. This is evidently written in complete ignorance of sec. 28 (*m*) of the Interpretation Act, which provides that when reference is made to two or more sections of a statute by number both shall be deemed to be included.

On the merits I think the Master reached the proper conclusion.

Under the Rule from which Rule 62 was derived, two decisions of the Court of Appeal determine its scope and operation. I refer to *Leslie* v. *Poulton* (1893), 15 P.R. (Ont.) 332, and *Molsons Bank* v. *Cooper* (1894), 16 P.R. (Ont.) 195. Both determine that the plaintiff must shew not only such a case as to entitle him to succeed upon a motion for judgment under the Rule corresponding with Rule 57, but must also shew some special ground calling for the application of the Rule in question. In the earlier case mere anxiety on the part of the plaintiff and fear that delay might jeopardise his recovery was, it was held, not enough, it not being shewn that the defendant was about to make any fraudulent disposition of her property. In the later case the natural desire of the plaintiff to obtain a judgment in time to enable it to rank in a distribution of the debtor's assets under the Creditors' Relief Act was not regarded as sufficient.

In these cases there are expressions going to shew that the Rule had no application to actions between a creditor and his debtor, but was confined to equitable causes, as the Rule had its origin in an old Chancery "General Order." All doubt is now removed, as Rule 62 is expressly made applicable to all cases in which the writ of summons is specially endorsed.

The present Rule contains a provision, not found in the former Rule, that an application under it can only be made when "some special reason for urgency is shewn." I do not read this as an adoption of the interpretation placed upon the old Rule, but rather as an indication that the Rule should be avail-

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able whenever some special reason for urgency is shewn, the existence and sufficiency of the urgency being a question of fact in each case. I adhere to the view taken in the case of *Oliver* v. *Frankford Canning Co. and Prèsqu'Isle Canning Co.*, that in general the urgency must arise from some conduct of the defendant. Here all that is shewn is that the defendants' goods were damaged by fire and they are holding a fire sale. No disposition of assets so as to defraud creditors is alleged, and it must be kept in mind that creditors now have the Bankruptcy Act to aid in dealing with insolvent debtors.

The motion must be dismissed, but the costs here and below may well be to the defendant in the cause.

Motion dismissed.

FARQUHARSON v. CANADIAN PACIFIC R. Co.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. October 3, 1922.

PARTIES (§IB—55)—PROPER PERSON TO BRING ACTION—NECESSITY OF ADDING PARTY DEVELOPING AT TRIAL—APPLICATION—DELAY—RE-OPENING JUDGMENT—TERMS.

When under the circumstances the plaintiff was the only proper person to bring an action, but on account of the peculiar terms of an assignment of which no notice was given, which fact did not become known until the close of the plaintiff's case at the trial the discretion of the trial Judge in adding the necessary party and in reopening the trial, with the accompanying opportunity for discovery will not be interfered with, but where he has applied a wrong principle in fixing the costs, by treating the plaintiff as if he had been originally responsible for the non-joinder, this part of his judgment will be modified, the plaintiff being only liable for the costs of and occasioned by the application to add the necessary party and by the delay in applying for the amendment from the time when it should have been made and when it was actually made after judgment reserved.

APPEAL by plaintiff from the judgment of MURPHY, J. On October 13, 1922, plaintiff filed the following memorandum:—

The plaintiff, appellant, hereby elects to accept the terms upon which the Court (by reasons for judgment dated October 3, 1922) held he might join the Canadian Bank of Commerce as a co-plaintiff.

A. I. Fisher, for appellant.

J. E. McMullen, for respondent.

The judgment of the Court was delivered by

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FARQUHARSON v. CANADIAN PACIFIC RAILWAY CO.

Martin, J.A.

MARTIN, J.A.:—After a careful consideration of the unfortunate situation into which these proceedings have fallen, we have come to the conclusion that the plaintiff-appellant's submission that the terms of the amendment imposed upon him when he applied (on June 7, 1921) after the hearing, but while judgment was still reserved, to add the Canadian Bank of Commerce as a plaintiff, are of such severity as to costs that they cannot on the facts herein, be supported by authority. It appears that the primary and all-important distinction in the facts between the cases relied upon by the defendant and those before the learned Judge was not drawn to his attention, which distinction is, that in all those cases there had been at the time of the beginning of the action a failure to join a necessary party, whereas in the case at bar, under the peculiar terms of the assignment, and no notice thereof having been given, the plaintiff was the proper and only party to begin the action and remained in that position when the trial was in progress and up to the morning of the second day thereof, *viz.*, on May 27, 1921, when at the close of the plaintiff's case the defendant at last produced and filed the notice to it from the bank (giving notice of the assignment and demanding payment) and tardily made the formal and successful application to amend its defence which it should have made the previous day. It thus appears that, with all due respect, a wrong principle has been applied in treating the plaintiff as though he had been responsible originally for the non-joinder and in that mistaken view requiring him to pay in any event the defendant's costs of the action down to the joining of the bank, which onerous terms could, upon the authorities, be only imposed (even if the Judge chose to go to that length in his discretion) where the plaintiff had been responsible for the non-joinder—*vide, e.g., Att'y-Gen'l* v. *Pontypridd Water-Works Co.*, [1908] 1 Ch. 388 at p. 400, 24 Times L.R. 196 and *White* v. *London General Omnibus Co* (1914), 58 So. Jo. 339; but we note that milder terms were imposed in similar circumstances in *Bowden's Patents Syndicate Ltd.*, v. *Herbert Smith & Co.*, [1904] 2 Ch. 86, 21 R.P.C. 438.

In other respects, we think the term as to the re-opening of the trial, with the accompanying opportunity for discovery, is not in conflict with any principle, and as there were materials before the Judge for the exercise of that discretion, it should not be interfered with. But, as to the costs, we are of opinion that the proper terms for the Judge to have imposed on the facts before him would have been to require the plaintiff to

pay all costs of and occasioned by his amendment to add the bank and by his delay in applying for that amendment till after judgment had been reserved, *i.e.*, for the period between and including May 27 and June 17, because that application should have been made immediately upon the granting of the defendant's application to amend its defence on May 27 so as to avoid the expense of continuing proceedings which would become useless or abortive if the amendment were made later.

The strict legal position of the plaintiff, therefore, is that he was called upon to make his election to amend upon terms which were inappropriate to his case and hence he was justified in refusing them, and it follows that he is entitled now, as he was entitled then, to the opportunity to make his election upon those proper terms which should have been offered to him, as we have indicated them. Therefore, the order that ought to be made at this state of the matter is that the plaintiff may elect within 2 weeks to accept or refuse the said terms. If he elects to accept them, the trial will be re-opened and such consequential proceedings had and taken by way of discovery or the introduction of fresh evidence or otherwise as may be necessary in the usual way. In such case, the appeal will be allowed and the judgment vacated because that judgment based on the imposition of wrong terms (which the defendant has persisted in supporting) cannot stand as a barrier in the plaintiff's path to justice, and since he was forced to appeal to us to assert his right to election upon appropriate terms, and has been successful in setting aside the judgment which stands in his way, the costs will follow the event.

But, if the plaintiff elects to refuse the said terms, then it will be necessary to pass upon the issues as the record now stands, which matters we reserve for further consideration till after the plaintiff makes his election known to us in Court or through the Registrar, within said specified time.

Judgment accordingly.

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CLARK v. MOOERS AND MOOSE JAW COLD STORAGE Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. October 23, 1922.

COMPANIES (§VG—291)—PROMOTER—INTERESTS ACQUIRED PRIOR TO FORMING COMPANY—ASSIGNMENT OF INTERESTS IN CONSIDERATION OF ISSUE OF SHARES—NOTICE TO SHAREHOLDERS—ABSENCE OF FRAUD OR CONCEALMENT—AGREEMENT WITHIN POWER OF COMPANY—POWERS OF MINORITY SHAREHOLDERS TO CANCEL ISSUE OF STOCK.

Whether a promoter of a company has acquired assets as a trustee of the company which is formed subsequently to the acquiring of such interests is a question of fact, and where the prospectus filed substantially shews the agreement between the promotor and the company, and the number of shares the promoter is to receive for the assignment of the interests he had acquired, the shareholders having notice of the agreement and there having been no fraud or concealment, the promoter will not be deemed to be the agent or trustee of the company as to the shares allotted to him in accordance with the terms of the agreement and the agreement being within the powers of the company, a minority of shareholders, cannot have the issue of stock cancelled or compel the promoter to pay for such stock, but he may be made to account for travelling expenses, entertainments and donations paid out to him or by him out of the funds of the company without any authority, such accounting should be from the date of the incorporation of the company, and need not be limited to a period of six years before action is brought.

[*Clark* v. *Mooers* (1921), 60 D.L.R. 542, affirmed.]

APPEAL by plaintiff from the trial judgment (1921), 60 D.L.R. 542, in an action by a shareholder on behalf of himself and other shareholders to have all the stock issued to a promoter of the company cancelled and to make him account for moneys paid. to him by the company as salary and expenses. Affirmed by an equally divided Court.

J. S. Rankin, and *E. M. Thomson*, for appellant.

W. F. Dunn, for respondents.

HAULTAIN, C.J.S.:—I agree with the conclusions arrived at by my brother Lamont and with his reasons therefor.

That part of the judgment on the trial ordering a reference as to the amounts paid out to Mooers for travelling expenses, entertainment, etc., was not appealed against, and to that extent the judgment should be sustained, with the variation directed by my brother Turgeon with which I agree.

LAMONT, J.A.:—The plaintiff brings this action on behalf of the minority shareholders of the defendant company, and seeks to set aside the grant to the defendant, H. F. Mooers, of 630 shares of the company's stock having a par value of $63,000, and to have the certificates thereof cancelled. The grounds upon which cancellation is sought are: (1) That the defendant H. F. Mooers was a trustee for the company in obtaining the contracts which he transferred as a consideration for such

stock; (2) That, if not a trustee, he was a promoter of the company, and stood in a fiduciary relation to the other shareholders and made a profit of the said shares without disclosing the fact that he intended to ask or that the provisional directors, who were his nominees would agree to pay such a price; (3) That the issue of said stock was invalid for want of a quorum of directors and for want of certain other formalties.

The plaintiffs also seek the cancellation of an issue of 67 shares of the company's preferred stock to the defendant, H. F. Mooers, as being issued by him to himself without any authority from the directors or the company. They also seek to have him account for the monies of the company of which he, as managing director, has from time to time taken and used.

The defendant H. F. Mooers denies that he was a trustee for the company, and alleges full and complete disclosure of all facts in relation to his promotion and organization of the company and the transfer thereto of the two contracts in question, and pleads ratification by the shareholders, and also that the action is barred by delay and acquiesence on the part of the plaintiffs.

Relief is sought against the defendants Edwin Mooers and Mary Mooers, respectively—brother and wife of the defendant H. F. Mooers, only on the ground that they are now each the registered owner of a number of the shares issued to H. F. Mooers, and that they gave no consideration for said shares.

In brief outline, the facts are as follows. In the summer of 1911, the defendant H. F. Mooers was engaged as contractor in the erection of a cold storage plant in Calgary. While there he appears to have conceived the idea of constructing a similar plant on his own account in the City of Moose Jaw, and discussed with one N. M. Jackson the question of forming a company for that purpose. In November, 1911, Mooers made a trip to Moose Jaw and interviewed the city council in reference to the probability of being able to get from the city certain lots at less than their real selling value, on condition of erecting thereon a cold storage plant. His project having been viewed with favour, he returned to Calgary, and from there made application to the Dominion Government for the subsidy provided in the Cold Storage Act. On January 26, he obtained from the Minister of Agriculture, acting for the Crown in right of the Dominion, a contract, by which the Government agreed to give him 30% of the cost of the plant, not exceeding $27,000, by way of subsidy to assist in the construction of a public cold storage warehouse in the City of Moose Jaw. This assistance

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was conditioned on the warehouse being completed by January 1, 1913, with full equipment. Under the Act, assistance can be given for the construction of only one plant in each city. The contract was good for 1 year, so that if any person obtained a contract from the Government, no one else could do so until after the expiration of that year. The obtaining of the contract was, therefore, something to be desired. In February, Mooers received from the Moose Jaw city clerk for his signature an agreement of sale of lots 31, 32 and 33, in block 127, Moose Jaw. It does not appear on what date Mooers or the city executed it, but, as the affidavit of execution by Mooers was sworn to be March 19, 1912, the agreement was executed by him prior to that date. On February 8, 1912, the memorandum of agreement of the Moose Jaw Cold Storage Co. Ltd. was signed. The incorporators were H. F. Mooers, Kingston, Ontarion, A. J. Maclean, Jr., of the same place, (Mooers' brother-in-law), and N. M. Jackson, of Calgary. Jackson's name appears to have been signed by H. F. Mooers under power of attorney. Letters of incorporation were issued February 19, 1912. The capital stock was $150,000, divided into 1,500 shares of $100. each; 750 were preference shares, and the other 750 ordinary shares. The three incorporators subscribed for 1 share each; which Mooers says they all paid. A perusal of the evidence leads irresistibly to the conclusion that Jackson and Maclean were merely the nominees of Mooers, and were there to register his will. Having a contract with the Government for the subsidy and a contract with the city for three lots, and having his company duly incorporated, Mooers, about April 5, 1912, returned to Moose Jaw, and then commenced the transactions which led to this litigation. Mooers himself had no money wherewith to construct the cold storage building. There were $6,000 or $8,000 owing to him from various persons, some of this of doubtful value, and he owed $6,000. It was, therefore, necessary to get subscribers to take sufficient stock in the company to erect the warehouse. According to his estimate, plant and land would cost about $90,000. He figured that, if he could get $30,000 subscribed in Moose Jaw, that amount, together with the subsidy and a mortgage of about $30,000 or $33,000 which he believed he could obtain on the building, when erected, would be sufficient. He proceeded to canvass for subscriptions. Two men, W. E. Alexander and P. C. Blackburn, made application for 25 shares each, or $5,000 stock in all. He then got 26 of the business men in Moose Jaw to execute an agreement whereby they pledged their credit to the extent of $1,000 each, and authorised the company to use the document

in any bank on consideration of the company placing in the hands of trustees preference stock equal to the amount of the credit pledged, which stock, to the extent of $1,000 each, was to belong to each shareholder as soon as he had paid his $1,000 in full. One of these men never paid anything, so only 25 were really subscribers. Just when this document was executed is not definitely shown, but it was before May 17th. Having in this manner got his $30,000, Mooers called several meetings of the directors. The three incorporators were provisional directors. The first meeting appears to have been on April 25. Jackson was then in Calgary and Maclean in Kingston. Thinking the directors could act by proxy, and having, he says, proxies from Jackson and Maclean, Mooers held a meeting. He was the only one present, but nevertheless he proceeded to elect permanent directors, and elected himself, Jackson and Maclean. He had himself appointed president, and Jackson secretary. On May 9, he held another directors' meeting, although he was again the only one present. On that occasion, he went through the formality of passing a resolution "that it was expedient and in the interest of the company that H. F. Mooers assign and transfer to the company all his interest under the agreement with the Government in respect of the subsidy and his agreement with the city in respect of the lots." The next meeting was May 17. By this time, he says he had been informed that one director could not hold a meeting, and on the advice of his solicitor he asked Jackson to come down, which Jackson did. The two of them held a meeting. Mooers had Maclean's proxy. The minutes of the meeting, which Mooers admits were written in the minute book in 1913 from notes taken, recite that "the assignment of the contracts held by H. F. Mooers to the company was presented and *considered*." The minutes then shew that the following resolutions were passed:—

"Moved by N. M. Jackson, seconded by A. Maclean, Jr., that the assignment be approved and accepted and executed and the seal of the company be attached. . . . . *Carried.*

Moved by N. M. Jackson, seconded by A. Maclean, Jr., that 270 shares of the preference stock and 360 shares of the common stock of the company be allotted and transferred to H. F. Mooers and that the secretary be instructed to register him as the holder of such shares both fully paid up and non-assessable. *Carried.*

Moved by N. M. Jackson, seconded by A. Maclean, Jr., that the construction of the company's warehouse be done under the supervision of Mr. H. F. Mooers, who shall be paid a sum of

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ten per cent. over and above the cost of all labor and material. *Carried.*

The shares referred to were issued to Mooers and registered in his name, and he was, thereby, put in actual control of the company, for a person holding one ordinary share had, by the articles of association, the same voting power as one holding a preference share. The plant was completed in the fall, the subsidy obtained, the lots paid for and title received, and a mortgage of $30,000 was placed upon the property. Mooers took charge, and allowed himself a salary of $3,000 per annum; this was, subsequently, raised to $3,600, and finally to $6,000. No dividends, whatever have been paid, although the gross earnings have, in certain years, amounted to over $25,000.

The first question necessary to consider is: Did the shareholders on whose behalf this action is brought know at the time they applied for shares that the defendant, H. F. Mooers, was to get $63,000 in shares for his interest in the two contracts? If they did, and agreed to it, they cannot recover.

At the trial, three shareholders, H. L. Brown, J. T. Cashman, and D. D. McCurdy, gave evidence on behalf of the plaintiffs. Brown testified that, up to the time he had a certain conversation with Mooers in 1920, he did not know that Mooers had been or was to be allotted 270 shares of preference stock and 360 shares of common stock in exchange for the assignment of his contracts. Cashman says that he did not learn of it until 3 years ago; while McCurdy says he learned of it only a few months before action was brought. These witnesses all say that Mooers in soliciting subscriptions, pointed out that the company was getting $27,000 from the Government, and was also getting some very valuable lots for a very small sum. They knew the lots were cheap, and with those advantages they say they thought that the company would be a success. On the other hand, Mooers says that he explained to the Board of Trade his scheme, and that the Board appointed a committee to investigate it; that the committee did investigate the incorporation of the company, articles of association, the contracts he had obtained, and prospectus, and the amount of stock to be issued by the company in return for his contracts, and that the Board of Trade approved of the proposition and members thereof accompanied him when he went soliciting subscriptions. He further says that the prospectus contained a statement that he was to get $63,000 in stock for his contracts, and that the prospectus was circulated. The plaintiffs' witnesses say that if the prospectus was circulated, they never saw one. Clark, the plaintiff, admitted in his examination for discovery (he did not

give evidence at the trial) that on one occasion a prospectus had been shown to him, but that it was after he had subscribed for stock. Of the contents of the prospectus he had, absolutely, no recollection.

If Mooers made known to the Board of Trade, or to the individual shareholders when accompanied by members of the Board, that he was to get $63,000 in stock for his contracts, it would have been an easy matter to have called some of these members to corroborate his story. Not one of them, however, was called. A prospectus has been filed with the memorandum of association, but Mooers admits that it had never been used. That prospectus contained the following:—

"By agreement in writing, dated February 8, 1912, the company have secured from H. F. Mooers all his right title and interest in and to the subsidy and contract granted by the Dominion Government, bearing date of January 26, 1912, for cold storage purposes at the city of Moose Jaw, Saskatchewan: in consideration of the issue to him by the company of 270 shares of the 8% cumulative preference stock of the company and of 270 shares of the ordinary stock of the company, both fully paid up and non-assessable.

The said agreement may be inspected at the offices of the company's solicitors during business hours."

That statement was not true. There was no such agreement. On February 8, 1912, there was no company in existence, and no one who could enter into an agreement on its behalf. Further, there is not a suggestion that any agreement had been entered into between Mooers and a trustee for the intended company. No agreement was produced, and the existence of an agreement, in my opinion, is inconsistent with the resolution passed by Mooers in the solitude of his office on May 9, to the effect that it was expedient and in the interest of the company that he assigned his contracts. The fair conclusion, in my opinion, is, that there was no agreement between Mooers and the company for a transfer of the contracts standing in his name until May 17, after the stock had been all subscribed. Then, was there a second prospectus issued and circulated setting out that Mooers was to get $63,000 in stock? He says there was. Apart from the admission of the plaintiff Clark above referred to, no one but Mooers appears to have seen one until recent years. As to whether one was used in soliciting subscriptions, we have the evidence of Mooers himself, given in his examination for discovery in an action between Clark and himself in 1914, when all matters would be reasonably fresh in his mind. Re-

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ferring to the time when he was soliciting subscriptions for stock in the company, he gave the following testimony:—

"Q. Well, had you a prospectus at that time? A. There was one printed but not used to my knowledge. Q. Did the company have a prospectus printed about that time? A. There was one printed, as I stated before, but it had not been used. Q. You did not shew that to Clark, did you? A. I could not say whether I did or not."

There is not a word here about a second prospectus being in existence or circulation, as he now claims. Had such been the case, I think he would have remembered it in 1914. No such prospectus was filed and sec. 84 (2) provides that no prospectus shall be issued until a copy thereof has been filed for registration. I have dealt with this point at length, because the trial Judge was of opinion that the Moose Jaw subscribers had notice of an agreement by which Mooers was to get $63,000 stock; some actual notice, and the rest by the filing of the prospectus. I find myself unable to accept this view. What Mooers asks us to believe is, that the Moose Jaw shareholders agreed to put up $30,000 in cash for which they were to get $30,000 of preferred stock, knowing at the time that, when they had paid their money, Mooers was to receive $27,000 of preferred stock and $36,000 of common stock without any actual outlay except the small expense he had been put to in obtaining the contracts. In other words, that they agreed to put up all the money other than the subsidy and the mortgage money which went into the plant, less $300 of the original incorporators, knowing that when it was completed Mooers would own two-thirds of the stock issued and would have complete control. That they did so is, to my mind, inconceivable. I have no doubt whatever that had Mooers put the proposition to them as he says he did, that he would not have received a single subscription. I find myself unable to reach any other conclusion than that the shareholders when they took stock did not know that of the company's stock $63,000 was to go for an assignment of Mooers' contracts. To my mind the facts and circumstances disclosed in the evidence speak more eloquently than Mooers' sworn testimony in the witness box.

We now come to a consideration of the legal relations existing between Mooers and the Moose Jaw shareholders. Was he a trustee for them in obtaining the contracts? That he was the promoter of the company is clear, but, as pointed out by Lindley, L.J., in *Lydney and Wigpool Iron Ore Co.* v. *Bird* (1886),

33 Ch. D. 85, at p. 93. "It is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained."

Whether in acquiring the contracts in question, Mooers acquired them for himself or for the company, is a question of fact to be found on the whole evidence. It is, therefore, necessary to examine with care what he did and how he did it, to determine whether or not he took the contracts for the company, although in his own name.

The evidence discloses the following uncontradicted facts. On November 29, 1911, Mooers wrote the Moose Jaw city council, applying for two lots suitable for the erection of a cold storage warehouse, and asking to be advised at Calgary. On November 30, the city clerk wrote offering two lots in 127 at $2,000 each, and requesting a decision as soon as possible. On December 4, Mooers wrote acknowledging receipt of the offer, but saying nothing as to its acceptance beyond this:—"Regarding the terms of payment for same it can be arranged between us later, as at the present time of organisation of my company is not complete, and later on I will advise you when I shall be ready for the construction of the work."

Mooers was, therefore, on December 4, actively engaged in promoting his company. On the following day, December 5, he sent an application to Ottawa for the subsidy given under the Act.

On December 22, the city clerk wrote again, and among other things said:—"The council, however, wish to have the purchase definitely fixed in the shape of an agreement, and I should be obliged if you would advise me in whose name you wish the agreement made out."

On January 9, 1912, Mooers replied as follows:—

"Your favour of the 22nd Dec. addressed to me at Calgary has just been forwarded to me here, where I have been for the past two weeks. I note the council wish to have our arrangement fixed up in the shape of an agreement, and you might make it out in my name, Henry F. Mooers, *for the present*, as I am busy organising a company *for this business*, and you might make it in the form of an agreement for sale at the price agreed upon, and fix the final date of payment Dec. 1st, 1912, with the proviso of taking it up at any time to that date. It is the intention as soon as the company is fully organised to proceed with the work early in the spring, and to have the plant complete before fall. You might insert in the agreement that this is for the purpose of a cold storage plant to be

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erected, the minimum valuation of which is to be not less than $50,000.

The lots I would choose are 32-33 in block 127, reserving 34 as a side entrance."

The business for which he was organising a company was the erection of a cold storage warehouse on the lots for which he was then negotiating.

On February 8, the city clerk wrote enclosing agreements, dated February 6, for the lots for execution, and asking for a cheque for the cash payment, $2,000, which was evidently the way the agreement read at the time. Mooers did not send the cheque, but some time later, when does not appear, the agreement was changed so that the first payment became due July 1st, 1912, and the balance 6 months later. The agreement contained a clause authorising Mooers to assign it to any company erecting a cold storage plant in Moose Jaw, but to no one else without the city's written consent. In the prospectus filed with the memorandum of association no mention is made of any intention to charge the company for the agreement as to the lots, although it does contain an intimation that he expects to receive $27,000 for the subsidy agreement. On November 4, 1912, Mooers wrote the city clerk, "by an agreement dated February 6, between the City of Moose Jaw and H. F. Mooers, lots 31, 32 and 33, in block 127, old 96, were sold to the purchaser (*now the Moose Jaw Cold Storage Co., Ltd.*) for $6,000," and he asked for transfer.

The reason given by Mooers on December 4, for postponing the fixing of the terms of payment for the lots,—namely, that the organisation of the company was incomplete,—and his statement that "for the present" the agreement for the lots might be put in his name, are, in my opinion, consistent only with a purchase for the company; while his altering the agreement to make the first payment thereon payable July 1, 1912, shews that it was the company he intended should pay the city therefor; and his omission to make any mention in the prospectus of a charge to be made for the assignment, points to the conclusion that up to that time he had not intended that the company should pay anything for the lots beyond their purchase price. As to the subsidy, three things stand out clear. First, that at the time he applied for it, and when he acquired the contract, he was actively promoting a company to earn it; secondly, he never at any time had any intention of earning it himself, and thirdly, in soliciting subscriptions he represented that the subsidy would be available to the company for financing the erection of the warehouse.

In his evidence after stating that members of the Board of Trade had come with him and discussed with the various shareholders the matters affecting their subscription, he gave the following evidence:—

"Q. You tell us this plant cost $83,000 exclusive of land. How was it proposed to finance the building of the company? A. There was $30,000 subscribed in Moose Jaw. Q. Your first subscribers were whom? A. Three incorporators, $100 apiece. Q. And the next? A. Alexander and Blackburn $2,500 each, of Moose Jaw; 25 others in Moose Jaw, giving $30,000 in Moose Jaw. Q. I am told there are 26? A. Well, there are 26; one didn't come through. $30,000 we figured on getting from the Dominion Government; that amount wasn't settled because the amount of subsidy given by the Government was a percentage based on the total cost of the building and the land. It outlined it that we would expend $90,000, and then the balance was a mortgage loan $30,000. Q. Well, was that your original proposition? A. Yes."

The subsidy could not be available for the company unless it was acquired on its behalf. The proper inference, in my opinion, to be drawn from the whole of this evidence is, that Mooers acquired both contracts for the company; although, so far as the subsidy contract is concerned, he did intend to charge the company its equivalent in stock for having it pass through his hands.

There is, however, a great difference between a person acquiring property for himself with the intention of, subsequently, forming a company to take it off his hands, and acquiring it for a company which he is then organizing, with the intention of making the company pay him a profit by reason of the agreement being temporarily in his name. Had the company gone on to erect the warehouse without having obtained an assignment of the subsidy, a Court of Equity would, in my opinion, under the circumstances have compelled its assignment. It would have done so, not because Mooers was a promotor (for a promotor may not be a trustee), but because on the evidence it is clear that, when he took the contracts in his own name, he intended the company to be the ultimate purchaser; that it should pay the city the purchase price of the lots and that it should earn the subsidy, and because it was a fundamental part of the scheme that both lots and subsidy should be available for the purposes of the company.

In *Cook* v. *Deeks*, 27 D.L.R. 1, [1916] 1 A.C. 554, the Toronto Construction Co. had a Board of three directors, includ-

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ing the plaintiff. The company had been working under contracts with the C.P.R. Co. A new contract was about to be let. The directors other than the plaintiff had negotiated for the previous contracts with the C.P.R. representative. The same directors negotiated with reference to the new contract, but they expressly stipulated that the contract was to belong to themselves personally, and not to the Toronto Construction Co. Their tender was accepted, and they formed a new company, called the Dominion Construction Co., to perform the contract. The Privy Council held that, in equity, the two directors must be held to have taken the contract on behalf of the Toronto Construction Co., and ordered the new company, which did the work, to account for the profits made.

That case seems to me to establish that the taking of a contract by a person in his own name, with the intention of appropriating to himself the benefit of it, is not alone sufficient to justify the conclusion that he took it on his own behalf. In addition to these considerations, we must look at all the facts and circumstances surrounding the taking of it, and the legal relation of the parties. In my opinion, therefore, Mooers held the contracts as trustee.

It was further argued that, even if Mooers was not a trustee, but only a promoter at the time he acquired the contracts, he could not, apart from ratification or acquiescence, hold the shares in the absence of knowledge on the part of the shareholders when they subscribed for stock that these shares were to go to him.

The cases of *Gluckstein* v. *Barnes*, [1900] A.C. 240, and *In re Jubilee Cotton Mills, Ltd.*, [1922] 1 Ch. 100, would seem to support that proposition. On the facts, however, it does not seem to me to be a case of non-disclosure. At the time the plaintiffs subscribed, what was there to disclose? There was then no agreement between Mooers and the company by which the company were to give him the shares. There was then nothing in existence, except an intention on the part of Mooers to demand at a later date these shares as the price of handing over the contracts, knowing full well that the provisional directors would register his will, and taking good care that there would be no independent Board of Directors to pass upon the advisability of paying his price. The gist of the whole transaction was, that Mooers and Jackson, having control of the Board of Directors, conspired to use their control for the purpose of having transferred to Mooers $63,000 of the company's stock on the pretence of transferring to the company three lots, the purchase price of which the company had still to pay to

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the city, and a subsidy which the company had yet to earn. Assuming for the sake of the argument that Mooers held these on his own behalf, the consideration extracted for this assignment was so greatly in excess of their real value as of itself to be evidence of fraud. As against the shareholders other than Mooers and his two instruments, the appropriation of these shares, under the circumstances, was, in my opinion, a fraudulent act.

There is a passage in the judgment of Earl of Halsbury, L.C., in *Gluckstein* v. *Barnes*, which seems to me can be appropriately cited here. He said, [1900] A.C. at pp. 246-247:—

"I am wholly unable to understand any claim that these directors, vendors, syndicate, associates, have to retain this money. I entirely agree with the Master of the Rolls that the essence of this scheme was to form a company. It was essential that this should be done, and that they should be directors of it, who would purchase. The company should have been informed of what was being done and consulted whether they would have allowed this profit. . . . When they did afterwards sell to a company, they took very good care there should be no one who could ask questions. They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of deluded shareholders."

That those in control of a company are not allowed to appropriate to themselves the interests or property of the minority, is made clear by the judgment of the Lord Chancellor in *Cook* v. *Deeks*, 27 D.L.R. at p. 10, where he said:—

"Even supposing it be not *ultra vires* of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-West. Transportation Co.* v. *Beatty* (1887), 12 App. Cas. 589, and *Burland* v. *Earle*, [1902] A.C. 83, have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves.

Such use of voting power has never been sanctioned by the

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Courts, and, indeed, was expressly disapproved in the case of *Menier* v. *Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350."

I cannot find in the evidence that the shareholders ever ratified the appropriation of these shares. Nor do I find that there was acquiescence or delay on their part, with knowledge sufficient to bar their right of action.

I am, therefore, of opinion that the 630 shares obtained by Mooers for an assignment of his contracts should not have been issued; that they are the property of the company, and that the certificates therefor should be cancelled.

As to the 67 shares, Mooers admits that he issued them to himself without any authorisation on the part of the directors or the company. The issue will, therefore, be set aside and the certificates cancelled. Whatever rights Mooers had against the company for supervising the construction of the building, he will still have. As to the monies of the company which Mooers has taken and used, he must account as directed by the trial Judge.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff with costs, setting aside the issue of the 630 and the 67 shares issued to H. F. Mooers, and cancelling the certificates for the same.

There should also be reference back to the Court of King's Bench to fix the amount Mooers should be paid for supervising the erection of the company's warehouse, and the salary he should receive for the time devoted to the company's business.

If either of these claims had been passed upon by an independent Board, the Court would not interefere; for Courts will not interfere with the internal management of the company. But where the control of the company is obtained by an issue of shares which should never have been made, the Courts, as I have already pointed out, will protect the minority. I think this is a case in which the fixing of these amounts should be made by the Court and not by a local Registrar.

TURGEON, J.A.:—This action is brought by the appellant, who is a shareholder of the Moose Jaw Cold Storage Co., and the relief sought is primarily against the defendant H. F. Mooers, and secondarily only against the defendants Edwin Mooers and Mary Mooers, both of whom hold shares in the company which were held at one time by H. F. Mooers and which are to a large extent the subject matter of this action. In brief, the plaintiff's contention is that 630 shares of the company's capital issued to the defendant H. F. Mooers, on or about May 17, 1912, under circumstances which will be described later,

and having a nominal value of $63,000, were in reality issued to him without consideration, or for a consideration fraudulently inadequate; or, alternatively, that they were never really "issued" at all, the proceedings surrounding the "issue" being void. The plaintiff asks to have the shares declared invalid and cancelled, or, in the alternative, to have the defendants pay their real value to the company. There is also a claim against the defendants on account of a further issue of 67 shares, made to H. F. Mooers on March 30, 1913, and transferred by him to Mary Mooers on the same date. It is contended also that this issue was made illegally and without consideration. In the third place, there is a claim against the defendant H. F. Mooers arising out of payments received by him from the funds of the company for his salary and expenses as manager of the company's business at Moose Jaw. It is claimed that these payments were unauthorised and were grossly in excess of what a fair remuneration would be for the services rendered.

The shares issued to H. F. Mooers on the several occasions above referred to constitute considerably more than one half of the stock of the company issued up to the time the action was brought, and is nearly all in the hands of the three defendants, H. F. Mooers, Mary, and Edwin Mooers; and, moreover, both H. F. Mooers and Edwin Mooers are directors in a directorate of three. This action, therefore, was not and could not be brought by the company, but, as the evidence discloses, is brought by the plaintiff, Clark, on behalf of himself and several other shareholders.

Mary Mooers is the wife of H. F. Mooers, the principal defendant, and Edwin Mooers is his brother.

Some time in the autumn of 1911, H. F. Mooers conceived the idea of erecting a cold storage warehouse at Moose Jaw, with the assistance of a subsidy from the Government of Canada under the provisions of the Cold Storage Act 1907 (Can.) ch. 6, for which he applied, and with such other assistance as he might be able to secure from the council of the City of Moose Jaw, by means of the purchase of a favourable site from the council at a low figure. Mooers' negotiations both with the Government and the city council proved successful. On January 26, 1912, a contract was executed between himself and the Minister of Agriculture, acting for the Government. This contract provided that the warehouse was to be completed and equipped by Mooers before January 1, 1913, and, thereafter, maintained and operated by him for the period during which the subsidy was to run. No amount is stipulated in the contract as the value of

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the plant to be erected, but the contract calls for the payment by the Government to Mooers of a subsidy not to exceed, on the one hand, 30% of the amount expended by him, and, on the other hand, the sum of $27,000. The contemplated expenditure was, therefore, approximately $90,000.

On February 6, 1912, an agreement for sale was entered into between the City of Moose Jaw and Mooers for lots 31, 32 and 33 in block 127, owned by the city. Mooers agreed to pay $6,000 for these three lots; the first instalment being payable on July 1, 1912, and the balance on December 1, in the same year. The contract expressly stated that the lots were being sold to Mooers at a reduced price in order to aid in the industrial development of the city, and that Mooers undertook, in addition to paying the $6,000, to erect or cause to be erected on the property a cold storage building of the value of not less than $50,000, the erection to be completed not later than December 1, 1912.

As a result of these contracts, Mooers found himself with a project upon his hands which, it seems, he could not carry through, at least without great difficulty, if he had to rely upon his own financial resources. His only means of obtaining funds appear, according to his own evidence, to have consisted of his ability to collect certain sums owing to him by various persons, and which, he says, amounted to somewhere between $5,000 and $10,000. On the other hand, he was indebted to his mother and sisters in the sum of $6,000 for money borrowed from them on previous occasions. He, therefore, set about to organize a joint stock company which would take over his project. He states that from the first he had it in mind to organize a company for this purpose, and that he had discussed such a proposal with H. M. Jackson, of Kingston, Ontario, and Andrew McLean of Calgary, Alberta, both of whom became associated with him later, as will appear.

On February 19, 1912, The Moose Jaw Cold Storage Co. Limited, was incorporated under the provisions of the Saskatchewan Companies' Act with an authorised capital of $150,000, divided into 1,500 shares of $100 each; 750 preference shares, and 750 ordinary shares. The preference shares were to be entitled to receive an annual cumulative dividend of 8% per annum before any dividend became payable on the ordinary shares. There were only three subscribers to the memorandum of association: the defendant H. F. Mooers, and H. M. Jackson and Andrew McLean (the two gentlemen previously referred to), each of whom subscribed for one share. Thereafter began the series of transactions and other occurrences which have resulted in this litigation. And

it is important to bear in mind, when examining the various incidents which follow, that Mooers' object in organising the company was to assign to it, for a valuable consideration, his rights and liabilities under his contracts with the Dominion Government and the City of Moose Jaw. I think, too, that it will be well for me to state at once that, except where otherwise specially noted, I rely for any conclusions of law at which I may arrive in the course of my remarks upon the decisions of the House of Lords in *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, and *Marler Estates, Ltd.*, v. *Marler* (1913), published as a note to *Cook* v. *Deeks* 27 D.L.R. 1 at p. 11, since reported in 85 L.J. (P.C.) 167. The first case deals at length and the second case deals compendiously with most of the principles applicable to the case at Bar.

A meeting of the directors of the company was called for April 25, 1912. As table A. of the first schedule to the Companies Act R.S.S. 1909, ch. 72, (now R.S.S. 1920, ch. 76), applied, with certain modifications, to this company as its Articles of Association, the directorate at that time was deemed (par. 53) to consist of the three subscribers to the memorandum of association: H. F. Mooers, Jackson and McLean. Mooers alone was present at the time and place appointed for the meeting, holding proxies for McLean and Jackson. He states that he thought at that time that a meeting of directors could be held validly in such a manner, which, of course, is erroneous, as one person cannot hold a "meeting." (*Sharp* v. *Dawes* (1876), 2 Q.B.D. 26, 46 L.J. (Q.B.) 104, 25 W.R. 66). He proceeded to appoint permanent directors, nominating himself, McLean and Jackson as such, and he declared himself president of the company and Jackson secretary-treasurer. All these proceedings were, of course, null and of no effect.

Another meeting of the directors was called for May 9, 1912, when again Mooers, only, was present, with proxies from McLean and Jackson. The object of this meeting was said to be, among other things, to consider a transfer from Mooers to the company of his contracts with the Government and the city. Apparently, however, according to the minutes, Mooers took no steps in this matter at this so-called "meeting," although he proceeded to receive applications for stock from several persons and to allot stock to them. This proceeding of May 9 was again null and ineffective as a meeting.

On May 17, 1912, a third meeting took place, which is of the greatest importance to this litigation, and the proceedings at which have given rise to most of this controversy. This meet-

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ing was attended by Mooers and Jackson in person. Owing to the nullity of the two previous meetings, no permanent directors had been appointed and, consequently, Mooers and Jackson were still provisional directors by virtue of the Articles of Association, and, being a majority of the directorate, were sufficient to form a quorum. (Interpretation Act, R.S.S. 1909, ch. 1, sec. 6 (37) now R.S.S. 1920, ch. 1.) This meeting dealt with several important matters, but the most important of all was a resolution, which was adopted, authorising an assignment to the company of Mooers' contracts with the city and the Government. This resolution authorised the allotment to Mooers, in consideration for the rights assigned to him, of 270 shares of preferred stock and 360 shares of common stock in the company. The resolution instructed the secretary to register Mooers as the holder of these shares, and this, I may say, was done. Mooers produced at the meeting a letter from the Minister of Agriculture consenting to the assignment to the company of his contract with the Government. The appellant contends that this act of the directors was null and void: Mooers, one of the two who formed the quorum, being interested in the contract adopted by the resolution. If in fact the making of the contract in this manner was an illegal proceeding we would have a short way out of the difficulties of the case, but I do not think this solution is open to us.

Reference was made in this connection to the decision in *Re Greymouth Point Elizabeth Railway & Coal Co.*, [1904] 1 Ch. 32. This decision holds that a director of a company is not entitled to join in forming a quorum for the consideration of matters with regard to which he is not entitled to vote, and that consequently a "quorum" in such a case means a quorum of independent directors. But the decision was founded upon one of the Articles of Association of the Greymouth company, which expressly prohibited a director from voting on any matters relating to a contract in which he was interested. No such express prohibition exists, however, in this case. The Articles of Association consist, as I have said, of table A. with certain modifications. One of these modifications goes to the length, in my opinion, of removing the disability which otherwise would have attached to Mooers in the present case. Article 57 of the table would, if in force, have disqualified Mooers from forming part of the quorum, as it provides that the office of a director shall be vacated if he is concerned in any contract with the company. But I find that a clause in the articles of the company expressly abrogates this Article 57. I think that this condition of affairs, whereby the articles do not purport to place any lim-

itation or prohibition upon the power of a director to approve, as such, of contracts between himself and the company is most unusual, but McLean and Jackson, Mooers' co-incorporators, signed these articles with him, and those who subsequently purchased stock must be taken, no doubt, to have had notice of the provisions of these articles, and I know of no rule of law that makes them invalid or that renders illegal, in the absence of some prohibition in the constitution of the company, a proceeding such as Mooers took part in here. However disadvantageous to the company the contract made by the directors with Mooers may be, and although the circumstances surrounding its adoption may have been such as to render it liable to be set aside and I will discuss that later—I can find no authority for declaring it illegal. And this applies to the acceptance of the assignment and to the allotment of the 630 shares to him. Later on this same date (May 17) Mooers and Jackson held what they called a special meeting of the shareholders, Mooers again holding a proxy for McLean. Nothing was done at this meeting, however, to ratify the contract just made by the directors. Had any such step been taken, another question might have arisen which does not now confront us.

The agreement between Mooers and the company covering the assignment agreed upon at the directors' meeting is also dated on this same date, and was executed by Mooers on his own behalf, and on behalf of the company by Mooers himself as president and Jackson as secretary.

But while this transaction between Mooers and the company was not illegal and consequently void, it was of such a nature that it is open to attack on other grounds. For the present it will suffice for me to say that, in my opinion, this contract was, as between Mooers and the company, greatly to the advantage of Mooers. Intending therefore, as he did, to make this contract with the company, Mooers' undoubted duty was to see to it that the company which he had formed and caused to be incorporated was furnished with an independent Board of Directors. This he did not do; but, on the contrary, it seems clear from the evidence that every step taken by him was calculated to result in the contract being considered and adopted by a directorate controlled by himself. A contract made under such conditions may be set aside, if action is taken in due time. But if at the time action is brought conditions are such that the parties can no longer be—and there is no doubt that such are the conditions in this case, restored to the position they occupied before the contract, rescission cannot be decreed, and

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damages only can be recovered against the delinquent director. If the subject-matter of the sale is an article which has a market value, the difference between this market value and the price paid by the company constitutes the measure of the damages. If, however, as is the case here, the thing sold to the company has no market value, the Court cannot be asked to fix a proper price between the parties, and the only measure of damages is the loss to the company in the whole transaction. Here, we meet with a great difficulty, because, admittedly, if the contract is to stand and Mooers is to keep what he got, it seems almost impossible to estimate the loss, if any, suffered by the company. I cannot say that Mooers gave no value at all for what he received, although, in my opinion, the bargain he made was a most one-sided one in his favour. By his contract with the Dominion Government, it may be said roughly, he was to receive $27,000, provided he erected a $90,000 plant within 12 months and kept it in operation. By his assignment to the company, he escaped entirely from this obligation, which he seemed to have no present means of carrying out, and received from the company $27,000 in preferred stock, for which all other subscribers paid $100 per share, and which apparently has always been worth its nominal value. The company, therefore, acquired from him his right to earn this money by paying him the full amount of it in the equivalent of cash. The only real consideration which he seems to have had to offer the company was the exclusive right to build and to receive the subsidy, which he enjoyed for those 12 months by the terms of his contract and of the Order-in-Council which governed it. Likewise, his agreement for sale with the City of Moose Jaw was handed over to the company on terms most advantageous to himself. This agreement obligated him to pay $6,000 and to erect a $50,000 building within 10 months. But we find that the contract he made with the company provides that, in addition to the $27,000 worth of preferred stock above referred to, he is likewise to receive, and he did receive, $36,000 of common stock. The actual value of this common stock has not been ascertained (none of it was ever sold), but Mooers himself in his evidence says that it was probably worth 10 to 20 cents on the dollar. I can find no justification, however, in the evidence for any such low valuation, excepting his own indefinite statement. In addition to this, it must be remembered that he did not pay anything to the city on account of the purchase of the lots, but the company, in addition to giving him the shares, undertook to pay, and did pay the whole of the $6,000. On the other hand, the lots were admittedly sold to Mooers at a reduced price. The

only evidence as to the actual value of the property at the time of the sale was given by Mayberry, a real estate agent, who placed the value at from $10,500 to $12,000. But, in addition to paying the agreed price ($6,000), it must be remembered that the company relieved Mooers of his obligation to erect the warehouse.

In justification of the price which he exacted from the company, Mooers says in his evidence that the general manager at Winnipeg of the Swift Canadian Co. offered to give him $27,000 in cash for his right to the Government subsidy, and to take over his contract with the City of Moose Jaw for the purchase of the lots, and that he refused this offer. It does not appear that the offer in question was any more than an oral proposal, not binding upon the Swift company, but I state it for what it is worth, as it is the only tittle of evidence I can find in support of the adequacy of the consideration given by Mooers to the company.

Such being the contract, we next find that Mooers asserts that it was ratified by the shareholders of the company in general meeting on December 9, 1912. In support of this assertion, he produces the minutes of this meeting, which was attended by four shareholders besides himself, (the presence of five being necessary to form a quorum), and at which he held proxies for McLean and Jackson. Some question exists as to the qualification of one of these shareholders and consequently as to validity of this meeting; but, in any case, I am of the opinion that the minutes produced do not prove any such ratification. The minutes first recite the purpose of the meeting, as follows:—

"The purpose of the meeting was for receiving and considering statements of accounts and a balance sheet, and the report of the auditors and directors and for the purpose of passing resolutions respecting the banking with the Bank of Nova Scotia and with the Dominion Bank, and of confirming all previous meetings of shareholders and directors, all in accordance with the notice calling the meeting, under date of November 14, 1912."

Further on the following resolution is shewn as having been adopted:—

"Moved by W. E. Seaborn and seconded by H. F. Mooers it was resolved that we, the shareholders of the Moose Jaw Cold Storage Co. Ltd. do hereby recognise, accept, adopt, ratify and confirm all of the said acts of the incorporators and stockholders of the company *at all the previous meetings held, the minutes of which have been read*, certifying our approval of the same, and we do agree to be bound by the Memorandum of Asso-

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ciation, Articles of Association and Certificate of Incorporation in the transaction of any or all business coming before us for or on behalf of the company. Carried."

It appears, however, from the minutes that the only minutes of previous meetings read were those of the meetings held on November 22 and December 6, 1912, neither of which contain any reference to the contract between Mooers and the company. Under the circumstances, I think the onus was upon Mooers to produce clear proof of the ratification which he sets up, and I do not think we should be asked to infer it from the general terms of the resolution. As between Mooers and the company, therefore, I am of the opinion that the contract in question was not approved by an independent Board of Directors and has never been ratified by a meeting of shareholders. I should add, however, that, while such is the situation, there does not appear to be any means of preventing a resolution of ratification being passed at a meeting of shareholders, if a quorum of five members can be formed for the purpose of holding a meeting, as the voting at meetings is according to the number of shares held by each member, and the three defendants are the holders of enough shares to carry the necessary resolution. Their interest in the contract is not of itself a disqualification from voting at a shareholders' meeting.

(*The North-West. Transportation Co.* v. *Beatty*, 12 App. Cas. 589, 56 L.J. (P.C.) 102).

In any case, whatever the attitude of the company, as a company, may be towards the contract and towards this litigation, the fact remains that the action is not brought by the company, but by certain shareholders. It, therefore, becomes necessary to consider what rules of law apply to the proceedings. It was laid down by the Judicial Committee of the Privy Council in *Burland* v. *Earle*, [1902] A.C. 83, at p. 93, 71 L.J. (P.C.) 1, 18 Times L.R. 41, "that in order to redress a wrong done to the company, or to recover money or damages alleged to be due to the company, the action should prima facie be brought by the company itself."

The decision then points out that, when the persons against whom relief is sought themselves hold the majority of the shares in the company and will not permit an action to be brought, the minority shareholders may maintain an action in cases where the acts complained of are, (1) *ultra vires* of the company, or (2) of a fraudulent character. There is still another form of action available to individual shareholders against persons who may have led them by misrepresentation to purchase shares in

a company involved or about to become involved in an inequitable contract, such as this contract is alleged to be, but the appellant apparently does not seek this sort of remedy. The wrongs described in the claim are referred to as wrongs done to the company and the form of relief asked for is restitution by the defendants to the company in shares or in money. What the appellant really asks is that the company be placed in the position which it would occupy if the shares in dispute had never been issued to H. F. Mooers, or if they had been issued to him without consideration and under circumstances requiring him to pay the company their full value in money. If this relief is sought on the theory that the consideration given to the company by Mooers for these shares was valueless, it cannot be granted, because the contracts he assigned were no doubt of some value, and they cannot now be handed back to him. If the claim is based, and it is so based alternatively, on the theory that Mooers really acquired these contracts with the Government and the city on behalf of the company which he was about to organise and that they were the property of the company at the time of the assignment, it must fail again, because a reference to the principles enunciated by the authorities to which I have already referred will make it clear, when they are applied to the facts of this case, that this proposition cannot be supported. There is no doubt that Mooers held these contracts in his own right, and was free at the time of the assignment to make any use of them he might choose. And again, if we were convinced of the inadequacy of the price paid by Mooers for his shares by means of the assignment, we have no power to remedy matters by fixing a new price between him and the company. There remains, therefore, only to consider whether there was fraud, and, if so, what damages have resulted from the fraud.

The task of ascertaining in this case whether any fraud was practised upon the company or upon the minority shareholders is one of great difficulty. In certain cases, the inadequacy of the price alone is deemed to be conclusive evidence of fraud, when it is so great as to shock the conscience (*Coles* v. *Trecothick* (1804), 9 Ves. Jr. 234, 32 E.R. 592). The question of whether there is such a degree of inadequacy here, and whether, moreover, this is a case where the rule suggested in the Coles case may be applied, can best be determined, I think, by a careful perusal of the facts which bear upon it.

It is alleged against Mooers that at the time he organised the company and procured the stock subscription of the appel-

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lant and of a number of other subscribers, he failed to disclose to them the nature of the contract which he intended to make with the company; nor, it is alleged, did he make any disclosure to the company itself, excepting, of course, such as he probably made to his two co-incorporators and co-directors, Jackson and McLean. Further, it is asserted, the contracts which Mooers held with the Government and with the city were of such a nature that the company itself could have obtained all the advantages which they offered by contracting on their own account directly with the Government and the city. The contention, therefore, appears to be made inferentially, (1) that Mooers should have adopted this suggested course of contracting directly on behalf of the company, or (2) that the other shareholders, if the situation had been made known to them, would have joined in refusing to furnish the company with capital, and (3) that, in any event, Mooers gave the company nothing which bore any value as between him and it.

As to the contention based on the theory of Mooers' duty towards the company, I have already expressed the opinion that these contracts were his own property and were not held by him in trust for the company. It may well be said that a person of a more generous character and of a finer sense of propriety would have given his company the benefit of dealing directly with the Government and the city, and of earning and keeping the advantages to be derived from such contracts without interposing himself as a middleman to secure a profit. But, as was pointed out in *Burland* v. *Earle*, *supra*, the Court cannot decide questions of that character. We must confine ourselves to ascertaining whether or not he was under any legal obligation to act otherwise than he did, and no such obligation existed.

Then, was the consideration given by Mooers of no value, or was the price obtained by him from the company so grossly excessive as to be in itself evidence of fraud? The trial Judge has the following to say on this question (60 D.L.R. 542 at p. 545):—

"It seems to me absurd to contend that these two contracts were of no value. The land was obtained at a cheap price, and, while anyone else would have obtained a similar agreement from the City of Moose Jaw, no one else could have obtained a subsidy from the Dominion Government for a cold storage warehouse at Moose Jaw, after Mooers had obtained same."

In my opinion, this statement puts the case much too favourably for the defendant. I have already described at length the substance of Mooers' contracts with the Government and the

city, and the short period during which, only, this first contract was to run and to be exclusive, unless completed by Mooers, and I need not repeat myself here. I would say without hesitation that the price obtained by Mooers from the company was excessive, and much more than, in my opinion, might reasonably have been fixed, say, by an arbitrator undertaking to fix a value at the time with a full knowledge of all the circumstances and of the resources of both parties. But at the same time the case is such that I find that I cannot, without more, say that the contract in itself reveals fraud conclusively. I must go further and examine the circumstances under which it was brought about.

We must, therefore, proceed to consider the allegation of non-disclosure. Upon this point, there is some conflict of evidence, and the finding of the trial Judge is substantially in favour of Mooers. His judgment contains the following paragraph, p. 545:—

"Did he make full disclosure? The prospectus filed substantially shewed the agreement between Mooers and the company. A new prospectus was issued, and I believe was circulated. Three of the shareholders say they never saw it, but the plaintiff admits it was shewn to him, and this corroborates Mooers' evidence that he distributed the prospectus to the subscribers. This second prospectus shews the agreement between Mooers and the company, and shews how many shares he was to receive for the assignment of these two agreements."

The company was incorporated on February 19, 1912. Mooers' assignment to the company, it has been shewn, was agreed to at a directors' meeting held on May 17, 1912. At this same meeting, a subscription list was presented, signed by 27 citizens of Moose Jaw. In effect, the subscribers agreed, among other things, to become shareholders, each to the extent of $1,000 of preferred shares. This application was accepted by the directors and 250 shares of preferred stock were allotted to Mr. Render, the manager of the Merchants' Bank, in trust for the subscribers. Twenty-five of these subscribers paid for and received their shares. The appellant and Brown, Cushman and McCurdy, who gave evidence on his behalf at the trial, were subscribers to this list, and obtained their shares in the company in this manner. I may add that these subscribers and the three respondents appear, with four or five other persons, to be all the shareholders in the company. The evidence shews that, in order to secure capital for his company in Moose Jaw, Mooers appealed to the community spirit of the citizens, and canvassed his project among them as one calculated to aid in the develop-

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ment of the city. We all know how effective appeals of this nature were in our various centres of population at the time this project was put under way. He enlisted the services of the Board of Trade, and different members of that body, four of whom are named in the evidence, accompanied him in his visits to the gentlemen who signed the subscription list. Four of these members are named in the evidence. The memorandum on the list which was signed by the appellant and the others sets out that the subscriptions were being taken in order that money might be borrowed from the bank on the security thus created. The memorandum states that "if an industrial league or fund is established this liability will be taken over and undertaken by the said industrial league." Everything, in short, goes to shew that the idea in the minds of all concerned was to assist by their credit an industry which would prove beneficial to the city. This explains, at least in part, why it was relatively easy for Mooers to carry out his project without having its merits scrutinised too closely by those who came to his assistance.

Mooers swears that in soliciting these subscriptions he made full disclosure to each subscriber of the contract he intended making with the company, and that he did this in presence of the members of the Board of Trade who accompanied him. A document is produced which is referred to in the evidence as a prospectus. This prospectus was never signed and filed in compliance with the Saskatchewan Companies' Act, but Mooers says that these omissions are attributable to his solicitors in Moose Jaw, whom he instructed to file the prospectus. In any event this document does set out in full the particulars of the transaction which Mooers intended to carry out with the company. The contracts with the Government and the city are described, and also the selling price, viz: 270 shares of preferred stock and 360 of common stock, fully paid up and non-assessable. The only inaccuracy is that the prospectus refers to the contract as having already been made with the company, while, in fact, it was made on May 17, 1912, after the list was fully signed. I do not think this inaccuracy is material, because, if these subscribers agreed to take stock in view of such a contract already made, I do not see how they can claim that this identical contract is of fraudulent a nature when, in fact, it was made on the same day their subscription was filed with the company. Now, Mooers swears that everyone of these subscribers had knowledge of the contract through this prospectus and through his conversation with them. Some of the subscrib-

ers, he says, asked him to leave a copy of the prospectus with them, others read it and discussed it with him; but every one of them, he swears, had full notice of its contents and consequently of the terms of the contract. His evidence on all this is uncontradicted, save as I am about to point out.

The appellant did not give evidence at the trial, but he was examined for discovery before the trial and this evidence was put in. It is substantially an omission by the appellant that the entire project, including the contract in question, was made known to him, but that he did not give the matter sufficient attention as the member of the Board of Trade who introduced him to Mooers said, "it would be a good thing for Moose Jaw," etc., and he fell a victim to the prevalent contagion. He says: "It was in those crazy days of Moose Jaw; those were 'crazy days.'"

The three shareholders who gave evidence on behalf of the appellant, and who apparently are associated with him in this action, are H. L. Brown, J. T. Cushman and D. D. McCurdy. These witnesses say, in effect, that Mooers represented to them at the time they signed the subscription list that the Government subsidy and the advantageous bargain made with the City for the lots would enure to the Company, and that they were not given to understand that Mooers was to receive anything from the Company for the same. None of the other 21 or 22 subscribers to this list gave evidence on either side, although nearly all of them still live and do business in the city of Moose Jaw. Eight of them, however, must have known so far back as September 25, 1912, that Mooers had acquired considerable stock in the Company by some means or other, because, on that date, they secured an agreement from Mooers whereby he transferred to each of them $1,000 of preferred stock and $1,000 common stock, of his own holdings, in consideration of their guarantee to the bank. With the knowledge these shareholders must have had at that time, in view of their dealings with the Bank, of the finances of the company, I do not see how they, at least, could possibly have been ignorant of the fact that Mooers had not paid in money for the $16,000 stock he was handing over to them.

On the whole, and bearing in mind the finding of the trial Judge, I am of opinion that the charge of non-disclosure must fail. My opinion is that the appellant and those whom, apparently, he represents had all the facts of the case brought home to them in 1912, but that they did not give the merits of the case, as a strictly personal, business proposition, sufficient con-

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sideration, being influenced largely by the belief that the project they were assisting would be beneficial to their city, and that probably, in any case, an industrial league would be formed to relieve them of their liability on the document signed by them. The fact that the creation of such an industrial league was then being considered by the Board of Trade and the citizens of Moose Jaw will illustrate the spirit of the times, and help to explain how easily projects of this sort were put through. Then, in course of time, these subscribers had to pay up their guarantee to the bank and thus became shareholders, probably against their expectations, because the memorandum they signed starts out by saying that they were pledging their credit, and that the shares were to be allotted to them only in case they were called upon to pay under the guarantee. Then, the years went by and no dividends were being paid, and the appellant himself says that, although he and his associates acquired knowledge of Mooers' bargain with the company, which is now alleged to be fraudulent, "years ago," (he does not say just how many years), they waited about to see whether the company would prosper and pay dividends. He is frank in his statement that the action would never have been brought if dividends had been paid. Leaving out of consideration the question of rescission which, as I have stated, cannot be granted in any event, I am of opinion, on all the facts of the case, that there has been sufficient delay to imply acquiescence and to allow enough time to go by to bar all actions.

All of the foregoing refers only to the 270 shares of preferred stock and the 360 shares of common stock allotted to Mooers on May 17, 1912, in consideration of his assignment to the company.

We next have to deal with the claim against Mooers on account of the issue to him of $6,700 stock on March 30, 1913.

The evidence shews that at the directors' meeting of May 17, 1912, it was agreed to appoint Mooers supervisor of the construction of the company's warehouse, his remuneration to be a payment of 10% of the cost of the labour and material. I have already had occasion to point out the reasons why this meeting was a valid meeting, and why a contract made with Mooers himself could not be attacked on the ground of nullity. There is no doubt that Mooers was qualified for this work, as he was a builder and contractor, and had just completed the building of a cold storage warehouse at Moose Jaw. He did the work, and, he says, there was due and owing to him on February 27, 1913, the sum of $7,656. On that date, a meeting of

the directors was held, at which five were present besides Mooers himself. The minutes shew that an issue of $15,000 of preferred stock was authorised. Moore states, and his evidence is uncontradicted, that the purpose of this issue was to raise money to pay Mooers his earnings, and to adjust certain other matters He then states that he tried to sell this stock, but was unsuccessful, and that he finally, on March 30, decided to take some of it himself in satisfaction of the amount owing to him by the company. I can see nothing fraudulent in this transaction, and, consequently, no grounds for a suit on behalf of the minority shareholders.

Then, we have the question of the salary paid to Mooers as manager of the company from its inception down to the time of action, for some years at the rate of $3,000 per annum then at $3,500, and since 1918 at $6,000.

According to art. 54 of table A. in the Companies Act of R.S.S. 1909, ch. 72 then applicable, the remuneration of directors must be fixed by the company in general meeting. This, apparently, was never done. But the evidence shews that Mooers performed the duties of manager. His salary, during the last period at least, may have been excessive, but there was no evidence adduced to shew positively whether it was or not, or what a reasonable salary would be. Mooers spends only about two-thirds of his time in Moose Jaw, and is in Kingston most of the rest of the year; but he claims to do some travelling on behalf of the company. Here again the trial Judge has not found fraud, nor can I; and, bearing in mind once more the limitation placed in *Burland* v. *Earle*, *supra*, upon the rights of minority shareholders to bring actions, I think that the appeal must fail on this branch of the case also.

There remains only one matter to be disposed of. The appellant claims against Mooers for certain sums of money appropriated by him from the funds of the company and used for his own purposes, and not the purposes of the company, under the name of "expenses," "entertainments," "donations", etc. In respect to this matter, the trial Judge has found fraud against Mooers, and directed a reference to the local Registrar to have all such items accounted for, the amount ascertained to be paid by Mooers into the funds of the company. The trial Judge limits this accounting to a period of 6 years before the date the action was brought. As Mooers had access to the funds of the company as manager and director, and used these facilities to conceal his fraud, I do not see why his liability should be limited to a 6 years' period. I think the judgment of the trial Judge should be varied in this respect, and the ac-

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counting to be held from the date of the incorporation of the company.

I do not think the disposition of the costs made by the trial Judge should be disturbed.

Except for the variation just referred to, I think the appeal must be dismissed, and with costs.

MCKAY, J.A. concurred with TURGEON, J.A.

Appeal dismissed; Court equally divided.

DOANE v. THOMAS.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. October 3, 1922.

AUTOMOBILES (§III—220)—COLLISION BETWEEN CAR AND BICYCLE—BOTH PARTIES NEGLIGENT — JOINT NEGLIGENCE CAUSE OF ACCIDENT — RIGHT TO RECOVER.

Where both parties to a collision between a motor car and a bicycle are equally at fault, such joint negligence being the cause of the accident the plaintiff cannot recover.

[*Winch* v. *Bowell* (1922), 67 D.L.R. 471, followed. See Annotation 39 D.L.R. 4.]

APPEAL by defendant from the trial judgment in an action to recover damages for injuries received in a collision between the defendant's automobile and the plaintiff's bicycle. Reversed.

H. B. Robertson, K.C., for appellant.

J. R. Green, for respondent.

MARTIN, J.A.:—With every respect for the view taken by the Judge below, I can only reach the conclusion that the inference to be drawn from the main facts, either admitted or not in substantial dispute, is that the plaintiff was guilty of contributory negligence and that the case is one wherein the plaintiff was at least as much to blame as the defendant, such joint negligence being the "real" cause of the accident, and therefore, guided by the principles I followed in our recent decisions in *Winch* v. *Bowell* (1922), 67 D.L.R. 471, and *Skidmore* v. *B.C. Electric Ry.* (1922), 68 D.L.R. 32, I am of the opinion that the appeal should be allowed. Without going into the matter at unnecessary length, I may say that I cannot help thinking that the Judge was, with all due respect, led into error at the outset in that he says at the beginning of his reasons for judgment, that the defendant "was well aware that Douglas Street, especially at the noon hour was occupied with considerable traffic both ways," and he repeats, in substance, this statement later on when he finds the defendant did not "take due precaution." But the fact is, as the plaintiff himself shows, that there was, upon that occasion, surprisingly little traffic, and, in any event, whatever the traffic was, the obligation to "take due precaution" was not upon the defendant alone but upon the

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plaintiff also. And upon the important question as to whether or no plaintiff was coasting on his bicycle the Judge has found, and rightly so, I think, against his credibility, and, therefore, his whole evidence has been, in my opinion, unfavourably affected, which accounts, doubtless, for the lack of his satisfactory explanation (to me at least) of his actions, and in view of that lack, I do not see how the judgment can be supported.

GALLIHER, J.A. (dissenting):—While not absolutely free from doubt, on the whole I cannot say the trial Judge came to a wrong conclusion and would dismiss the appeal.

MCPHILLIPS, J.A.:—I concur in the judgment of my brother Martin, that the appeal should be allowed.

EBERTS, J.A. would allow the appeal. *Appeal allowed.*

Re SMITH AND McPHERSON.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., Middleton, J. and Ferguson, J.A. December 30, 1921.

MINES AND MINERALS (§IB—10)—EXTENSION OF TIME—"UNTIL" MEANING OF.

Upon the application of the holder of a mining claim the Mining Commissioner issued an order extending the time for the performance of certain work "until the 1st day of July next." The Court held that the order gave the holder the whole of July 1st for the performance of the deficiency and that a claim staked on July 2nd had priority over a claim staked on July 1st because the time had not then expired.

APPEAL from the decision of the Mining Commissioner. Reversed.

The decision of the Mining Commissioner which is appealed from is as follows:—

Upon the application of Edward Hargreaves, the recorded holder of mining claim L. 8200, situate in the township of Label, in the Larder Lake Mining Division, I issued an order on February 7, 1921, a clause of which reads as follows:—

"And I further order that the time for the performance of the deficiency of the work upon the said claim L. 8200 be extended until the 1st day of July next."

The deficiency of work was not fully performed as ordered; and on July 1, 1921, W. H. Smith restaked the claim and sought to record his application therefor. The Mining Recorder held that under my order the time for performing the work would not expire until the end of the 1st day of July, and consequently the land was not open for staking on that day. Homer Racicot staked the same land on the 2nd July and recorded his application. On the 15th July, W. H. Smith instituted an appeal from the decision of the Mining Recorder, refusing Smith's application for the recording of the staking of the 1st July.

The sole issue before me upon the appeal is, was the land open for staking on the 1st or not until the 2nd July.

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In computing time, for an act or event, there is no general rule that the day mentioned is to be inclusive or exclusive—it depends on the reason of the thing according to the circumstances: *Lester* v. *Garland* (1808), 15 Ves. 248, 33 E.R. 748. Whether the computation is to be made inclusive or exclusive of the first mentioned or last mentioned day, regard must be had to the context and to the purposes for which the computation has to be made. Where there is room for doubt the enactment or instrument ought to be so construed as to effectuate and not to defeat the intention of Parliament or of the parties as the case may be: 27 Hals. p. 446.

In *Backhouse* v. *Mellor* (1859), 28 L.J. (Ex.) 141, Watson, B., at p. 142, said: "The word 'until' is ambiguous, and may be construed either inclusive or exclusive of the day mentioned, according to the subject-matter and true intent of the document in which it is used." See also *sub nom Bellhouse* v. *Mellor*, 4 H. & N. 116 at pp. 124, 125, 157 E.R. 780.

Nichols v. *Ramsel* (1678), 2 Mod. Rep. 280, 86 E.R. 1072, was considered by Lord Ellenborough, C.J., in *Rex* v. *Stevens and Agnew* (1804), 5 East 244, at p. 255, 102 E.R. 1063. "On the other side . . . it is contended, on the authority of *Nichols* v. *Ramsel*, 2 Mod. Rep. 280, . . . that in legal proceedings the word 'until' must have an exclusive sense; and it has been argued from the analogy it bears to the word 'unto' (which word generally bears the same relation to place which 'until' does to time) that the case of *Rex* v. *Inhabitants of Gamlingay* (1799), 3 Term. Rep. 513, 100 E.R. 707 is to be considered as authority to the same effect. These words, however, have obtained, in ordinary use, an equivocal sense at least, of which many instances were given at the Bar."

The American authorities give the word "until" an exclusive or inclusive meaning according to the subject-matter being construed, and are not, nor are other authorities cited, conclusive or binding on me in determining the meaning to be given this word in the order referred to.

The recorded holder, who secured the extension order, was not in doubt as to when his extended term expired, and understood the work must be performed by midnight of the last day of June. The intention of the order was that the work should be performed by the end of June. The word "until", as used, was the equivalent of "unto," "as far as," and not meant to be inclusive of the day named, when the protection ceased.

In determining the time within which an act should be performed pursuant to the requirements of the Mining Act of Ontario, R.S.O. 1914, ch. 32, it has been the rule to exclude the first and include the last day; but the reasoning behind

the adoption of that rule does not apply here, as the only doubt, is, was the day named for the conclusion of the work to be treated as inclusive, or as a time or period of demarcation between the performance of the work and a forfeiture for the non-performance?

It will be noticed that in the prescribed form for a miner's license (form 1) the words used are, "to be in force until and including the 31st day of March." With intent the word "until" was not used in this form in a restrictive sense or as a word of limitation.

Having a personal knowledge of the true intent of the clause of the order in question, and the recipient of the order being in no doubt as to its intent and meaning, and not being bound by a settled and fixed judicial interpretation of the word "until," I find that a forfeiture had occurred, and mining claim L. 8200 was open for staking after midnight of June 30, 1921.

The extension granted was in the nature of an indulgence within the jurisdiction of the Mining Commissioner to grant, and not a statutory allowance, and should not in this respect be liberally construed.

It is not a case for costs.

The appeal of W. H. Smith should be allowed, his application should be recorded, and the recording of mining claim L. 9250 staked by H. Racicot on behalf of D. A. McPherson should be cancelled.

The appeal from the decision of the Mining Commissioner was by D. A. McPherson.

S. H. Bradford, K.C., for appellant.

H. R. Frost, for W. H. Smith, respondent.

MACLAREN, J.A. (after briefly stating the facts):—The sole question argued before us was, whether the time for the performance of the deficiency of the said work expired at the close of the 30th of June or whether it included the 1st day of July.

Smith asserted that his discovery and staking at 12.01 a.m. on July 1 was good, while McPherson maintained that Hargreaves' time did not expire until the close of the 1st July, and that his discovery and staking by H. Racicot at 12.01 a.m. on July 2 gave him priority.

The Mining Recorder rejected the claim of Smith as being premature, and accepted and recorded the claim of McPherson. Smith appealed to the Mining Commissioner, who held that the time fixed by the order of February 7 expired on June 30, and

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that Smith was entitled to priority and to have his discovery and staking accepted and recorded.

The appeal was argued before us wholly upon the meaning and effect of the concluding paragraph of the order of July 7 above quoted and especially of the word "until."

I am of opinion that the words are not to be construed in any unusual or technical sense, but in the same manner as if a debtor had approached his creditor or one who had power to grant him an extension, and the time for payment had been "extended until the 1st day of July next." I have no doubt that the vast majority of people would interpret it as was done by the Mining Recorder and include the 1st July. As the Commissioner was conferring a favour upon the applicant, even if there was any ambiguity in the language, it would not be presumed that what he was giving with one hand he would take away with the other.

If, on the other hand, we should endeavour to ascertain how the words have been construed by the highest legal authorities, I am of opinion that we would arrive at the same conclusion. The leading modern case, in which the older cases are reviewed by Kelly, C.B., is *Isaacs* v. *Royal Ins. Co.* (1870), L.R. 5 Ex. 296, where property was insured for six months from the 14th February to the 14th August, and was destroyed by fire on the 14th August. Among other cases cited by the Chief Baron was *Ackland* v. *Lutley* (1839), 9 Ad. & El. 879, 112 E.R. 1446, where a lease was granted for 21 years from the 25th March in a particular year. It was held to last until the end of the 25th March of the last year of the lease. In *Bellhouse* v. *Mellor* (1859), 4 H. & N. 116, 157 E.R. 780, where an order of protection was granted to a bankrupt until the 29th July, it was held that the whole of the 29th July was included.

In *Webb* v. *Fairmaner* (1838), 3 M. & W. 473, 150 E.R. 1231, where goods were to be paid for "in two months," it was held that the last day was included. These and other authorities, said the Chief Baron (L.R. 5 Ex. at p. 300) "illustrate the principle that, in general, the day on which the engagement is entered into is excluded, and the last day of the term is included." Barons Martin and Cleasby concurred.

In 27 Hals. p. 446, para. 881, in discussing the question, it is said that "regard must be had to the context and to the purposes for which the computation has to be made." The writer concludes the paragraph by stating that, "as a general rule, however, the effect of defining a period in such a manner is to exclude the first day and to include the last day." In the foot-

notes under this paragraph there is a collection of cases to the same effect as those above discussed.

I am of opinion that the Mining Commissioner did not proceed in accordance with the provisions of sec. 139 (2) of the Mining Act in giving his reasons for his judgment or decision in this matter.

What effect, if any, should be given to the statement by the Commissioner as to his intention.

It is trite law that a judgment of the Court must not be allowed to have an effect never contemplated because of an error on the part of ministerial officers in drawing up the formal decree. This, however, has no application to the present case.

Here an application was made to the Mining Commissioner to relieve from default. He might grant any extension of time he saw fit; he said he extended the time until the 1st July. The order as issued undoubtedly embodies his expressed intention. He now says that what he thought the words used meant was that the time should expire on the 30th June midnight, and on this it is suggested that the order should be amended or should be treated as stating something other than it does. Had the actual judgment read "until 12 p.m. on the 30th June," and had the formal order read "until 1st July" a case would have been made for the amendment of the order—but the order here follows the judgment.

It is a rule as applicable to the construction of an order of this kind as to the construction of a contract that language used must be construed according to its ordinary meaning and not in some unnatural and esoteric sense.

A judgment once issued cannot be changed if in accordance with the actual decree: *Port Elgin Public School Board* v. *Eby* (1895), 17 P.R. (Ont.) 58.

It must not be forgotten that this is not simply a matter between the original discoverer and the Crown, but a case in which strangers to the original application are called upon to act on the recorded order and are justified in acting upon it according to its very letter, and what is sought is to deprive one who interpreted it correctly of rights which he acquired by reason of something of which he had no knowledge, the intention of the Commissioner to use words in a peculiar and unnatural sense. See *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673.

In my opinion, the judgment of the Commissioner should be reversed, and that of the Recorder restored.

MAGEE, J.A., and MIDDLETON, J., agreed with MACLAREN, J.A.

FERGUSON, J.A. (after stating the facts):—The appeal was argued on the assumption that the effect of the order of Feb-

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ruary 7 was to revest in Hargreaves, as of the date of the order, all the rights he, under sec. 68 of the Act, formerly had in mining claim L. 8200, just as if the forfeiture provided for by sec. 84 of the Act had not occurred, and that therefore the result of the appeal turned on the meaning of the word "until." Though, for reasons which I shall state later, I am of opinion that the claim could not revest in Hargreaves unless and until he did his work, I shall express my opinion of the word "until" as used in the order of February 7.

After reading a great many cases in which the meaning of the word "until" is considered and discussed, I think the result of the authorities is accurately stated in 39 Cyc. at pp. 841-842, as follows:—

"*Until.*" A restrictive word; a word of limitation; construed in contracts and like documents as exclusive of the date mentioned, unless it was the manifest intent of the parties to include it. But this construction is not of universal application, and the effect to be given to this word must depend upon the intention of the parties using it, as manifested by the context and considered with reference to the subject to which it relates."

On the foregoing statement of the law, the 1st July would, I think, be excluded from the time allowed Hargreaves to complete his work unless the context, considered in reference to the subject-matter and the surrounding circumstances, shews that the parties using the word intended to include the 1st July. I find nothing in the context, Act, or surrounding circumstances which would lead me to think that the Commissioner, in making the order, intended to include the 1st July, and he himself says he did not.

If an order or judgment as issued does not express the intention of the Judge who made the order or delivered the judgment, or is ambiguous, it may be changed to express clearly the real intention of the Judge. See *Lawrie* v. *Lees* (1881), 7 App. Cas. 19 at p. 34; *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673 at p. 677.

These authorities establish that this power is inherent in the Court pronouncing the order, and does not depend on any rule or statute; and, in view of this inherent power, and the provisions of secs. 139 and 140 of the Mining Act of Ontario, R.S.O. 1914, ch. 32, which give the Commissioner power to act on his own knowledge, I see no reason for rejecting or refusing to act on the statement of the Commissioner as to what he intended in making the order.

I am also of opinion that, if the order of February 7, be read so as to give Hargreaves all the 1st July to do his work, yet that the claim L. 8200 was not vested in Hargreaves between February 7 and July 2, under the provisions of sec. 84 it was a forfeited claim, and open for staking.

Section 84 reads in part:—

"(1) Except as provided by section 85, all the interest of the holder of a mining claim before the patent thereof has issued shall, without any declaration, entry or act on the part of the Crown or by any officer, cease, and the claim shall forthwith be open for prospecting and staking out. . . . .

(*c*) If the prescribed work is not duly performed."

The only powers the Commissioner had in reference to such claim are defined by sec. 85, which (as enacted by (1918) 8 Geo. V. ch. 9, sec. 7) reads:—

"(1) Where forfeiture or loss of right has occurred under section 84, the Commissioner within three months after default may, upon such terms as he may deem just, make an order relieving the person in default from such forfeiture or loss of rights, and upon compliance with the terms, if any, so imposed the interest or rights forfeited or lost shall revest in the person so relieved . . ."

Under that section, the Mining Commissioner could relieve with or without terms. If he relieved without terms with the intention that the balance of the work should be done, there is no provision in the Act for a further forfeiture. If he relieved on terms, then the claim did not revest until the terms were performed, and I think the order of February 7 must be read as relieving on terms, and that consequently Hargreaves' rights to the claim were not revested unless and until he did the work, and the evidence is that he did not do the work, and these two strangers came in and staked. No doubt, both of them were under the impression that neither could stake until the time had elapsed for Hargreaves doing his work, but I think the Act means that either could have staked at any time up to the work being done, taking a chance as to the purpose of the staking failing in case Hargreaves did his work, or the alternative of acquiring the claim in case Hargreaves did not do his work.

Under these circumstances, Smith staked first, and I think his staking should be allowed and recorded. I would dismiss the appeal.

HODGINS, J.A.:—I agree in the judgment of my brother Maclaren, which I have had the advantage of seeing, and only desire to add a word as to my brother Ferguson's view that the

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claim was not vested in Hargreaves between February 7 and July 2, and that the claim was not to be revested until the work was completed.

As I read the Mining Act, under sec. 68 the recording of a mining claim gives the person so recording the status of a licensee of the Crown with the right to proceed to obtain a certificate of record and a patent from the Crown.

Under sec. 85, when, by reason of the work prescribed in the statute not having been duly performed, a loss of these rights has occurred, the Mining Commissioner may, within 3 months after default, make an order relieving the person in default from such loss of rights. In so doing he may impose such terms as he may deem just, and, if he does so, the interest lost shall revest in the person relieved upon compliance with these terms.

I think these two sections indicate that the Commissioner may, if he chooses, put the holder of a mining claim back into the position given him by sec. 68, conditionally on performing certain acts such as obtaining a special renewal license, or filing a proper report; and, if he does so, the revesting is postponed till the act required is accomplished. But the Commissioner may, as I read the Act, make such order without conditions, and that appears to be the effect of the order now in question, because the doing of the work is not made a condition precedent to the revesting, but the Commissioner reinstated the claim and then extended the time for the work until July 1, 1921.

The power of the Commissioner to extend the time for the performance of the work was not questioned, and I do not think it can be, in view of the wide jurisdiction given to him under the Mining Act and its various amendments, including 11 Geo. V. ch. 16, assented to on May 3, 1921.

Having made the order, as I think, unconditionally, revesting the property in the applicant, the Mining Commissioner went on in that order, to say as follows:—

"*And I further order* that the time for the performance of the deficiency of work upon the said claim L. 8200 be extended until the 1st July next."

Upon the expiration of that time, the provisions of sec. 84, sub-sec. (*c*), would operate, and the interest revested by the Commissioner would, on default being made in the performance of the work within the time limited, cease and determine.

Appeal allowed.

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BIALUSKI v. BORESKY.

Manitoba King's Bench, Galt, J. October 10, 1922.

PLEADINGS (§IIIB—312)—ILLEGALITY OF CONTRACT.

Where an action is brought on a contract which is *ex facie* illegal the Court will not enforce the contract whether the illegality is pleaded or not, but where the question of illegality depends upon the surrounding circumstances, the Court will not entertain the question unless it is raised in the pleadings.

[*North Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461, 30 Times L.R. 313, followed.]

ACTION to recover commission on the sale of real estate. Judgment for plaintiff.

J. S. Lamont, for plaintiff; *J. F. Davidson*, for defendant.

GALT, J.:—In this action the plaintiff seeks to recover $660 commission, being one-half of commission earned on a sale of certain lands the property of one William Hopps to certain purchasers Korchuk, Uhriniuk and Tesluk, which purchasers were introduced by the plaintiff to the defendant.

Part of the evidence put in by the plaintiff consists of a copy of an agreement written by one of the witnesses, Theodore Boresky, and executed by both parties, as follows:—

"Winnepeg, March 7th, 1921. Hereby I agreed to pay one-half commission to B. Bialuski for each person or persons that will be represented by B. Bialuski. I agreed to pay that one-half commission as soon as I got from above mentioned party."

The plaintiff proved that he had introduced the purchasers above named and that the sale was concluded whereby a commission of $1,320 became payable and was paid to the defendant by said William Hopps.

The defendant did not attend the trial. He was represented by Mr. Davidson, and at the conclusion of the plaintiff's evidence Mr. Davidson moved for a non-suit, principally upon the ground that the plaintiff was manifestly acting as agent for the purchasers and, therefore, not between him and the defendant. To share up commission was illegal and could not be enforced as between two agents. But this defence was not pleaded.

In *North Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461, 30 Times L.R. 313, it was held by the Houes of Lords, that where an action is brought on a contract which is *ex facie* illegal as being in unreasonable restraint of trade, the Court will decline to enforce the contract, irrespective of whether illegality is pleaded or not; but, where the question of illegality depends upon the surrounding circumstances as a general rule, the Court will not entertain the question unless it is raised by

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the pleadings. The House of Lords held that, having regard to the form of the pleadings, the surrounding circumstances could not be looked at for the purpose of determining the illegality of the agreement, and that the agreement was not *ex facie* illegal.

Viscount Haldane, L. C., [1914] A.C. at p. 469:—

"My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

In the present case it is impossible to say that the contract above quoted, shows an *ex facie* illegal contract. The evidence of the plaintiff showed that a mere introduction of purchasers was all that the defendant stipulated for to entitle the plaintiff to one-half commission.

I, therefore, give judgment for the plaintiff for $660 with costs.

Judgment for plaintiff.

Re OTTAWA AND GLOUCESTER ROAD Co. AND COUNTY OF CARLETON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ. December 30, 1921.

EXPROPRIATION (§IIIC—137)—TOLL ROAD—MEASURE OF COMPENSATION.

In arriving at the price to be paid to the owners of a toll road on its expropriation by the county, the arbitrators should not adhere strictly to the rule that the value to the owner and not the value to the taker is the test as to the amount to be paid because while the owners are losing money on the road without any reason to expect that conditions will improve, and so the road may be said to be valueless to the owners, consideration should be taken of work which has been done upon the ground and material which has been placed, which will be of advantage to the purchaser and the purchaser should pay as much at least as it would cost to do this work and supply the material but

work which is useless and material which is valueless should be disregarded.

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APPEALS by a county corporation from the judgment of Rose, J. dismissing appeals from the decisions of the arbitrators fixing the amount of compensation to be paid on the expropriation of certain toll roads by the appellant. Affirmed.

The judgment appealed from is as follows:—

ROSE, J.:—The County of Carleton took the requisite proceedings for expropriating the "toll roads" (as defined in the Toll Roads Act, R.S.O. 1914, ch. 210, sec. 75) of four different toll road companies. In each case there was the arbitration provided for by sec. 76 of the Act to fix "the price or compensation to be paid for the road." The arbitrators, in each case, were Mr. F. H. Chrysler, K.C., appointed by the county, the late Mr. R. G. Code, K.C., appointed by the company, and Mr. J. A. Ritchie, chosen by the other two as third arbitrator. In the case of the Ottawa and Gloucester Road Company, and in one other case, the award was made by Mr. Ritchie and Mr. Chrysler, Mr. Code refusing to join. In the other two cases the arbitrators were unanimous. In each case the county corporation move against the award. I deal first with the case of the Ottawa and Gloucester Road Company, because it was argued first, and what I have to say that is common to all four cases will be said in this judgment, and not repeated.

Besides making their award in each case, respectively, the arbitrators handed out a memorandum intituled in the matter of the four arbitrations, in which they all joined. This, while it is endorsed "Reasons", does not set forth the calculations by which the various amounts awarded were arrived at; indeed, it is, in effect, little more than a description of the evidence adduced and of the contentions made by the county on the one side and by the road companies on the other. It ends, however, with the statement that all the considerations set forth were present to the minds of the arbitrators, who "endeavoured to give due effect to all of these matters in making their award;" and counsel for the appellants, linking together that statement and a statement made earlier in the memorandum, to the effect that the statutory definition of "road" (in sec. 75 of the Act) "is now wide enough to include some value for the toll road itself, as well as for the franchise of the company," argue that it appears from the memorandum that the arbitrators, losing sight of the fact that the physical assets which were being taken away from the companies were property which (except some toll houses and other things of small value),

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whether in the hands of the companies or of any purchaser from them, was subject to great restrictions as to the use to which it could be put, had attached separate values to the physical assets and to the "franchises" of the companies and had added these values together, instead of considering the assets (including the fixed and movable property and the franchises) as a whole and arriving at the value of that whole to the companies. It seems to me that this argument can be supported only by a very strained and unnatural reading of the memorandum; and that when the memorandum is read along with the reporter's notes of the discussions that took place during the course of the proceedings it is quite impossible to attribute to the arbitrators any such error as is suggested.

The increasing use of motor vehicles has made the upkeep of macadam roads a very expensive matter, and latterly the companies have not been making profits; and counsel for the county suggest that, having regard to the statutory obligation of a road company to keep its road in repair, the roads had become a source of expense rather than of profit—a liability rather than an asset. They do not, however, contend that the argument based upon this suggestion should be pressed to what seems to be its logical conclusion—they do not say that the companies should be awarded nothing or a merely nominal sum—but they do say that the only fair way of getting at the compensation is to capitalise the average annual profits of the companies, over the whole period of their existence. It is fairly obvious from the figures that the arbitrators did not proceed by capitalising profits—whether that method was suggested to them or only to me upon the argument of the motions, I do not know—but it does not follow, unless that method is the only method permissible in such a case, that the arbitrators have adopted a wrong method or that they have adopted the plan which counsel say the memorandum of their reasons shews that they did adopt.

That the plan of capitalising earnings is the proper plan, or a permissible plan, in certain cases, appears from the recent judgment of the Appellate Division in *Re Cobourg and Grafton Road Co.* (1921), 64 D.L.R. 241, 50 O.L.R. 125; but neither in that case nor elsewhere, so far as I am aware, has it been laid down that it is a plan which must be followed in all cases. The companies in the cases in hand were able to adduce evidence which made it practicable to resort to quite another method of computation, a method which is much more likely, as it appears to me, to result, in a case in which it is available, in the ascertainment of the real value of that which is being

expropriated; and in none of the cases does it appear that the arbitrators awarded a larger sum than the evidence justifies, if that method of computing the compensation is followed.

Roads ought, of course, to be built with reference to the kind of traffic which will pass over them, and if that traffic includes heavy motor traffic they will have to have a kind of surface which they would not need if they were to be used solely by horse-drawn vehicles; and the more extensive the motor traffic the more expensive will be the foundation and the surface required. The motor traffic has so increased on all the roads in question in these proceedings that, whoever owns them, they will have to be turned into roads having a surface of concrete or asphalt or some other material specially adapted to withstand the wear and tear caused by this kind of traffic. In view of that fact, the companies adduced the evidence of competent and apparently careful engineers as to the value of the present road-beds to any one who is about to construct, on the sites of the present roads, roads which will be suitable for the traffic in question. These witnesses assigned to the present structures a value, as material in place for road purposes, exceeding the sums which the arbitrators have awarded. It was strenuously argued that to give effect to this evidence would be to substitute for the value to the owner (which was, of course, what the arbitrators had to ascertain) the value to the taker (which the cases say is not the criterion). It appears to me, however, that this argument is not well-founded. In each case it was in evidence that the county was not the only possible purchaser: there are other public bodies which might have taken over the roads, if the county had not done so, and to any one of those bodies and to the companies themselves, if the companies had decided to construct roads of the type which the traffic now requires, the value would have been exactly the same—the value of material in place very suitable as a foundation for any road which it is decided to build. To say that the companies are entitled to be paid the value of that material, as material in place, is not to say that the existence of the county's scheme of freeing the roads from tolls and making them suitable for modern traffic is to be taken as adding to the value of the companies' property: the value exists whether the county's scheme is adopted or not; any one who wants to build roads in the particular locations would be well advised to pay a fair price for this road material. It is not like assigning to the pieces of road values derived from the fact that they are integral portions of longer roads owned by the county: the values do not depend upon that fact at all, but upon the fact

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that material has from time to time been put in place and in the course of years has been so consolidated that it now forms, according to the evidence, a foundation for a modern road better than any that could now be laid for the price which the engineers say the companies ought to have. To take this evidence into consideration is not, therefore, to do anything which in *Sidney* v. *North Eastern Railway Co.*, [1914] 3 K.B. 629, the Court said ought not to be done. It is more like applying the rule of *Re Gough and Aspatria etc. Water Board*, [1904] 1 K.B. 417.

But it is said that there would never be competition amongst the various public bodies of which another might have taken over any of these roads if the county had not done so; in other words, that a toll-free road is a liability to a public body, rather than an asset, and that one public body would not bid against another which shewed a disposition to acquire any given road. And it is argued, therefore, that there is no right to take into account any "special adaptability" of the companies' property for the purposes of the county's scheme. This argument is based largely upon what was said by Rowlatt, J., in the course of his judgment in *Sidney* v. *North Eastern Railway Co.*, but it does not seem to me that the passages referred to really help the county. Upon the land which was in question in that case there had been constructed, by lessees from the owner, a railway leading to a colliery, and this railway had become part of the line of the North Eastern Railway. The lease had expired, and the North Eastern Railway Company was expropriating the land. The question was what it ought to pay. The Court held that regard was to be had to the special adaptability of the land for railway purposes, but not to the existence on it of an integral part of the North Eastern Company's railway, or to the fact of such railway's forming part of the main line; see the judgment of Avory, J., at p. 635. In explaining this holding, Rowlatt, J., pointed out that special adaptability for the purposes of the particular scheme of the expropriating company may be taken into consideration where it can be said that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market, but that where the price is reached at which all competition must fail, any further sum which the promoter can afford to pay must be referable not to the value of the land to the owner or in the market, but to the value of the land to the promoter for the purpose of his particular scheme. He did not say, and

I am sure he did not mean, that if it could have been shewn that no railway company would bid against another for a piece of land which that other was attempting to buy in order to fill a gap in its line, evidence as to the value of such piece of land for railway purposes generally would be irrelevant. All the cases shew that such evidence is relevant. What is irrelevant in such a case is evidence as to what the railway company can afford to pay rather than have a gap in its line. And in *In re Gough and Aspatria etc. Water Board*, (*supra*), it is distinctly laid down that it is not necessary, in order that the owner may be entitled to have the special adaptability of his land taken into consideration, to prove that the land could be used for the special purpose by any specified body other than the body which is expropriating it.

I have said that to take the evidence of the engineers into consideration in these cases resembles more nearly the application of the rule of *Re Gough and Aspatria etc. Water Board*, than the doing of anything disapproved of in *Sidney* v. *North Eastern R. Co.* In the cases mentioned, the land—in the first case by reason of its location and configuration, in the second by reason of its location—was specially adapted to a particular purpose, and the Court held that that special adaptability was to be taken into consideration. The same thing may be said about the roadbeds which the companies have constructed; they have a special adaptability for use as the foundations of roads of a modern character, and the only distinction between those cases and the ones in hand is—and it seems to be a distinction without a difference—that instead of land in its natural state, as in the *Aspatria* and *North Eastern* cases, the arbitrators have had to deal with a manufactured article, a road-bed.

When a municipality exercises the power conferred upon it by the Toll Roads Act of expropriating those assets of a toll road company which are comprised within the statutory definition of a "road" (R.S.O. 1914, ch. 210, sec. 75), it does so proceed, as it did before the passing of the Toll Roads Municipal Expropriation Act, 1889, 52 Vict. ch. 28, by purchasing the shares of the company's stock; and, therefore, the sum which it has to pay is not necessarily limited to the value of the company's physical assets as dividend-earning property, but it makes what the Municipal Act calls "due compensation" to the company; and the arbitrators, in fixing that compensation, must ascertain the value of what is expropriated, and allow the highest value which the thing expropriated has, for the best use to which it can be put. In these cases the property ex-

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propriated included the material which, from time to time during a period of nearly 70 years, had been placed in position by the companies and had become consolidated. It would not have paid the companies to dig up and carry away this material, even if they had been free to do so. The material, however, had a value as roadways to which additions had to be made in order that they should be suitable for the requirements of modern traffic. The evidence was that the additions could be made for a certain price, and that when they were made there would be in place modern roads having as their foundations something as good as, or better than, newly built foundations costing certain specified sums. These ready-made foundations, therefore—whether they were called roads to which additions had to be made, or, as I have been calling them, road-material in place and available for use in the construction of new roads—had a value equal to the sums which it would have cost to lay new foundations. That value may be attributed to the "special adaptability" of the property for use for road purposes; and the cases cited shew that the value attributable to that special adaptability is to be taken into consideration in assessing the compensation to be paid to the companies. It seems to me, however, that there is really no need to talk about "special adaptability," or to consider the cases in which it is discussed. These things are roads, and when a certain amount of money is expended upon them they will be perfectly good modern roads: why does it require the consideration of any cases to shew that their value to any one who wants a road is the value of modern roads, less what it will cost to put them in first-class modern condition? The result is the same whichever form of expression is used, but there seems to me to be a certain danger of making a very simple proposition seem abstruse by stating it in the language which has been used in the discussion of complex cases.

If my way of looking at the question is the correct one, it is immaterial to consider whether the companies had been making, or had a fair chance of making, profits out of the use of their roads. The evidence as to this will, however, be referred to in the consideration of the individual cases. Each case differs somewhat from the others in this particular, and there is no object in discussing the question at large.

The Ottawa and Gloucester Road Company, with whose case I am now dealing, owned two pieces of road. The materials in place on these two pieces were valued by the engineers called by the company at $42,136.72 and $16,006.70, respectively, in

all $58,143.42, the valuation being based upon the kind of calculation that has been described. The company also had certain toll houses and some land; but these were not taken into account.

There was evidence that as roads are improved the motor traffic over them increases; and it was suggested by the witnesses that if these roads had not been expropriated the company might have been well advised to put them in good condition at its own expense, in the expectation that the increased traffic would bring in a revenue large enough to put the company's undertaking upon a paying basis, which it has not been for some years; but no one was prepared to say that the roads could be operated at a profit unless the Legislature could be induced to authorise the collection of tolls at a higher rate than that now in force; and no one seemed to have any very good reason for saying that, in spite of the modern desire to get rid of toll roads, the Legislature would be very likely to increase the rate. A remark made by Mr. Ritchie in another of the cases (the *Bytown and Nepean Company's* case, indicates that he did not attach much importance to indefinite evidence of this sort; and I imagine that it is safe to assume that it was left out of consideration in this (the *Ottawa and Gloucester Company's* case), as I think it ought to have been. Certainly, the amount of the award, $42,500, made by Mr. Ritchie and Mr. Chrysler, is not so large as to indicate that anything was taken into account which the company was not entitled to have considered; indeed, the inference is rather that very considerable effect was given to the criticism by Mr. Hogarth, C.E., of the figures submitted by the engineers called by the company.

The appeal will be dismissed with costs.

The Judge also dismissed the appeals from the awards in the cases of the other three companies.

J. E. Caldwell, and *T. J. Agar*, for the appellants.

George F. Henderson, K.C., for the Ottawa and Gloucester Road Company.

Wentworth Greene, for the Nepean and North Gower Consolidated Road Company and the Bytown and Nepean Road Company.

Ainslie W. Greene, for the Ottawa, Montreal and Russell Consolidated Road Company.

LATCHFORD, J.:—It is, I think, to be regretted that after summarising the evidence and arguments submitted to them the arbitrators should have given no reasons for the conclusions arrived at. They only say that, having such considerations in mind,

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they endeavoured to give effect to all of them in making their award.

That nothing was allowed for franchises is evident. No claim was made for franchises before the arbitrators or asserted on this appeal.

The companies claimed that they were entitled to be paid for the physical assets they possessed which were taken over by the County of Carleton—road materials in place, bridges, culverts, ditches, and in two cases parts of a road owned in fee.

The contention of the appellants has been and is that these assets are of no value to the owners. During recent years, especially, the revenues have been less than the expenditures for repairs, and no dividends have been available for distribution. The roads have become a burden instead of a benefit to their owners.

In the past it was considered that those immediately benefited by a publicly available utility, such as a macadamised road, should pay for that advantage when and as often as they used it. The modern tendency, however, fostered by such legislation as that under which the appellants have acted, is to impose on the public the cost of constructing and maintaining what only particular persons use. Thus it happens that many taking no part in the dance are compelled to pay the piper. The opinions now held so generally are not likely to change. Unless they do, it is in the highest degree improbable that any one of the toll roads concerned in this appeal will produce a return to its shareholders. Hence the contention that the roads are worth nothing to their owners. This, pushed to its logical conclusion, means, as pointed out by Rose, J. that nothing whatever should be paid for the properties expropriated. I am glad that no such view was taken in the award or in the judgment in appeal. I have had the advantage of knowing the three arbitrators intimately throughout a period of 30 years. One of them, who was an honour to his profession and to Canadian manhood, recently passed from this life. All three have been widely recognised in this Province as men of great business capacity, sound judgment, and absolute honesty. They unanimously rejected as untenable the contention of the appellants, although they did not in all the cases agree as to the amount payable. They did not in any case allow as much as evidence shewed to be the value to the county of the property expropriated, though doubtless they did not wholly disregard that consideration. It was open to them to decline to accept as to any particular road the estimate of value fixed by the appel-

lants' engineers or by the engineers of the respondents or to arrive as they did in fixing due compensation at values greater than one or less than the other estimate.

I have no reason for supposing that the several amounts awarded are in any way excessive, and would therefore dismiss the appeals.

MIDDLETON, J.:—I have come to the conclusion that the appeals should be dismissed. The value to the owner, and not the value to the taker, is said to be the test of the amount to be paid, but this does not mean what is here contended by counsel for the county. To the county a road which is an essential link in a system may have such value that, if no right of expropriation exists, almost any price might be extorted, and it is this kind of thing the rule is aimed at. For similar reasons, property which has some special suitability for the scheme of the taker may have great value to him, but this is not the index of the price to be paid to the owner in whose hands it has no such special utility.

I should rather apply some such test as this: Assume no right to expropriate, but a willing vendor and a willing purchaser, honestly endeavouring to adjust a fair price. Work has been done upon the ground and material has been placed which will be of advantage to the purchaser. He should pay as much at least as it would cost him to do this work and supply the material. Work done which is useless, and material which is valueless to the purchaser, should be disregarded.

Applying this test, the engineers for the company proved figures exceeding the award.

Counsel for the appellants admitted that any expropriation which took the property without such compensation would be confiscation, but would not admit liability for any amount beyond what the engineers appointed by the county admit.

Once it is shewn or admitted that such allowance should be made, the amount must be determined on the whole evidence and not by the admissions of the witnesses of the one party. The amount awarded is more than the county engineer admits, but less than the opposing engineers prove. The evidence amply justifies the awards.

The appeals should be dismissed with costs.

RIDDELL, J., agreed with MIDDLETON, J.

LENNOX, J., agreed in the result.

MEREDITH, C.J.C.P. (dissenting):—The facts upon which the rights of the parties to these four appeals depend are few, simple and plain.

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The respondents are toll road companies, and the appellants are a municipal corporation taking over the toll roads of such companies in the interests of the public and at public expense.

Toll roads, such as those in question, have long since had their day; and are now comomnly said to be "relics of barbarism" which should long since have passed away.

In earlier days there was need for them, and many of them made some profit, though never much.

And, as to these very roads, it had come to pass that for many years—some one said 17 years—they have been altogether profitless, and should long ago have become public ways but for the forlorn hope of the companies that some day such thing as that which has happened might happen—they might be taken by the local municipality, the county municipality, or the Province, and that such taking might bring some money into the pockets of the shareholders of the companies for a thing that was worthless, if not worse than that—an annual loss—to them.

The road companies' rights and duties were those prescribed in the Toll Roads Act, under which they were incorporated: and it is said to be under the provisions of that Act that they are taken over by the appellants: and that that which the companies are entitled to from the county is due compensation for the roads taken: and the question is: what is the proper amount of such compensation, if any, for each of the roads in question.

The roads being, and having been for many years, profitless, and with no future as roads owned by the road companies, except of more and more unprofitableness as the free roads continued to be made better and better, it may very reasonably be said that they are not entitled to compensation: that they are in a money sense the better off the sooner the roads are abandoned or taken over.

The answer to that is: but they are of much value to the respondents: getting them—even in the worthless, for the respondents' purposes, condition in which they are as roads—must save the respondents much money that must have been spent in buying land and making a new road, or in making the road if they adopted another existing one which is a free highway.

The obvious reply is: it is not the value to the appellants, but it is the value of the road to the companies, that is the measure of compensation to be paid by the appellants.

But the logic of these contentions does not cover the whole subject of compensation, for in some instances the value to the taker may be the real value to the loser. If the case were one

of an ordinary mercantile transaction, the value to a purchaser might well be the general value of the article; that which purchasers are willing to give is very good evidence of actual value; it is either really the market price or something very like it.

This, however, is not a case of that kind; the road companies' rights are not the ordinary common law rights of the owner: they are only such as toll roads legislation has conferred, and they are subject to the onerous obligations imposed by that legislation, as well as to the forfeitures, etc., provided for in it.

So, too, it must be borne in mind that the main purpose of the exactments was not the enrichment or benefit of the company or its shareholders. It was to aid the public of the neighbourhood, particularly, and His Majesty's liege subjects generally, in affording them some better roads in the days when that could not be as well done out of the taxes available for that purpose.

The shareholders of the companies knew that when, out of taxation, free roads were improved, the traffic should depart from them, and that all toll roads must in time be abandoned. That was inevitable and always obvious.

So that it is not surprising that when, after that time had come and yet the toll road companies clung to their roads for the sole purpose of compelling the public to take the roads from them and pay large sums of money for that which was worthless to the companies, resentment of the travelling public went further than the use of harsh words; that efforts were concentrated on improving another road so as to draw off the traffic from the toll road; the toll road was avoided, payment of tolls evaded, and sometimes malicious injury done to toll gates and gate houses, making the lot of the toll road companies, hard and profitless enough at best, a still harder one.

During the past quarter of a century or so, the natural life of most of the toll roads came to an end: free highways had been so improved that traffic could be mainly carried on upon them: the time came in which it was unprofitable to maintain the tolls at the costs of the obligations of the toll road companies. Most of the companies came to their inevitable, and from the first obvious, end, without litigation, though all made efforts in different ways to obtain money from the public through the municipalities or the Province before making the abandonment of these roads provided for in the legislation to which they owed their existence, and by which they were bound.

All the companies which litigated their rights had, as the respondents here had, for many years before, that litigation in view, and had adopted all the means possible to fortify their position and increase any award of compensation that might

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be made in their favour: whilst, on the other hand, no steps of an opposite character were taken in the public interests: the municipalities and the Province seeming to rest in the mistaken belief that there was no need for forethought and forearming, that, no matter which might be done, the result should be the same, that the law had fixed some invariable and true measure of compensation that must in the end prevail.

The companies' position, in thus holding on year after year, unable to improve the roads, unable to extract any profit from them, yet refusing to abandon them as provided for in the legislation under which alone they could exist, has been called a "dog in the manger" policy; but that is hardly fair to the fabled dog; he was not anxiously waiting only to be enticed out with a golden bone, whilst the public had in the hands of the municipalities and of the Province a whip which might have been employed quite as effectually.

The municipalities, or others in the same interests, might have purchased a controlling number, or all, of the shares of these companies, which shares had come to be really worth nothing, and having them could have abandoned the road or have sold out for such consideration as they deemed right. The municipalities or the Province could have chosen an adjacent public way and have constructed their "state highway" upon it, and have driven the toll road companies to abandonment: or they could have made their highway alongside of the toll road, with the advantages of a wholly modernly constructed and placed road, and so also should have done that which commonly is described as throwing the toll road into the scrap heap, and so compelling abandonment which would enable the municipalities to give the land owners upon whose land the new road was built, the old road in lieu of it.

These things are not merely "moral" consideration: they are decisive of the companies' claims for compensation; for, if they had the whip hand and could exact their own price, their road might be worth that much to them: whilst, if the municipalities or the Province held the whip, and could compel abandonment, there can be no compensation for a thing which in itself was worthless to the companies.

The municipalities and the Province having plainly had the whip hand, the companies could get from them only that which they in the public interests deemed it fair to pay, and that was very fairly put by them in these cases, at the actual saving to them in getting the old road—instead of constructing a new one elsewhere—as measured and ascertained by the competent

public officers and men employed in the actual work of constructing the new highway in the place where the old one was. The appellants having been, and being as I understood Mr. Caldwell, willing to pay these sums, instead of applying the thumb-screws which I have mentioned, and paying nothing, I am in favour of allowing these appeals and reducing the awards to such sums. The appellants are entitled to their costs of these appeals.

To prevent any notion that any contention in the companies' favour has been overlooked, it may be as well to add some words in regard to the suggestion that the companies might have made cement or asphalt roads, as well as the county or the Province: it should hardly be needful to say that the companies were penniless, without power to acquire new stock, and subject to a limitation of tolls which made it impossible to keep up even a gravel road: and that these new toll roads could have been, equally with the old ones and by like method, driven to the scrap-heap. Toll roads cannot pay, toll roads cannot live to-day, here.

Then it was said that one of the roads and some additions to others were not highways originally, but that the land for them had to be bought by the companies in order to make these roads. But how can that affect the question here involved? It is the roads which are being taken, the roads as they are, and the question is not how much did the companies pay for them, but is: what were they worth to the companies before the appellants appropriated them? Not what were they worth after the appellants' purposes respecting them became known and had been carried into effect: see *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569. When the land was purchased and made part of the road, the company had no more power over it than if the land or right of way had cost nothing: the road was altogether subject to the provisions of the Act and could be dealt with only as permitted by the Act; if abandoned, it must be altogether abandoned.

But the sole question here is, what were the roads, as they were, worth to the companies immediately before the appellants appropriated them? The answer is, unquestionably: nothing as going concerns, worse than worthless in that respect, and nothing in the market; there are no purchasers for such profitless things: and nothing in holding the manger, against the public, because the municipalities and the Province held the whip by which they might without cost lawfully be driven out.

Appeals dismissed.

Sask.

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REX v. ALLEN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, and McKay, JJ.A. May 29, 1922.

INDICTMENT, INFORMATION AND COMPLAINT (§IIE—30)—CONVICTION UNDER SEC. 238 (*f*) OF CRIMINAL CODE—VALIDITY—STATUTORY OFFENCE AGAINST "PEACEABLE PASSENGERS"—CONVICTION FOR OFFENCE AGAINST "A PEACEABLE PASSENGER."

An information and conviction under sec. 238 (*f*) of the Criminal Code, which refer only to "a peaceable passenger" is a nullity and should not be enforced, there being no evidence that any other peaceable passenger was impeded or incommoded on the occasion in question and the section applying only to the impeding or incommoding of "peaceable passengers."

CASE stated by a Police Magistrate on a conviction under sec. 238 (*f*) of the Cr. Code, for causing a disturbance in or near a street in the village of Lang, by impeding or incommoding a peaceable passenger, and being therefore a loose, idle or disorderly person and a vagrant.

The facts of the case are as follows:—Violet Allen, the daughter of the accused, who will be 18 years of age on May 19 next, left her parents' home, apparently to go to school, and did not return. The parents subsequently learned that she was living with one Mrs. Batty in Lang. There was evidence that the girl had left her home on a previous occasion. Between February 22 and March 17, the date of the alleged offence, the parents endeavoured to induce her to come home, but she refused. They consulted a solicitor and the inspector of the police at Weyburn, and it was subsequently arranged between the father and mother that the former should go out and bring the daughter home by force, if necessary. He met her on her way to school on the public street and walked up the street with her, asking her to come home, but she still refused to return. When they came opposite the gate of the Allen's home, he seized the girl and endeavoured to carry or drag her to the house. In passing through the gateway the girl clung to the gatepost and called for help. In response to her calls, a number of persons ran up and a crowd gathered. Mrs. Allen also seized the girl, but one of the crowd removed her hold, and in the melee, Allen also released the girl, who then made her way to school.

Two contentions were submitted on behalf of the accused; (1) That there could not be a conviction for vagrancy unless the accused had in some measure acquired the character of a vagrant and that the provisions of sec. 238 (*f*) did not apply to a man of property such as the accused; (2) That the accused, by virtue of his parental authority was justified in attempting to bring the girl home by force and that, therefore, the disturbance was

caused not by him but by those who interfered with him in the exercise of that authority.

The questions for the consideration of the Court of Appeal were as follows:—"1. Was I right in holding that it was unnecessary to shew that the accused had in some measure acquired the character of a vagrant apart from the facts above set forth, in order to render him liable to conviction under this section? 2. Was I right in holding that where the girl was shewn to be upwards of 17 years of age, to have left her home of her own free will, and to be desirous of remaining away, the father was not, in the absence of some authority vested in him by a competent civil Court, justified in attempting to take the girl back into his custody by force?"

H. D. Pickett, for appellant.

D. A. McNiven, for prosecutor.

HAULTAIN, C.J.S.:—Neither the information nor the conviction in this case discloses an offence known to the law.

By sec. 238(*f*) of the Cr. Code R.S.C. 1906, ch. 146, "Everyone is a loose, idle or disorderly person or vagrant who . . . . . (*f*) causes a disturbance in or near any street, road highway or public place, by . . . . impeding or incommoding peaceable passengers."

The information and conviction only refer to "a peaceable passenger" who, I assume, was the daughter of the accused, and I should gather from the statement of facts in the stated case that no other peaceable passenger was impeded or incommoded by the accused on the occasion in question.

On these facts, I am of opinion that the conviction is a nullity, and cannot and should not be enforced.

It will not, therefore, be necessary to deal with the questions submitted in the stated case. There will be no order as to costs.

Since the argument was heard in this case, counsel for the respondent has asked leave to raise the further objection that this Court has no jurisdiction to hear an appeal by way of a case stated by a Justice of the Peace. This ground is, in my opinion, not well taken. By sec. 705 (*b*) of the Cr. Code:—"The Court" in the sections of this Part relating to justices stating or signing cases means and includes any superior Court of criminal jurisdiction in the Province in which the proceedings in respect of which the case is sought to be stated are carried on.

By sec. 2 (35) (*f*) of the Cr. Code, "Superior Court of criminal jurisdiction" means and includes, in the Province of Sas-

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katchewan, the Supreme Court of the North-West Territories until the same is abolished, and, thereafter, such Court as is by the Legislature of that Province substituted therefor. In 1907, the Supreme Court of the North-West Territories was abolished and the Supreme Court of Saskatchewan substituted therefor. The Rules of Court with regard to cases stated by magistrates of both the above-mentioned Courts provided for the appeal being taken either to the Court *en banc* or a Judge in Chambers.

By the Court of Appeal Act, 1915 (Sask.), ch. 9 and the King's Bench Act, 1915 (Sask.), ch. 10, the present Court of Appeal and Court of King's Bench were established and the Supreme Court of Saskatchewan was abolished.

By sec. 6 of the Court of Appeal Act, R.S.S. 1920, ch. 38, the Court of Appeal is declared to have all the jurisdiction and powers possessed by the Supreme Court of Saskatchewan *en banc* immediately prior to the coming into force of that Act. The same section also confers jurisdiction and power, subject to the Rules of Court, to hear and determine all application for new trials, etc., etc.,—

"And all other motions, matters or things whatsoever which might lawfully be brought before any divisional Court of the High Court of Justice or the Court of Appeals in England on the first day of January, 1898."

The Court of Appeal succeeded to the jurisdiction and powers of the Supreme Court of Saskatchewan *en banc*, and through it to the jurisdiction and powers of the Supreme Court of the North-West Territories *en banc*, and for the purpose of the exercise of that jurisdiction and those powers was substituted for those Courts, and, therefore, an appeal by way of a case stated by a Justice is properly brought to it. It may also be noted that in England in 1898 the right of appeal by stated case to the High Court was given by the Summary Jurisdiction Acts of 1857 (Imp.) ch. 43, and 1879 (Imp.) ch. 49, the cases were heard and determined by a Divisional Court of the King's Bench Division.

LAMONT, J.A.—I agree that the conviction was a nullity.

TURGEON and MCKAY, JJ.A. concurred with HAULTAIN, C.J.S.

Judgment accordingly.

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S.C.

Ontario Supreme Court, Middleton, J. December 31, 1921.

PARTIES (§IA—51)—MEMBERS OF UNINCORPORATED BODY—ACTION AGAINST FOR TORT—RIGHT TO INVOKE RULE 75.

In an action to recover damages for a tort against the members of an unincorporated association, the members of such association cannot invoke Rule 75 which enacts that, "Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorised by the Court to defend on behalf of or for the benefit of all" unless it is intended to be alleged that the unincorporated body is possessed of a trust-fund and such circumstances exist as to entitle the plaintiff to resort to that fund in satisfaction of his claim.

MOTION by the plaintiff for an order appointing three individual defendants to represent the Monarch Park Business Men's Association, and authorising them to defend the action for the association, which was unincorporated. The individual defendants were the president, the secretary, and the treasurer of the association, which was also named as a defendant.

Norman S. Macdonnell, for the plaintiff.

R. H. Greer, K.C., for the defendant association.

William Johnston, K.C., for the defendant the Municipal Corporation of the City of Toronto.

MIDDLETON, J.:—Little appears upon the material, but counsel admitted the following facts. The association is a voluntary association to advance the interests of the merchants in a certain locality in the city of Toronto. There is no incorporation and no property save possibly some small sum derived from membership fees. To advance the objects of the association, some demonstrations were held upon the streets, and a rope was stretched across a highway to prevent the crowd from interfering with what was taking place. It is said that this was placed by the leave of some civic official. The plaintiff, in lawful use of the road, was travelling in an automobile, and this rope caught the cap of the radiator of the car and threw it violently in the plaintiff's face, so injuring an eye as to cause blindness.

The action is brought against the three defendants and the city corporation, and what is sought is that some right to a remedy against the association may be found by this application, based on Rule 75. This rule is as follows:

"Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorised by the Court to defend, on behalf of, or for the benefit of all."

This rule is based upon an English rule introduced by the Judicature Act, and is an attempt to graft upon the common law practice a procedure familiar in equity. Where what is

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sought is a declaration of right or an injunction or other equitable relief, there is not much difficulty in applying the Rule, but where what is sought is the purely common law remedy of the recovery of money in respect of a tort, new difficulties present themselves. The technical aspect of the case soon becomes confused with fundamental questions—e.g., the liability of all the members of an association for the wrongful act of one.

A short review of the decisions is necessary to understand the situation.

In *Temperton* v. *Russell*, [1893] 1 Q.B. 435, the plaintiff sued members of the committee of a trade union as representing the union, seeking damages for wrongfully procuring persons who had made contracts with him to break them, and for an injunction. A Divisional Court struck out of the writ of summons all words indicating that the defendants were sued as representing their fellow-members, and on appeal to the Court of Appeal this decision was affirmed. Lord Justice Lindley, who delivered the judgment, laid down certain principles which have since been much discussed and have not been accepted in their entirety.

First, the rule requires the persons represented and the defendants to have the same interest in one cause or matter, and this extends only to persons who have or claim some beneficial proprietary right which they are asserting or defending.

Second, the rule only enables the former equitable jurisdiction to be exercised by all the Divisions of the Court, and so has no application to actions of tort.

Third, an injunction could not even in equity be granted against persons who were not parties to the action.

This case was followed in *Wood* v. *McCarthy*, [1893] 1 Q.B. 775, by Wills, J., who pointed out that the defendants against their will could be nominated to represent the class.

In *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494, and *Duke of Bedford* v. *Ellis*, [1901] A.C. 1, the question of the accuracy of those statements was considered. In this case the plaintiffs joined in an action against the Duke of Bedford, the owner of Covent Garden Market, claiming, on behalf of themselves and all others, the growers of fruit, flowers, etc., a declaration of certain rights in the market which they claimed to possess under a statute relating to the market. The Court of Appeal held that the plaintiffs had such an interest in common as to enable them to maintain the action. Lindley, M.R., was a member of the Court and agreed; in fact he wrote the leading judgment. There is no suggestion in any of the judgments that *Temperton*

v. *Russell* was not well decided. In the Lords, Lord Macnaghten points out that what was said by Lindley, M.R., was too narrow, and that the rule applied even where there was no proprietory right, and that plaintiffs might always, in equity, sue where there was "a common interest and a common grievance . . . if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent" ([1901] A.C. at p. 8). The learned Lord points out the true ambit of the rule. It is "to apply the practice of the Court of Chancery to all divisions of the High Court" (p. 8). The old practice of Chancery was based upon the principle that the Court required the presence of all parties interested in the matter or suit in order that a final end might be made of the controversy. Where the parties are numerous, you can only "come at justice" with any convenience by the device of a representative suit. *Temperton* v. *Russell*, apart from the dicta, was well decided, for "the attempt made there to invest the defendants with a representative character was absurd on the face of it" (p. 10).

In the same year, the case of *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426, was decided; Lord Macnaghten and Lord Lindley both taking part in the decision. Two questions were determined. A trades union can be sued under its own name by reason of the status given it by legislation, and such a union is liable for damages for injury which it inflicts. There are, however, weighty dicta bearing on the question before me. Lord Macnaghten (p. 437) repudiates an argument put forward by Mr. Haldane, that where a wrong is done by a body of persons acting in concert, too numerous to be made defendants, the person injured would be without remedy, unless he could fasten upon the individuals who with their own hands had done the wrong. The illustration is given of an unregistered trading body operating a factory which fouled a stream, where it was said defendants might be sued in a representative capacity. It is not said whether this would only be so if an injunction was claimed or whether it would equally be the case if the claim was for damages.

Lord Lindley's remarks are particularly important. He points out (pp. 442, 443) that the problem is not new. The common law rules as to parties were too rigid for practical purposes when attempted to be applied to trade unions. The more flexible rules of equity allowing class representation were essential to prevent a failure of justice. He refers to the statement of Sir George Jessel, M.R., in *Commissioners of Sewers* v.

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Gellatly (1876), 3 Ch. D. 610 at p. 615: "Where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right . . . some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted."

Lord Lindley then adds ([1901] A.C. at p. 443): "The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires." He then refers to the "unfortunate observations" on the rule in *Temperton* v. *Russell*, "happily corrected" in *Duke of Bedford* v. *Ellis*, and adds: "I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of the members (its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union."

This being the state of the law, *Metallic Roofing Co. of Canada* v. *Local Union No. 30* (1905), 9 O.L.R. 171, was determined by the Court of Appeal. The defendant was an unincorporated body and was sued in its name, which was held to be improper, but it was held that an order might properly be made permitting certain named defendants to be sued for the class; although the action was based on tort, the allegations being very similar to those of the plaintiff in *Temperton* v. *Russell*, an order should be made for representation of the members of the union.

It is pointed out in this case, as well as in the English cases, that "the use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used." The sequel is important. The plaintiff was awarded the costs of appeal, and the problem of realisation had to be faced, and the result is found in *Metallic Roof-*

ing Co. of Canada v. *Local Union No. 30* (1905), 10 O.L.R. 108, where it was held that the costs awarded against the representative defendants could not be realised by garnishee process attaching money to the credit of the union. The Court refused to consider what would be the situation in the event of a recovery in the action. At the trial there was a recovery, and the Court of Appeal indicated that under this the property of the society could be taken: *Metallic Roofing Co. of Canada* v. *Jose* (1907), 14 O.L.R. 156; but this was reversed upon another ground by the Privy Council (*Jose* v. *Metallic Roofing Co. of Canada*, [1908] A.C. 514) and a new trial directed. There was no indication by the Judicial Committee that it thought the action improperly constituted.

Since then, light has been thrown upon the situation by two important cases in England, *Markt & Co. Limited* v. *Knight Steamship Co. Limited*, [1910] 2 K.B. 1021, and *Walker* v. *Sur*, [1914] 2 K.B. 930.

In the former case a ship had been sunk at sea. The plaintiffs, who had shipped goods upon her, sued, on behalf of themselves and other owners of cargo, for damages by reason of breach of contract and duty in the carriage of the cargo. It was held that the plaintiffs and those whom they undertook to represent had not "the same interest in one cause or matter" within the meaning of the Rule. The scope and due application of the Rule are discussed at some length, and an acute difference of opinion upon matters of importance upon this motion was developed.

Vaughan Williams, L.J., points out that in *Duke of Bedford* v. *Ellis* the essential thing was that all the class had the same rights and all relied upon the same charter, and that according to the old Chancery idea all must in some way be parties to the action. Here the rights of each depended upon his own contract, and each might sue to enforce his rights without asking the other a party to the action. The test is not the same as that applicable when considering the right of individuals to join as plaintiffs, when it is enough to find that the rights claimed arose out of the same occurrence, and there is a common question to be tried. (See Rule 66). Fletcher Moulton, L.J., first emphasises this distinction, and applies as the test in the case in hand Lord Macnaghten's paraphrase of the rule, "Given a common interest and a common grievance, a representative suit is in order if the relief is in its nature beneficial to all whom the plaintiff proposes to represent." There is no common interest; each seeks his own damage. The suggestion that all might have a common interest in a declaration of misconduct in

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the course of navigation is answered by the statement that a claim for damage cannot be split up into an abstract proposition and an award of damages. He goes so far as to say: "The claims here are necessarily claims for damages only and therefore no representative action can be brought."

Buckley, L.J., dissents, thinking that a class-action can be brought even where the claims are distinct, substantially applying the test as to joinder of parties.

In *Walker* v. *Sur*, the plaintiff sought to recover architect's fees from an unincorporated religious body which had erected a hospital. An order of representation was made authorising the four named defendants to defend on behalf of all the members of the Order. This was sought so as to enable the plaintiff, if successful, to reach the property of the religious Order. In the Court of Appeal this was reversed. Vaughan Williams, L.J., states that the object of the Rule was to make easier the bringing of actions for the enforcement of rights against an unincorporated aggregate of people. "It lies with the Judge to give the authority and if he thinks it a case in which the plaintiff may properly sue the persons that he proposes to sue as people proper to be authorised to defend in such cause or matter on behalf of or for the benefit of all persons interested then the order may be made." As this did not appear, the order was refused. Buckley, L.J., points out that without such an order the plaintiff can only obtain judgment against the named defendants and execution against their individual assets. He then says that "we have to determine whether this action ought to go on so that execution could be maintained against all the persons represented. In my judgment that would be impossible. It is simply an action of debt against a large number of individuals, and no judgment could be obtained which would be representative against all of them, there could only be a judgment individually against each of them."

Kennedy, L.J., says ([1914] 2 K.B. at pp. 936, 937): "This is an action of debt, and . . . such an action, where the person or persons sought to be sued are, as here, members of an unincorporated body which cannot itself be sued, will not lie, framed, as this action is sought to be, under the authority given by the Judge. I admit that I feel a difficulty in saying what does, and in general terms what ought not to, fall within the terms of this permission: but of the body in the present case we know very little on the affidavits before us, and it is not pretended that, as was the case in the *Taff Vale* case, there are any funds vested in trustees. It is not alleged there are any trustees at all, and the claim is to my mind a claim in

which it is sought to make a judgment for payment of money effective against a number of persons who belong to a named society but who have no common fund vested in trustees who could be joined as representing the society." He then points out (p. 937) that the membership is not fixed. "The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract . . . A judgment could not very well be given against one who had ceased to be a member . . . "

The impropriety of any personal judgment operative against one who has not served is also pointed out.

Since then the question has been regarded as placed upon a firm basis. For example, in *Mercantile Marine Service Association* v. *Toms*, [1916] 2 K.B. 243, an order was refused in an action for libel against an unincorporated society of 15,000 members. The named defendants were the chairman, vice-chairman, and secretary of the guild. It was asked to add the trustees of the funds of the guild to represent the body. Swinfen Eady, L.J., said (pp. 246, 247): "The action is for libel, and the plaintiffs must prove who published the libel, and *primâ facie* only those who have published it either by themselves or by their servants or agents or have authorised its publication are liable. The various members of this association may be in a wholly different position. If the members of the management committeee were sued, and if in fact they had authorised the publication of the libel, they could raise such defences as might be open to them . . . The other members of the association, if sued, might say that, however defamatory the words complained of might be, they did not authorise their publication. . . . In my opinion this rule is not intended to apply to such a case as this." The Lord Justice then points out that there is no case in which the rule has been applied in the case of a pure tort and points out that the statement of Lindley, C.J., in *Temperton* v. *Russell*, that it is not applicable in actions of damages for tort, has never been dissented from, and that, apart from the modification of the one statement that the common interest necessary must be proprietary, the decision is still good law. Pickford, L.J., agrees, but seems careful to avoid the statement that in no case can the Rule be used in an action for tort. He rests mainly upon the fact that the plaintiff had not shewn that he could not obtain an effectual remedy without having the 15,000 members before the Court.

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The only other case that I am aware of bearing on the question is *London Association for Protection of Trade* v. *Greenlands Limited*, [1916] 2 A.C. 15, where an unincorporated body was sued in its trade name for libel, and it is said (p. 30) that the rule cannot be relied on unless it appears in the style of cause that the defendants are sued as representatives. I should add that an order authorising the defendants to represent the class is, by the rule, equally essential.

The result, in my opinion, is that in an action to recover damages for tort the rule cannot be invoked unless it is intended to be alleged that the unincorporated body is possessed of a trust-fund, and such circumstances exist as to entitle the plaintiff to resort to that fund in satisfaction of his claim. In such case the trustees may be appointed to represent the general membership in defending the fund.

Where the claim is equitable in its nature, an order may be made where under the old Chancery practice it was necessary to have all the members of the class before the Court in some way, and the membership of the class is too large to permit this save by such an order. Where there are many tort-feasors, the plaintiff has an adequate remedy by suing those whom he can shew to be wrong-doers, and from whom he may expect to levy the amount of any recovery. Any individual alleged to be a wrongdoer and to be liable to a personal judgment ought to have an opportunity of defending himself. His interest is several and not in common with other alleged wrongdoers.

The plaintiff's claim here is not very different from that in *Brown* v. *Lewis* (1896), 12 Times L.R. 455, where the plaintiff recovered damages against the members of the executive committee of a football club upon the grounds of which a defective stand had been erected.

The motion must be dismissed with costs to the defendants in the cause.

Motion dismissed.

CITY OF GREENWOOD v. CANADIAN MORTGAGE INV. Co.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. June 7, 1921.

MOTIONS AND ORDERS (§II—6)—POWER OF JUDGE TO VACATE ORDER MADE BY HIM.

Where mortgagees are in possession of certain property, and in receipt of the rents and profits, and an order is made affecting the said property, and the mortgagees have received no notice of the application on which the order is founded, the Judge who made the order may vacate it insofar as to enable the mortgagees to be heard, and after hearing the matter, may vacate the order previously made insofar as it prejudices the mortgagee's rights.

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TAXES (§IV—175)—SPECIAL LIEN—RIGHTS OF MUNICIPALITY—SEC. 229 MUNICIPAL ACT AS AMENDED BY 1919 (B.C.) CH. 63 SEC. 9—CONSTRUCTION.

Section 229 of the Municipal Act 1914 (B.C.) ch. 52, as amended by sec. 9 of 1919 (B.C.) ch. 63, does not empower a Municipal corporation to receive the rents and profits of land for arrears of taxes, to the prejudice of a mortgagee in possession, the words lands and improvements, in the section not including rents and profits as concomitant elements.

APPEAL by plaintiff from an order of Morrison, J., of December 23, 1920, vacating an order made by him of September 23, 1920, at the instance of the plaintiff, under sec. 229 of the Municipal Act, as amended by sec. 9 of 1919 (B.C.) ch. 63, that the corporation be empowered to collect the rents and profits due or hereafter accruing due from the tenants of said lands. The defendant, holding a mortgage on a portion of the property affected by said order, obtained an order on November 3, 1920, that it be allowed as a party. On motion by the defendant, an order was then made vacating the order of September 23.

The judgment appealed from is as follows:—

MORRISON, J.:—Were it not for sec. 229, 1914 (B.C.) ch. 52, as amended by sec. 9 of 1919 (B.C.) ch. 63, it could not be contended successfully that taxes would have priority over a mortgagee in possession collecting rents. The question submitted to me herein is as to whether that section has created a special lien on the rents separate and apart from that on the lands and improvements. In my opinion the section in question does not create a lien of that sort. It seems to me that the key to a proper interpretation of the provision lies in the reference to the Creditors' Relief Act, R.S.B.C. 1911, ch. 60 which, taken compendiously destroys priorities between creditors and has no reference to rents. The section specifically refers to lands and improvements. These terms are exclusive and do not carry with them rents and profits as concomitant elements.

The order, therefore, insofar as it affects the Canadian Mortgage Investment Co. is vacated. On the main application, this company had no notice thereof, and I, therefore, reopened the matter to let them in to appear, with the above result.

F. A. McDiarmid, for appellant: There are two questions to be considered, first, as to the effect of sec. 229 of the Municipal Act as amended by sec. 9 of 1919 (B.C.) ch. 63, that is as to whether a lien can be given in respect of rents and profits prior to a sale of the land for taxes; and secondly as to the authority of the Judge to vacate his own order. It was an *ex parte* order, first, that was substituted by an order made on motion to the Court. A Judge has no jurisdiction to review his own order.

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see *Bright's Trustees* v. *Sellar*, [1904] 1 Ch. 369; *Re St. Nazaire Co.* (1879), 12 Ch. D. 88. Taxation takes precedence over all claimants except the Crown. There is precedence over a mortgagee whether in or out of possession: see *Town of Sturgeon Falls* v. *Imperial Land Co.* (1914), 20 D.L.R. 718, 31 O.L.R. 62. We always had the remedy of sale under the Act and the question is whether the section gives us precedence over the mortgage.

D. A. McDonald, K.C., for respondent: He gets nothing under the statute except what the statute actually and clearly gives him, and, under the Act, he only has a right against land and improvements. The Ontario Act gives further power. The apt language is there, so that the Ontario case referred to does not apply. He has the right to sell the lands but the Act gives him no preferential lien for rents and profits. The nearest to this is a mechanic's lien: See Wallace on Mechanics' Liens, 3rd ed., 10. The word "privilege" would not include the right to rents and profits.

MARTIN, J.A.:—Two questions were raised in this appeal, one as to the jurisdiction of the Judge to reopen his order of September 23rd, 1920, which we decided at the hearing in favour of the respondent, and the other as to the right of the plaintiff under sec. 229 (1) of the Municipal Act, 1914 (B.C.) ch. 52, as amended by sec. 9 of 1919 (B.C.) ch. 63 to enforce the preferential special lien for taxes on the land and improvements thereby conferred by means of an order to appropriate to itself the rents of the land due to the mortgagee in possession who was collecting them. Sub-section (2) goes on to say that:—

"If it shall be necessary or advisable to protect or enforce the said lien by any action or proceedings, the same may be done by order of the Court, upon application therefor, and upon such notice thereof as to a Court or a Judge shall seem meet."

The respondent submits that there is nothing therein which would authorise the realisation of a lien in so unusual a manner and that all the Court can do is to direct a sale in the usual way, the section conferring nothing more than a special lien enforceable by action or other proceedings sanctioned "by order of the Court", which means a sale, but such action or proceedings can only be commenced after application therefor, and such notice as the Court may direct, which conditions prevent, in the interest of the defaulting owner, or others, any precipitate or unfair prejudicial steps being taken. That, I think, is the correct view of the section, and as no apt authority has been cited to the contrary, the appeal should be dismissed.

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Galliher, J.A.

GALLIHER, J.A.:—By petition dated August 23, 1920, the Corporation of Greenwood applied to the Supreme Court for an order that the rents and profits derived from certain properties described in the petition should be paid to the corporation on account of arrears of taxes. This proceeding was taken under sec. 229 of the Municipal Act as amended by sec. 9 of 1919 (B.C.), ch. 63, which is headed, "Special Lien for Taxes." On September 1, 1920, Morrison, J. directed copies of the petition to be served on certain persons interested in the properties and on the matter again coming before him on September 23 an order was made that the special lien of the corporation be enforced as against the properties in the petition described and that the corporation be empowered to collect the rents and profits due and hereafter accruing due from the tenants of the said lands and requiring the tenants to attorn and pay rents to the corporation.

Notice of motion was given by the Canadian Mortgage Investment Co., the respondent herein, dated November 1, 1920, and returnable on the 4th, asking that the order of September 23, 1920, be set aside and vacated on the ground that they, as mortgagees of certain of the properties affected by said order, had no notice of the application on which said order was founded. The motion came on for hearing before the same Judge and an order was made vacating the said order of September 23, 1920, in so far as is necessary to enable the mortgage company to be heard. This order does not seem to have been taken out but after one or two adjournments the matter was dealt with and on December 23, 1920, the same Judge made an order vacating the order of September 23, 1920, insofar as it affected or prejudiced the right of the mortgage company to receive and collect the rents and profits of the lands and premises covered by their mortgage and restraining the corporation from further proceeding as to the rents and profits of these lands under said order of September 23, 1920, and required the corporation to repay to the mortgage company any rents and profits collected by them under said last-mentioned order. The corporation appealed from this order.

Mr. McDiarmid, for the corporation, submits, first, that the learned Judge has no power to set aside or vacate his order of September 23, 1920. I agree, if what has been done here amounts to a vacating and setting aside of an order dealing with this claim. When the order was pronounced the position was this: The mortgage company at the time was in possession and in receipt of the rents and profits of certain of the lands included in the said petition. They received no notice and were

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not parties at the hearing: they had no right of appeal. They took the only course open to them and applied to be let in to be heard. What then happened was this: The order of September 23 was opened up to permit their claim being heard; a claim which was not adjudicated upon and which they had no opportunity of presenting at the hearing of the petition. This seems to me a proper proceeding. It is not by way of review of any claim passed upon or of any order made dealing with such claim. They should have received notice of the original petition and not having received such notice and their claim not having been dealt with, it was an original hearing of that claim and the order of September 23 is varied so as to give effect to a claim which should have been but was not dealt with in the first instance. It is true the subject-matter was dealt with originally but not the question of the company's rights and in such a case I am satisfied the Judge below had jurisdiction to make the order appealed from.

The only other question is as to the meaning of sec. 229, and I agree with the Judge below in his interpretation of that section.

I would dismiss the appeal.

McPHILLIPS, J.A.:—I am of the like opinion as my brother Martin and would dismiss the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

PLAYTER v. LUCAS.

Ontario Supreme Court, Masten, J. November 4, 1921.
Ontario Supreme Court, Middleton, J. December 31, 1921.

INJUNCTION (§II—130)—INTERIM—GRANTING OR REFUSING OF BY COURT.

An interim injunction to restrain a defendant from proceeding with the erection of a building in alleged breach of a building restriction will not be granted where the granting of such injunction depends on the determination of matters in dispute which are dependent on evidence to be adduced at the trial and where it is not shewn that immediate damage which cannot be amply compensated for at the trial is likely to result to the plaintiffs before the trial of the action if the injunction is refused.

BUILDINGS (§II—18)—RESTRICTIVE COVENANTS—ENFORCEMENT.

Where a restrictive building covenant is intended for the benefit of the vendor only, and such vendor retains and owns no land at the time he seeks to enforce the covenant, which it was intended to protect, he cannot succeed.

MOTION by plaintiff before Masten, J., for an interim injunction restraining the defendant from committing a breach of a building covenant. Motion dismissed.

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Masten, J.

ACTION before Middleton, J., for an injunction to restrain the erection of a building in violation of certain building restrictions. Action dismissed.

T. P. Galt, K.C., for plaintiffs; *E. F. Raney*, for defendant.

MASTEN, J.:—This is a motion for an interlocutory injunction to restrain the defendant, until the trial or other final disposition of this action, from committing a breach of the following covenant:—

"And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, covenants with the parties of the first part, their heirs, executors, administrators, and assigns, that for the period of 15 years from the 1st day of August, 1909, he (the party of the second part), his heirs, executors, administrators, and assigns, will not erect or permit to be erected, on said lands or any portion thereof, any buildings except one dwelling house and stable, such dwelling house to be detached, and to cost to erect not less than $3,000, and the stable to cost to erect not less than $300; the exterior walls of such dwelling house and stable not to be constructed of any other material than brick, stone, tiles, or iron; and the said house shall only be used for residential purposes, the said dwelling house and stable or any portion thereof shall not be placed within 20 feet from Hurndale avenue, except that a verandah, oriel or bay window, or eaves, may be constructed in front of the said house, but no portion of said verandah or steps thereto shall be erected, placed, or maintained within 8 feet of the street line, and the oriel window or bay window or eaves shall not project in front of the main building of the house a greater distance than 4 feet; and this covenant shall be construed as a covenant running with the land."

The above covenant was made in favour of the present plaintiffs by one Thomas Jeffrey in respect of lot 41 on registered plan 1463, and by Charles S. Howarth in respect of the adjoining lot, 42 on the same plan. It is admitted that the lands in question, being part of these two lots, were acquired by the defendant with full notice and knowledge of the above covenant. It is also admitted that the defendant has erected one house on lot 41 and another on lot 42, and that he is now proceeding to erect a third house between the two. The plaintiffs assert that this is a breach of the negative covenant above quoted, and have brought this action to enforce the covenant, and they now claim an interlocutory injunction to restrain any further building until the trial.

The defendant, while admitting the covenant and that he took the lands with notice, sets up:—

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(1) That the lots were sold as part of a building scheme covering these and neighbouring lands, and were purchased and paid for on an implied covenant by the vendors (the plaintiffs) that all the lots covered by the building scheme should be sold subject to a like covenant; that the plaintiffs on their part have broken this implied covenant, destroyed the building scheme, and in consequence are personally disqualified from maintaining the present action to enforce the express covenant above mentioned.

(2) That the character of the district has so altered since 1912 that the covenant is no longer applicable.

(3) That, in any case, the damage is not shewn to be irreparable, and, if the plaintiffs' claim is valid, damages will afford an adequate remedy.

The plaintiffs in reply allege:—

(1) That there never was a building scheme, but that each covenant was independent of the other, and that it was within the discretion of the plaintiffs to omit the covenant or to modify or vary it in any case.

(2) That, even if there was a building scheme, the variations from it have been so trifling that they failed to produce the result contended for by the defendant.

(3) That the character of the district has not altered in the manner contended for.

The motion was fully and ably argued on the merits touching all these questions; but it appears to me that, before dealing with the merits, it is necessary to consider a preliminary question of practice with respect to the granting of interlocutory injunctions. It does not always follow that, because a perpetual injunction may be granted at the trial, therefore an interlocutory injunction before the trial will also be granted. The general principle is thus stated in 17 Hals. p. 217, sec. 480:—

"In cases of interlocutory injunctions in aid of the legal right, all the court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere without waiting for the legal right to be established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the discretion of the court ought in all cases to be regulated. It is not necessary that the court should find a case which would entitle the plaintiff to relief at all events: it is quite sufficient if the court finds a case which shews that there is a substantial question to be investigated, and that matters ought to be preserved *in statu quo* until that question can be finally disposed of."

And in note (*q*) to the above section it is added:—

"In the Chancery Division the modern tendency, however, is to avoid trying the same question on two occasions, and in ordinary cases only to grant interlocutory injunctions where the right to relief is clear."

It is true that, where parties to a contract, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, proof of damage is not necessary as a general rule in order to entitle the plaintiff to a perpetual injunction to restrain the breach thereof. But, as I shall point out hereafter, if difficult questions of fact present themselves on an application for an interlocutory injunction, other considerations may prevail.

The rule was long ago established, and has been consistently applied, that the Court will not grant an injunction on the ground that it will do the defendant no harm: *Coffin v. Coffin* (1821), Jac. 70 at p. 72, 37 E.R. 776; *Strousberg* v. *Linklaters* (1888), 32 Sol. Jo. 751.

In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1885), 15 Q.B.D. 476, the plaintiffs applied for an interlocutory injunction to restrain boycotting. Lord Coleridge, C.J., delivered the judgment of an Appellate Court consisting of himself and Fry, L.J., and his remarks on the granting of an interlocutory injunction are so pertinent to the circumstances here existing that I quote them at some length (pp. 484, 485, 486, and 487):—

"Now, my learned Brother's experience in matters of this sort is much greater than my own; and, after much anxious discussion, we have come to the conclusion that this is not a case for the issuing of an interlocutory injunction, and for many reasons. First of all because, although conceivably, as I have already stated, the cause of action is one within the limits of legal idea and capable of proof, yet every one must see that it is a case in which the proof is extremely difficult; and here it is that the case put forward by the defendants comes in with great weight . . . Whether they (the plaintiffs) say so truly—I do not mean veraciously or accurately—is altogether another matter. They say it; and, as I observed with regard to the case of the plaintiffs, without deciding that they are right, it is plain they may be so: and so, without deciding the case against the defendants, it is plain that they also may be right. It is entirely, as it seems to us, a matter to be decided by-and-by before a jury or a judge or whatever tribunal may be called upon to determine which of the two contentions is made out in point of fact. That being so, it would be a very wrong thing

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for this Court to anticipate the decision of so doubtful a matter by the issuing of an interlocutory injunction.

In the next place, it is to be considered, that, even assuming that the plaintiffs are right in their contention, it will be competent to the jury at the trial to award, and I have no doubt they will award, the plaintiffs abundant damages to compensate them for the injury that they may have sustained at the hands of the defendants. I have always understood, and I am confirmed in that understanding by the larger experience of Lord Justice Fry, that that is almost of itself a reason for not issuing an injunction prior to the trial of the action. If the plaintiffs establish their case by the verdict of the jury or the decision of the judge, they will get all they are entitled to.

Next, this does not appear to me to be a case in which, as I was at one time inclined to think, the plaintiffs can sustain irreparable injury by our declining to grant the relief prayed. It may be that they will suffer some damage; it may be that they will for a time have a difficulty in carrying on their China trade, or may have to carry it on at a loss. But injury of that sort differs altogether from the injury which is called 'irreparable,' to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue from this Court. For instance, if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable, and cannot be compensated in damages. It is in cases of that nature that an interim injunction issues. The injury here, if it be made out, obviously is not one of that character.

. . . . The injury complained of is not irreparable: there is no infringement of any right which affects the enjoyment of life; no restraint of freedom of personal action; none of those considerations which besides the head of irreparable injury have induced the Courts to interfere by injunction before the trial of the action."

In the present case, the covenant being clear and the erection of the building being admitted, if that were all that appeared, the interlocutory injunction ought, I think, to be granted, even though no irreparable damage is shewn. But that is not all: the defendant sets up grounds for contending that the covenant is wholly gone, or, in the alternative, is unenforceable by these plaintiffs, and, without deciding that he is right, it is manifest that he may succeed on those questions at the trial. I understand the principle to be that where the affidavit-evidence on the motion leaves the matter so much in doubt that the Court must see there is a serious question of difficulty to try, then the matter of convenience becomes of paramount importance.

Here the legal right of the plaintiffs depends on evidence of facts which can only appear satisfactorily at the trial. The present material, ample though it is in many respects, is yet not sufficiently clear to enable me to form any satisfactory opinion on the plaintiff's rights. Under such circumstances the rules governing applications of this kind are well settled, and are as stated by Moss, J.A., in *Dwyre* v. *Ottawa* (1898), 25 A.R. (Ont.) 121, at p. 130: —

"Where the legal right is not sufficiently clear to enable the Court to form an opinion it will generally be governed in deciding an application for an interim injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the order.

And where it appears that greater danger is likely to result from granting than withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will not be granted."

The several issues arising in this action, as indicated in the beginning of this judgment, as to whether there was in fact a building scheme and as to whether the plaintiffs have disqualified themselves and as to whether the character of the locality has changed, are all peculiarly dependent upon the evidence which will be adduced at the trial. Considering the situation which I have just indicated, and that no immediate damage is shewn to be likely to result to the plaintiffs between the present time and the trial of the action, if the injunction order is refused; considering that the covenant in question has less than 3 years more to run, and that it may at the trial be determined that the plaintiffs can be amply compensated in damages; considering also that the defendant from the date of the issue of the writ proceeds at his own risk, and that if the plaintiffs are ultimately found to be entitled to the injunction as prayed, the defendant may and probably will be ordered to tear down and remove the building in question (*Daniel* v. *Ferguson*, [1891] 2 Ch. 27, and *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774)—I think I ought to decline to determine the issues on which the plaintiffs' rights depend, and on the balance of convenience to find in favour of the defendant, on the clear understanding that he is proceeding at his own risk.

The order should therefore be that, upon the defendant undertaking to facilitate the speedy trial of the action, this motion is enlarged to the trial without any injunction in the meantime.

Order accordingly.

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Galt, K.C., for plaintiffs; *Raney*, for defendant.

MIDDLETON, J.:—Action for an injunction to restrain the erection of a building in violation of restrictions contained in two conveyances of lots fronting on Hurndale avenue. The restrictive covenant on the sale of each lot provides that only one dwelling house shall be erected upon it. The defendant was not the original purchaser, but has acquired by divers mesne conveyances title to two adjoining lots originally sold to separate purchasers, and is erecting three houses upon the two lots. He first built one house on each lot, leaving as much land between as practicable, and then asked to be relieved from the restriction so that he might place a third house between the others. This was refused, and he then took the position that he was not bound by the covenant, and started to build. A motion for an injunction followed and he was allowed to proceed entirely at his own risk. Pending the hearing the house has been erected at a cost, it is said, of $12,000. If the plaintiffs are in the right, as I understand the law, I must order the destruction of the building.

"If there is a negative covenant the Court has no discretion to exercise. If the parties for a valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that the thing shall not be done. In such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience or of the amount of damage or injury, it is the specific performance by the Court of that negative bargain which the parties have made:" *Doherty* v. *Allman* (1878), 3 App. Cas. 709, 720, followed in *McEacharn* v. *Colton*, [1902] A.C. 104.

In this case the defendant is not a party to the covenant, and it does not run with the land. He can only be bound by it if the case be within the equitable rule expounded in *Tulk* v. *Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143. That the defendant is a purchaser with full notice of the covenant admits of no doubt, but recent cases have demonstrated that "if the vendor has retained no land which can be protected by the restrictive covenant, the basis of the reasoning of the judgment is swept away:" *London County Council* v. *Allen*, [1914] 3 K.B. 642, at p. 654. This does not mean "retain at the date of the covenant," but "retains and owns at the date when it is sought to enforce the covenant." This law has been recently applied in *Page* v. *Campbell* (1921), 59 D.L.R. 215, 61 Can. S.C.R. 633.

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Here, fortunately for the defendant, the plaintiffs have parted with all the land which the restrictive covenant was intended to benefit and protect.

In case it should hereafter be deemed of importance, I find there was not a "building scheme," as that expression is understood in the cases. The covenant was intended to be for the benefit of the vendors alone: *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305.

The action fails. Though sorely tempted, I can see no reason for refusing costs. Such costs will not cover any relating solely to the attempt to shew a building scheme and release by reason of the vendors' conduct toward other purchasers.

Action dismissed.

MARSHALL v. CANADIAN PACIFIC LUMBER Co. AND DOMINION BANK.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips. October 3, 1922.

MOTIONS AND ORDERS (§II—6)—JURISDICTION OF JUDGE TO AMEND OR VACATE ORDER MADE BY HIM AFTER ENTRY.

The Court in this case re-affirmed its decision in the case of *City of Greenwood* v. *Canadian Mortgage Investment Co.*, 69 D.L.R. 510, as to the jurisdiction of a Judge to amend or vacate an order previously made by him after it had been duly entered.

[See also (1922), 65 D.L.R. 461, 63 Can. S.C.R. 352; see *City of Greenwood* v. *Canadian Mortgage Investment Co.* 69 D.L.R. 510.]

APPEAL by plaintiff from order of Morrison, J. of January 11, 1921. Reversed.

E. P. Davis, K.C., for appellant.

E. C. Mayers, for respondent.

MACDONALD, C.J.A.:—In April, 1921, Morrison, J. made an order providing for the distribution of certain moneys in the hands of the receiver, for bondholders of the Canadian Pacific Lumber Co. Later, the Dominion Bank which was not a party to the order or to the proceedings, applied and was added as a party defendant. In January, 1922, the bank obtained from the same Judge an order striking out two sub-paragraphs of the order of April, and this appeal is from that order. Both were Court orders.

The point was taken in the notice of appeal that the Judge had no power to review the first order. Mr. Davis counsel for the appellant, neither admitted nor disputed in argument the jurisdiction of the Judge. As the question is one of jurisdiction which cannot be given by consent, the Court is bound

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to consider it. The question is one in regard to which I entertain a very strong opinion.

I thought it had been decided that since the Judicature Act, no Judge had power to review his own order after the same had been duly entered. The point is dealt with by the Court of Appeal in *Re St. Nazaire Co.* (1879), 12 Ch. D. 88, the headnote of which is as follows:—

"Under the system of procedure established by the Judicature Acts no Judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other Judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal."

The same principle was adverted to in *Oxley* v. *Link*, [1914] 2 K.B. 734 at p. 738, where Vaughan Williams, L.J., said:—

"A Judge had no right, since the Judicature Act, to rehear an application in any form."

And again in *Hession* v. *Jones*, [1914] 2 K.B. 421, 30 Times L.R. 320, where the principle of *Re St. Nazaire Co.*, *supra*, was followed.

Mr. Mayers referred us to *Watson* v. *Cave* (*No. 1*) (1881), 17 Ch. D. 19, but that case merely decided that a person not a party to the action in which the order was made cannot appeal from it to the Court of Appeal. There are, it is true, some expressions of the Judge's in that case which suggest that relief might have been obtained in the Court below, but its character is not indicated. No doubt, relief might have been applied for in the Court below, as for instance, to add the applicant as a party defendant, whereupon he might if the facts warranted it, apply to the proper Court for an extension of the time for appeal. Moreover, the applicant not being a party to the proceedings enjoyed his legal rights unimpaired by the order to which he was not a party.

The question raised is a most important one, affecting as it does the right to review judgments once formally entered. Jessel, M.R., as well as the other Judges in that case, points this out in *Re St. Nazaire*, *supra*, and while the facts of them are somewhat different to those at Bar, the principle was the same. The only thing that embarrasses me is the decision of this Court in *City of Greenwood* v. *Canadian Mortgage Investment Co.* (1921), 69 D.L.R. 510, 30 B.C.R. 72 at p. 74, in which the Court sustained an order similar to the one appealed from. The question of jurisdiction was there distinctly raised though it would not appear from the report that any authorities had been cited.

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but on consulting my brother Galliher, who gave reasons for his decision on the point of jurisdiction, I find that the *St. Nazaire* case was referred to by counsel. This Court on more than one occasion has intimated that the rule of *stare decisis* is not an inflexible one, that where a decision had been given contrary to a distinct line of authorities which had not been cited, the Court might reconsider the matter. Galliher, J.A., in his reasons does not appear to dispute the proposition above laid down, where the appellant was a party, but sees a distinction, in favour of jurisdiction, in the circumstance that the party applying for review has, since the order complained of, been made a party to the action, and had no opportunity at the time the order was made of appealing from it (30 B.C.R. at pp. 75-76). That is the whole point in this case. The Court has now been called upon after re-argument to decide the point again. At the close of the argument upon the statement of counsel that the point was covered by the *Greenwood* case, the Court stated that it would follow that decision, but as judgment was reserved on the merits, I have since had time to consider the matter in the light of the authorities to which I have referred above, as I may do when the judgment has not yet been drawn up and entered. In fact, it is my duty if I have doubts, to resolve those doubts before parting with the case.

It did appear to me hardly in accordance with sound reason and authority that a party not a party to an action should, upon becoming one, be entitled to attack before the Court which made it any order theretofore made in the cause.

In the above observations I have expressed my opinion and given my reasons therefor, but, nevertheless, in view of the fact that the majority of the Court are for re-affirming their former decision, I shall not dissent.

On the merits, I hold that the moneys advanced were not by way of loan but were advanced for the purchase of coupons and that the holders of the coupons are in the same position as other bondholders in respect of the distribution of the assets of the company. One of the paragraphs struck out was not complained of, as I understand the matter, but the other, dealing with the distribution of the moneys by the receiver should be restored with this variation, that the Dominion Bank is not to be made liable with respect to interest and costs. The order, therefore, should be drawn up to protect the bank in this respect, as contended for by Mr. Mayers.

Appeal allowed accordingly.

MARTIN, J.A.:—After this appeal was argued in March last some doubt arose as to our jurisdiction to entertain it and so

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counsel for all parties were requested to speak to that point and it came up for argument before the full Bench on the 10th of July last and at the end of the argument the following unanimous judgment was delivered by the Chief Justice on our behalf, as appears by this transcript from the notes of the official stenographer:—

Macdonald, C.J.A.: We will give judgment a little later, perhaps during the present sitting. The *Greenwood case* (69 D.L.R. 510) of course decides that we have jurisdiction; then we have to decide the matter on its merits.

This confirms exactly my own note of our judgment, and so the matter of our jurisdiction having thus been finally disposed of, it would be neither proper nor profitable to discuss it or to seek to blow upon this decision or upon our preceding one upon which it was founded. Moreover, how could we in fairness to the litigants now reverse our decision and put them out of this Court without giving them an opportunity to be heard after solemnly declaring nearly 3 months ago that they were lawfully in it? Consequently, I shall now confine myself to the only question properly left open for our consideration, *viz.*, the merits of the case. And as to them, my view is, briefly, that the transaction cannot be regarded as a straight loan but as one whereby, so as to avoid a winding up, the coupons were to be purchased by Williamson, Murray & Co., and kept alive with the object that they, as the "lenders," should also have the benefit and protection of the trust deed; and they were, in fact, so purchased on the "condition" set out in the agreement. So far as the claim of the Dominion Bank as to certain interest on the coupons is concerned, I understood that Mr. Davis admitted it, but if, by any chance, I am mistaken in this, I should like the point to be further spoken to. Subject to this the appeal, I think, should be allowed.

GALLIHER and MCPHILLIPS, JJ.A. would allow the appeal.

Appeal allowed.

Re FITZGIBBON.

Ontario Supreme Court, Middleton, J. January 10, 1922.

WILLS (§IIID—100)—FUND TO FORWARD WORK OF PARTICULAR INSTITUTION—NO GENERAL INTENTION TO DEVOTE TO CHARITY—FAILURE OF GIFT—DISTRIBUTION.

Where there is no general intention in a will to devote a fund to charity, but only to forward the work of a particular institution, and to confer a benefit on those who have been aided by it—and this fails, the gift also fails and reverts to the estate.

MOTION by the executors of the will of Mary Agnes Fitzgib-

bon, deceased, upon originating notice, for an order determining the question whether certain moneys directed by the will of the deceased to be set apart as the Fitzgibbon trust fell into the estate, upon the failure of the object of the trust (a charitable one), and so should be distributed among the various legatees who had been called upon to abate, or whether the fund was so dedicated to charity that it should be administered in accordance with the cy-près doctrine.

Gerald M. Malone, for the executors.

D. C. Ross, for the Attorney-General for Ontario.

F. W. Harcourt, K.C., for the legatees.

MIDDLETON, J.:—Miss Fitzgibbon died on the 17th May, 1915, having first made a will, dated the 2nd April, 1915, which has been duly admitted to probate, and has already been construed by me upon an application resulting in an order of the 14th October, 1916: *Re Fitzgibbon* (1916), 11 O.W.N. 71.

The provision of the will now calling for interpretation provides that a fund which amounts to $953 be "set apart in trust to form an annual prize to be given to any domestic going through the Hostel who has remained in one place three years or upwards, giving satisfaction to her employers, to be judged by the managers of the Hostel and the employer of the said recipient, this to be known as the Fitzgibbon trust."

Miss Fitzgibbon was one of the founders of the institution known as the "Women's Welcome Hostel," and upon the former application it was determined that this was the institution intended to be benefited by the clause in question. The aim and object of this institution was the receiving of young women arriving from the old country, contemplating taking positions in domestic employment, who came to Canada under the auspices of approved emigration societies. The institution aimed to provide for temporary lodging and the securing of suitable employment for all young women of this type, and the late Miss Fitzgibbon devoted herself to the carrying on of this charitable work.

Owing to some change in the mode of supervising emigration by the Dominion Government, the association was found to have survived its usefulness, and on the 2nd November, 1920, at a meeting of the board, the following resolution was passed:—

"Whereas the work of the Women's Welcome Hostel has been obliged to cease owing to the Government having undertaken all placing and receiving of women immigrants:—

Be it resolved that the board of the Women's Welcome Hostel amalgamate with the Girls' Friendly Society and transfer

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to the central council of the Girls' Friendly Society in Canada all the property known as 52 St. Alban's street."

This resolution being carried, the proposed arrangement has gone into effect.

The Girls' Friendly Society is not carrying on such work as to enable it to make any claim upon the fund, and that society has expressly disclaimed any right to benefit by it.

In the winding-up of the estate, there was not enough money to answer all the legacies given by the late Miss Fitzgibbon, and upon the earlier application it was held that this fund and the other legacies should abate proportionately. The legatees now claim that this fund reverts to the estates, and should be used, *quantum valeat*, to make up the deficiency upon their legacies. The Attorney-General, on the other hand, contends that this is a good charitable gift; and that, the mode of user pointed out by the testatrix having failed, it is the duty of the Court to devise a scheme by which it may be administered cy-près.

There are, no doubt, other institutions carrying on work among the same class of young women, who would be glad to avail themselves of this fund. The question, however, must first be determined whether there was any such general charitable intention on the part of Miss Fitzgibbon as to make the doctrine relied upon applicable, for the residuary legatees contend that there was no general charitable intention, but only an intention to benefit the work being carried on by the Women's Hostel.

I have come to the conclusion that the case is not brought within the doctrine relied upon.

It is of importance, in the first place, to observe the exact terms of the gift. The Hostel itself is not the beneficiary, but the fund is to remain with the testator's trustees, and the annual income is to be given to the young woman immigrant who has gone through the Hostel and remained in one place for three years, giving satisfaction to her employers, her fitness being determined by the board of that institution. The income and not the fund itself is the thing that is vested in the ultimate beneficiary. Had the fund been vested in the Hostel, the principle laid down in *Re Slevin*, [1891] 1 Ch. 373, would have applied, and the Crown would have been entitled to take the fund, not by virtue of the cy-près doctrine, but because it would have then been effectually devoted to charity, and on the failure of the primary purpose it would be applicable to some other purpose to be ascertained by the Court.

Although the hostel is not the beneficiary directly, the purpose of the testatrix, as I gather from the words I have quoted, was to forward the particular work with which she was so

intimately concerned. There was not a general intention to devote this fund to charity. The main and only object was to forward the work undertaken by this particular institution.

In discussing this question, a rule is formulated in Theobald on Wills, 7th ed., p. 373:—

"If the gift is for a charitable purpose, the question is, is the testator's intention to promote some specific and well-defined purpose, and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way?"

This statement has the approval of Lord Justice Kennedy in *Re University of London Medical Sciences Institute Fund*, [1909] 2 Ch. 1. I am ready to adopt the words of the Lord Justice in that case, as applicable to the case before me (p. 9):—

"Here there is no doubt that the gift was for a charitable purpose; and it seems equally clear—and but for the argument addressed to us I should have thought it impossible to argue otherwise—that the testator's intention in making this gift . . . was for the specific and well-defined purpose of the Institute . . . and for no general or other purpose whatever."

The judgment of Parker, J., in the case of *Re Wilson*, [1913] 1 Ch. 314, illuminates the situation. He points out that the cases fall into two classes: first, those in which the gift is for a particular charitable purpose, but it is possible to say that the paramount intention is to give the property for a general charitable purpose, and to regard the particular charitable purpose mentioned as a mere graft upon the general gift, indicating the testator's desire as to the mode in which the general gift is to be carried into effect. Finding this good general gift, and the particular purpose having failed, that direction is to be eliminated from the will, and the valid general gift will then remain.

The second class of cases are those "where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out the particular purpose, the whole gift is held to fail."

Applying the reasoning in that case to the case in hand, I am confirmed in the view that there was no general intention to devote this fund to charity, but that here the only intention was to forward the work of the Hostel, and to confer a benefit upon those who had been aided by it; and, this failing, the gift fails and the fund must now be distributed among the legatees. If the intention to benefit the Hostel is read out of this

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will, it is impossible to find a good general charitable gift.

The decision of Chitty, J., affirmed by the Court of Appeal, in *Re Rymer*, [1895] 1 Ch. 19, leads to the same conclusion.

The costs of all parties may well be paid out of the fund before distribution.

Judgment accordingly.

KELLOGG v. DAPPEN.

Saskatchewan Court of Appeal, Turgeon, McKay and Martin, JJ.A. October 23, 1922.

ANIMALS (§ID—35)—RUNNING AT LARGE—ACCESSIBLE CELLAR OF VACANT HOUSE—INJURY—DAMAGES—OPEN WELLS ACT R.S.S. 1920, CH. 169—APPLICATION—LIABILITY OF OWNER.

The object of the Open Wells Act R.S.S. 1920, ch. 169 is to protect animals which are at large from any excavation which may be dangerous and accessible to them, and the owner of a house who has on ceasing to use the building, removed the flooring and left the cellar in the nature of an excavation into which a horse gaining entrance through the door, falls and is killed is liable in damages to the owner of such horse.

[See Annotations 32 D.L.R. 397, 33 D.L.R. 423, 35 D.L.R. 481.]

APPEAL by defendant from the trial judgment in an action for damages for the death of a horse. Affirmed.

Avery Casey, K.C., for appellant.

P. H. Gordon, for respondent.

TURGEON, J.A.:—I agree with the conclusion arrived at by my brother Martin in his judgment, that this appeal should be dismissed with costs.

In my opinion, the excavation in question comes fairly within the prohibition of the statute. This excavation was originally the cellar of a building belonging to the appellant. He ceased to use the building as a dwelling, (or, so far as the evidence shews, for any other purpose), several years before the accident occurred. When leaving the building, he removed the flooring, and left the cellar in the position of an excavation with walls around it and a door leading into it, which door was not secured in a manner suitable to remove the danger of animals passing through it and falling into the excavation. Had he removed not only the floor but the walls of the building as well, there can be no doubt that the cellar would thereby have become, beyond controversy, a dangerous excavation within the meaning of the Act. The condition in which he did leave this excavation differs only in degree from this more patent violation of the statute.

MCKAY, J.A.:—I concur in the result.

MARTIN, J.A.:—This is an action to recover the value of a

mare, which was killed by falling into a cellar in a house on the n/e ¼-14-52-16-w. 3rd., the land of the defendant.

In the fall of 1919, the plaintiff lost a mare, 4 years old, valued at $150. In the month of December he heard, in some way which does not appear from the evidence, that there was a horse lying in the cellar of the house in question, and on going to see, he found the mare he had lost. The mare had apparently got into the house through the door, as this was the only means of entrance, and had fallen into the open cellar which was about 6 ft. deep and 5 ft. in width, and was so located near the door that any animal stepping inside would almost unavoidably fall into it. It appears that the door had been fastened by a small chain, the chain being fastened to the door and hanging to a nail on the door jamb. One of the witnesses stated that in the summer of 1919 he was engaged in putting up hay on the land in question and passed and re-passed the shack many times. He says the door was wide open that summer; in fact he never saw it closed. He was there as late as September in that year, and the door was wide open.

The defendant says he lived in the house on the land in question till the summer of 1915, and the last time that he was at the place before the accident occurred was on December 18, 1918. When he left the farm in 1915, he had the windows in the house nailed up, and a 6 inch iron hasp with a chain on the door with a padlock. On the occasion of his visit in December, 1918, he found the door tampered with, and two of the boards of a window. The padlock was gone, but the chain was still there. He fastened the door as best he could with the chain, and says he passed the shack again in September 30, 1919, and the door was shut. He further says he never knew of the house being dangerous or accessible to stock.

There is no doubt that the plaintiff's horse was killed as the result of falling into the cellar and must have had access to the horse through the door. The preponderance of evidence is that the door of the house was open during the summer and fall of 1919, so that whatever precautions the defendant may have taken when he left the house in 1915, and when he visited it in December, 1918, he did not take any precautions after the month of December, 1918.

The trial Judge found as a fact that the defendant did not inspect the place from December 18, 1918, till the time that the mare was killed in October, 1919. He also found that the plaintiff had no knowledge of the existence of the cellar, and he held that the defendant had, upon his premises, an excavation in the nature of an open well which was accessible to stock.

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and that the plaintiff's horse fell into that and was killed and that the defendant was liable. From this judgment the defendant appeals.

Section 3 of the Open Wells Act, R.S.S. 1920, ch. 169, is as follows:—

"3. No person shall have on his premises or on any premises occupied by him any open well or other excavation in the nature thereof of a sufficient area and depth to be dangerous to stock and accessible to stock of any other person which may come or stray upon such premises."

I must say that I have had some difficulty in arriving at the conclusion that the open cellar in the shack in question was an excavation in the nature of an open well under the provisions of this section. The use of the words "in the nature thereof" make the words "or other excavation" *ejusdem generis*, and, if I were confined to this section of the Act in construing it, I would be forced to come to the conclusion that the cellar in question in this action is not included within the meaning of sec. 3. Construing the whole Act, however, including the title, which is "An Act respecting Open Wells and other Things Dangerous to Stock," I think it may be reasonably concluded that the object of the Act is to protect animals which are at large from any excavation which may be dangerous and accessible to them.

Maxwell on the Interpretation of Statutes, 6th ed., p. 75 says:—

"*And it is now settled law that the title of a statute is an important part of the Act*, and may be referred to for the purpose of ascertaining its general scope, and of throwing light on its construction, and this rule seems to apply alike to the 'long' and the 'short' title."

See also *Jones* v. *Sherrington*, [1908] 2 K.B. 539, 24 Times L.R. 693, 77 L.J. (K.B.) 771, at p. 774. *Ambler & Sons* v. *Bradford Corpn.*, [1902] 2 Ch. 585, 18 Times L.R. 758, 71 L.J. (Ch.) 744, (and particularly the judgment of Romer, L.J. at p. 747).

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

Appeal dismissed.

REX v. HORNING.

Ontario Supreme Court, Mulock, C.J. Ex. January 13, 1922.

CRIMINAL LAW (§IIG—70)—FORMER JEOPARDY—CONVICTION FOR THEFT AND RECEIVING—NO BAR TO CONVICTION OF CONSPIRING TO ROB AND ROBBERY.

Neither a charge of theft before a magistrate, nor one of un-

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lawfully receiving to which on his trial before a county Judge an accused pleads guilty, includes either the offence of conspiring to rob or of robbery, and his conviction of receiving is not a bar to his conviction of robbery and conspiracy to rob.

APPLICATION by prisoner in arrest of judgment or to stay proceedings upon the verdict. Application dismissed.

The facts of the case are as follows.

On March 7, 1921, in the County Court Judge's Criminal Court of the County of Wentworth, George Horning elected to be tried upon and pleaded "guilty" to the charge that he "on December 23, 1920, at the township of Binbrook, in the said county, did unlawfully receive and have the sum of $8 of the moneys and property of Wilfred Laidman, then well knowing the same to have been theretofore unlawfully stolen," and for the offence was sentenced to 4 months' imprisonment.

Subsequently, at the assizes held in Hamilton in the month of November, 1921, Horning was indicted on two counts:—

First, that he did on December 23, 1920, conspire with others to commit robbery at Binbrook.

Second, that he did on December 23, 1920, commit robbery at Binbrook.

Upon these two counts Horning was tried before Mulock, C.J. Ex., and a jury, and found guilty on both counts.

The evidence adduced at the trial at the assizes was, that Horning and 4 others had, in the afternoon of December 23, 1920, conspired to rob 3 stores, one being a store at Binbrook; that, in pursuance of this conspiracy, the 5 conspirators drove from the city of Hamilton to Binbrook in a motor vehicle, Spaulding, one of the 5, drove the vehicle; Martin and Horning pointed out the way to Spaulding, each of them being familiar with a part of it; Meharg and Dickenson went into the store, after Spaulding had inspected the premises; Spaulding, Martin, and Horning sat in the vehicle awaiting the return of Meharg and Dickenson; Dickenson took $40 from the till in the store and handed it to Meharg; these two then returned to the vehicle, which was rapidly driven away; Meharg divided the money practically equally among the 5; Horning received $8.

It was for the offence of receiving this sum of $8 that Horning pleaded "guilty" in the County Court Judge's Criminal Court.

Upon Horning's trial at the assizes he did not plead *autrefois convict*.

C. W. Bell, K.C., for the prisoner.

Daniel O'Connell, K.C., for the Crown.

MULOCK, C.J.Ex.:—The prisoner was tried before me at the

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Wentworth Assizes, held in November, 1921, and found guilty of two offences, namely, conspiracy to rob and robbery. The counts in the indictment upon which he was found guilty were in the following words:—

(1) "That at the city of Hamilton, in the county of Wentworth, on or about December 23, 1920, George Horning, did conspire, combine, confederate, and agree to and with Wilfred Meharg, Edward Dickenson, Clarence Spaulding, and Lloyd Martin, to, with, and by threats and acts of violence, on December 23, 1920, then and there to be used by them to and against the persons of those who might be in custody of the money and property in certain stores in the county of Wentworth to prevent resistance, violently to steal, in the presence of the said persons so in custody of the property in the said stores against the said custodians' will, the said money and property then and there in said stores.

(2) That afterwards at the township of Binbrook, in the county of Wentworth, on December 23, 1920, the said George Horning, in pursuance of the said conspiracy, did then, and being together with the said Wilfred Meharg, Edward Dickenson, Clarence Spaulding, and Lloyd Martin, with and by means of violence then and there used by them to and against the person of Edward Whitworth, of the said township of Binbrook, to prevent resistance, violently steal, in the presence of the said Edward Whitworth and against the said Edward Whitworth's will, moneys of Wilfred Laidman to the amount of $42, contrary to the Criminal Code."

For the defence it was proved that on February 23, 1921, the prisoner was charged before the Police Magistrate, at Hamilton, in the said county, "that he did on December 23, 1920, at the township of Binbrook, in the county of Wentworth, unlawfully steal the sum of $40, the moneys and property of William Laidman," and that on the said charge he was committed for trial by the Police Magistrate, and was on March 7 thereafter tried by the Judge of the County Court of the County of Wentworth, and on his trial was charged that he had "unlawfully received the sum of $8, the money and property of William Laidman, well knowing the same to have been stolen."

Upon his arraignment upon this charge, he was found guilty, and was sentenced to 4 months' imprisonment, and it was contended on behalf of the prisoner that his conviction before the said County Court Judge was a bar to conviction on the charges of conspiracy and robbery for which he was tried before me and found guilty.

The prisoner's counsel rested this contention not on the

ground of *autrefois* convict, but on the ground that the facts which were in evidence before the Police Magistrate and the County Court Judge were the same as those in evidence at the prisoner's trial on the charges of conspiracy and robbery, and that his conviction by the County Court Judge must be considered as an adjudication in respect of other offence disclosed by the evidence adduced before me.

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In support of this argument, prisoner's counsel relied on *Reg.* v. *King*, [1897] 1 Q.B. 214. In my opinion, that case is not open to so sweeping an interpretation. There the prisoner had been convicted upon an indictment charging him with obtaining credit for goods by false pretences, and was subsequently convicted upon a further indictment charging him with larceny of the same goods. The view of the Court of Criminal Appeal appears to have been that the offences charged were substantially the same, and that, the prisoner having been convicted of obtaining goods by false pretences, it was not fair that he should later be tried for an offence only technically different. It is true that Hawkins, J., is reported as saying (p. 218), "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts;" but he adds, "The offences are practically the same, though not their legal operation." Apparently the substantial identity of the offence was the *ratio decidendi* in *Regina* v. *King*. See *Rex* v. *Barron*, [1914] 2 K.B. 570.

Dealing then with the present case, I am of opinion that the contest is not whether the facts in the case before the County Court Judge and in the present case are the same, but whether the prisoner could have been properly convicted on the trial before the County Court Judge of the said offences of conspiracy and robbery. Neither the charge of theft before the magistrate nor that of unlawfully receiving, to which on his trial before the County Court Judge he pleaded "guilty," includes either the offence of conspiracy to rob or of robbery. On the charge of theft and receiving he could not have been properly convicted of the major offence of robbery (the lesser does not include the greater offence) nor of a wholly different offence, that of conspiracy to rob. Thus, before the County Court Judge he was not "in peril" in respect of either of these offences, and his conviction of receiving is not a bar to his conviction of robbery and conspiracy to rob.

I therefore dismiss the prisoner's application.

Application dismissed.

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RAINEY v. KELLY.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. March 8, 1922.

JUDGEMENT (§IID—141)—COLLISION BETWEEN MOTOR CAR AND PEDESTRIAN —FINDING OF TRIAL JUDGE AS TO NEGLIGENCE—CONCLUSIVENESS OF FINDING.

In an action arising out of a collision between a motor car and a pedestrian it is for the trial Judge on the hearing of the evidence pro and con to decide where the negligence lay, and an Appellate Court will not disturb his finding unless he is clearly wrong in his decision.

APPEAL by defendant from the trial judgment in an action for damages for injuries received in a collision between the defendant's motor car and the plaintiff. Affirmed.

Frank Higgins, K.C., for appellant.

R. C. Lowe, for respondent.

MACDONALD, C.J.A. (oral):—I would dismiss the appeal. It was for the trial Judge on the hearing of the evidence pro and con to decide where the negligence lay. I must say from what has been said to us to-day that I think the trial Judge's verdict cannot be reversed. I go further and say that I think he was right. I think the defendant and his witness, Wilson, who was in the car with defendant at the time of the accident, saw the plaintiff crossing the street—saw him in front, in the centre of the street. They saw him when he was eight or ten car-lengths away. If defendant was going at the speed that he says he was going, 10 or 12 miles an hour, he had ample time to not only have got his car under complete control but even stopped altogether and allowed the other man his right-of-way across the street; or, if he had not the right-of-way, if he were not on the crossing, still he ought to have avoided the accident if he could. He did not do that, but went on, apparently at a rather rapid rate of speed, since when he swerved the car to endeavour to avoid the plaintiff he struck him with the mud guard with such force as to break his arm in two places and his leg in two places, indicating a very violent collision. So that on the whole evidence as it appeared to the Judge, it cannot be said that he was wrong. I would, therefore, dismiss the appeal. The appeal is dismissed.

MARTIN, J.A. (oral):—I am of the same opinion. It seems to me that it is one of those cases where the driver of the motor car persists in that absolutely erroneous view that a pedestrian in the act of crossing the street can, at any time, be arrested in his course of crossing, whereas the contrary is the case. It must be remembered that a pedestrian when he leaves the curb and goes out into the traffic and gets himself in a position of

danger, must be allowed to extricate himself from it by being permitted to finish that crossing which he has begun. We know from our everyday experience, both in our individual experience and also from seeing other people, that the contrary is the idea, and a very dangerous one, as well as being very illegal, that is, that all the motor driver has to do, is, at a certain distance, to sound his horn and then all the pedestrians in front of him have got to take immediate steps to extricate themselves from the approaching motor car, whereas that is not the position at all. I repeat it again, once a pedestrian has got into the vehicular traffic, and has begun to cross, he must be allowed to continue his crossing in safety and to finish it. Now one point that did impress me was the point taken by Mr. Higgins here, which I thought was his strong point at first—and at the end it appears still to be his strong point—where he calls attention to the fact that this man lurched forward, and, before the accident, he gave what might be called an invitation to the motor driver to proceed, and he says that excuses the motor driver from doing what otherwise he would have done; but then we have the specific denial of the man himself that that is not what he did, and there are other circumstances there which justified the Judge in taking the view that that was the truth. If so, we are practically helpless. How can I say that the Judge was wrong? Therefore, I agree that the appeal should be dismissed.

GALLIHER, J.A. (oral) (dissenting):—While my learned brothers are of the opinion, as I understand the argument, that the appeal should be dismissed, I am of a different opinion myself, and for several reasons, but it is not necessary to have Mr. Lowe continue his argument for the purpose of trying to convince me in his favour.

As at present advised, I am certainly of the opinion that the appeal should be allowed, and shortly on this ground: The only evidence we have as to the speed of the car is direct evidence from people in the car—the driver of the car—that he was going at a rate of 10 miles an hour, that he slowed up to 10 miles an hour when he saw this person crossing the street. A motor car is under perfect control at 10 miles an hour, and it is under better control under most conditions than it would be at a lesser speed. I can see no reason why the Judge below held that the car was going at any greater speed. However, that is my opinion anyway. Going at this rate of speed, the man some short distance in front of him stops and gives a direct invitation, as I understand it, for the motor car to continue on, and he would keep himself in a safe position. If the motor man

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had intended to act otherwise than go on, it would have been natural for him to wave to the man to go ahead—to go across. He does not do so, and the man himself, after inviting the driver of the motor car to go on and he would stay in his position, instead of doing so, after the man has received that invitation and has accepted it— the foot passenger must have known that he accepted that, because he continued—and notwithstanding that, the foot passenger for some reason, after the car is going along, after he has, in effect, signalled to him to do so, he himself attempts to cross in front of it, with the result, unfortunately, for him—that he meets with an accident. It appears to me to be his own fault.

Now there was some reference made to the fact that the car must have been going fast, because they went down to some building to turn, but I find the evidence of Wilson, one of the men on the car, that the car had stopped in two car-lengths—two lengths of itself—after it struck the pedestrian. Now Colombine's evidence is, after all, when it is sifted down in cross-examination, it amounts to this, that he saw the car turning down some 150 feet away, near some buildings. Well it may, or may not, have been necessary for him to go that far to turn; at all events, he doesn't say the car was stopped there, because the question was directed to him on p. 23, when he says, "You said the car was standing 150 feet out Burnside Road? I said that was where it turned." So I do not think much of that circumstance.

Then, with regard to the question of giving the car gas to go ahead, that is p. 110, evidence of Wilson, he says, "He slowed down when he saw the man standing, as much as to say, 'Come ahead,' but gave her the gas to go ahead." Now that is exactly what a man would do, what anyone would do if he was going ahead at all, in order that the car might go ahead he would naturally touch the gas. So as the case strikes me, I must say I do not agree with the trial Judge, and I cannot agree that he can have found—which he must have found—that there was negligence on the part of the defendant. I do not think the evidence warrants that; and, moreover, he must also have found, in effect, that there was no negligence on the part of the plaintiff, with which I also disagree.

McPHILLIPS, J.A. (oral):—I agree in the view that the appeal should be dismissed. Mr. Higgins, the counsel for the appellant, has very forcibly presented the view as advanced in the interest of the appellant, that the accident was due to the conduct of the plaintiff. Now with respect to that, I cannot accede

to that submission, in that it is quite apparent—I might say it is common ground—that the plaintiff was proceeding to cross the street, either at the intersection, or at some little distance up, which he had the right to do. A great deal of misunderstanding sometimes is prevalent among people, that a pedestrian is confined to the crossing in crossing a highway or street. Such is not the case at all, that is not the law of England, nor is it the law here. The pedestrian has a perfect right to cross the street at any point. It is true there are perhaps considerations that will obtain at the one point that would not obtain at the other—that is, there ought to be greater care, perhaps, exercised, or people are not put upon the same responsibility, quite; but there is the right at large to cross the street or highway at any point. That is the right that the pedestrian has, and until Parliament interferes with that right, the Courts must give full effect to that right.

Now, the plaintiff was seen at a distance of eight or ten car-lengths or as the defendant admits himself, three or four car-lengths away, and if he was proceeding at this slow speed of 10 miles an hour—surely the car ought to have been under sufficient control to have obviated a happening of this kind. There is no contention advanced on the part of the appellant that he really had the right-of-way as against the plaintiff, but the appellant attempts to excuse himself, by saying that the plaintiff indicated at the time that he should have the right-of-way, and as I pointed out during the argument, that was an acceptance of risk on the part of the defendant, and if he erred in this, why, of course, he cannot excuse himself. The plaintiff denies any such intimation, therefore, the defendant is in the very serious position of doing something which he claims he had the right to do, from some indication coming from the plaintiff but denied. He accepted a risk, and he must accept it seems to me, the responsibility, unless he can actually make that out. Now has he made it out? I cannot say that he has. The one circumstance to make it out is the one that Mr. Higgins relied on very greatly and that was the lurch—that the plaintiff lurched forward, that is, if the plaintiff had indicated to the defendant that he might proceed, why of course the plaintiff would be wrong in moving forward. The contention is that after the intimation given to the defendant the plaintiff lurched forward. Now as to the lurching, it is quite consistent with the evidence that if there was any lurching or involuntary act at all, one could quite understand it, it was a case of imminent danger or, as it is sometimes put, "The agony of collision," it is understand-

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able, that he might lurch forward, might be liable to go either way, be startled and give a quick jump or lurch or whatever it might be termed. That does not look at all unreasonable, but that that lurch was consequent upon his then condition I do not think we are called upon to accept. There is a finding of the trial Judge that the plaintiff was not intoxicated. It is quite possible for a man to drink intoxicants and not be intoxicated. We must understand the affairs of men; and we know that a great many men can drink a great deal and still not be intoxicated; then others perhaps can drink very little without it shewing its effect; in any case, the trial Judge says the plaintiff was not intoxicated. I do not give much weight, with all deference, to the police officers as to intoxication, because when a man has his arm broken and his leg broken in two places the shock to the system is very, very great. I would prefer to have heard evidence of some physician or surgeon and there might be evidences there that to the untrained mind would indicate intoxication when it was not that at all; the mere fact that his breath smelled a little is not at all conclusive—one drink might cause that.

Then the next question is, would it upon the facts of the case be right to disagree with the trial Judge? Now what has the trial Judge found? At p. 137 he says:—

"Now I think that the plaintiff's contention is correct that he was run down, and that he was crossing the street in a reasonably careful manner. I think that in running him down the defendant must have been negligent."

It seems to me that that language completely meets the point pressed by Mr. Higgins, that there was no real finding of negligence. When I read that and couple it with the evidence there is a sufficient finding of negligence and ample evidence to support the finding.

Then as to disturbing the judgment—in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, it is stated that the Court of Appeal must give weight to the decision of the trial Judge. It is true that they must not shrink from overruling it if they come to the conclusion that the trial Judge was wrong. How could we in this case come to the conclusion upon the evidence that the trial Judge went wrong? It seems to me that everything points to the trial Judge being right.

Sir Arthur Channel dealt with this point in *Toronto Power Co. v. Kate Paskwan*, 22 D.L.R. 340, [1915] A.C. 734, and puts the point that the question is all one of reasonableness. Was the trial Judge entitled to find as he did or would a jury be

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reasonably entitled to find as the trial Judge did? It seems to me that it is a reasonable conclusion to say that the answers should be in the affirmative.

Lord Buckmaster also dealt with the question in *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 21 C.R.C. 377, 38 O.L.R. 556, where he points out that a judgment of the trial Judge upon a question of fact is one that ought not to be disturbed—that is, not disturbed unless there are circumstances requiring its disturbance—especially when it is decided upon contending evidence or rival evidence.

Now, here there is contending and rival evidence, but the preponderance of the evidence is in favour of the case for the plaintiff. I cannot disagree with the decision arrived at by the trial Judge.

Appeal dismissed.

SALTER v. MAHER.

Ontario Supreme Court, Orde, J. December 27, 1921.
Ontario Supreme Court, Riddell, J. January 25, 1922.

DISCOVERY AND INSPECTION (§II—5)—PHYSICAL EXAMINATION—ONTARIO JUDICATURE ACT, R.S.O. 1914, CH. 56, SEC. 70—TIME FOR MAKING—NECESSITY OF KEEPING RECORD.

The physical examination allowed by sec. 70 of the Ontario Judicature Act, R.S.O. 1914, ch. 56, in actions for compensation for bodily injuries, is an examination for discovery and in the absence of some special reason, ought not to be made until the defendant under the practice is entitled to discovery. The medical practitioner is not required to report the result of the examination to the Court, nor is it necessary to keep any record of it.

[*Clouse* v. *Coleman* (1895), 16 P.R. (Ont.) 496, followed.]

AN appeal by the defendants from an order of the Master in Chambers dismissing their application, made under sec. 70 of the Ontario Judicature Act, for an order for the physical examination of the plaintiffs by a physician and surgeon on behalf of the defendants.

The provisions of sec. 70 are as follows:—

"(1) In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily injury sustained by any person, the Court which, or the judge, or the person who by consent of parties, or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury damages or compensation are sought shall submit himself to a physical examination by a duly qualified medical practitioner who is not a witness on either side and may make such order respecting the examination and the costs of it as may be deemed proper.

(2) The medical practitioner shall be selected by the court,

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judge, or person making the order, and may afterwards be a witness on the trial unless the court, judge, or person before whom the action or proceeding is tried otherwise directs."

W. Heighington, for defendants; *W. S. Walton*, for plaintiffs.

ORDE, J.:—The application was opposed by the plaintiffs on the ground that it was premature and ought not to be made until the defendant would, under the practice, be entitled to discovery. No pleadings have yet been delivered. The writ was issued on November 22, 1921, the claim being for damages for injuries to the plaintiff accused by the negligent driving of an automobile by one of the defendants while in the employment of the other defendant. The defendants appeared on November 26, and immediately afterwards launched their motion before the Master in Chambers. The defendants give as their grounds for desiring a physical examination before delivery of the statement of defence, that the examination should be made as soon as possible after the accident, and that the information to be obtained thereby may result in a settlement.

There is nothing in sec. 70 itself to indicate that the principles governing the right to examine for discovery are to be applied to an application for a physical examination. But the history of the section and the decisions under it make it clear that the physical examination permitted by the section is, in the words of Osler, J.A., in *Fraser* v. *London Street Railway Co.* (1899), 18 P.R. (Ont.) 370, at p. 372, "an examination for discovery only." See also *Burns* v. *Toronto Railway Co.* (1907), 13 O.L.R. 404. I do not think the legislation was intended to do more than give to a party the right, for purposes of discovery only, to the physical examination of the opposite party, which, prior to the passing of 54 Vict. ch. 11, it had been decided in *Reily* v. *City of London* (1891), 14 P.R. (Ont.) 171, he could not have under the law as it then stood.

It does not follow from this, of course, that in exceptional cases a physical examination may not be ordered before the statement of defence is delivered or the pleadings are closed, and it may be that because of the peculiar nature of the discovery permitted by sec. 70 and of the absence of any limitation in the section as to the stage of the action at which the application may be made, the Court would order a physical examination at an earlier stage in cases where it might not order an examination for discovery. But, in the absence of some evidence to shew the necessity of a physical examination at this stage rather than at a later stage, I cannot believe that either the mere suggestion that it is important to have the examination as soon as possible after the accident, or that the information to

be gained thereby may expedite a settlement, is sufficient ground for departing from the rules as to discovery, which I think ought to govern the Court in dealing with applications under sec. 70.

It must be apparent, when it is remembered that the physical examination by a physician under sec. 70 is strictly confined to a mere examination of the person of the party examined and that the physician is not entitled to ask questions or to conduct any oral examination (*Clouse* v. *Coleman* (1895), 16 P.R. (Ont.) 496 and p. 541), that the examining physician would be greatly handicapped in making an examination before the issues in the action are clearly defined by the pleadings, and in most cases until the ordinary examination for discovery has taken place. Without the information so afforded how is he to proceed? Is a female plaintiff, whose sole injury, for example, is a broken arm, to be subjected to the indignity of a complete physical examination merely because the action has not yet reached the stage at which she is required by the practice to disclose the exact nature of her injuries? The physical examination must, like all examinations for discovery, be confined to the facts in issue, and until the issues are defined I do not see how, except in very rare cases, a physical examination can be properly made.

For these reasons, the defendants' appeal fails and must be dismissed, with costs payable to the plaintiffs in any event of the cause.

At a later stage of the action, the Master in Chambers made an order for the physical examination of the plaintiffs, and the defendants appealed from the order.

The appeal was heard by RIDDELL, J., in Chambers.

Heighington, for defendants; *Walton*, for plaintiffs.

RIDDELL, J.:—In an action for damages occasioned by negligent driving, the defendants applied for an order, under sec. 70 of the Judicature Act, for the physical examination of the plaintiffs by Dr. G.; the order was made, but the Master in Chambers directed that "the report of such examination by Dr. G. shall be delivered to and filed at the office of the Master in Chambers, Osgoode Hall, . . ." The defendants appeal from this provision.

I asked the plaintiffs' counsel by what authority a report was required at all under the statute; and he could find none.

The cases cited at the hearing do not seem to me to have any bearing upon the matter. *Friend* v. *London, Chatham, and Dover Railway Co.* (1877), 2 Ex. D. 437, and cases cited; *Pacey* v. *London Tramways* (1876), 2 Ex. D. 440 (note); Chitty and Marks, Yearly Practice, 1922, p. 443, and cases there mentioned.

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The whole purpose and intent of the provisions of sec. 70 are stated with clearness and accuracy by Osler, J.A., in *Clouse* v. *Coleman*, 16 P.R. (Ont.) 541, at p. 542: "The medical practitioner . . . is not required to report the result of the examination to the Court. The examination is not one taken on oath or in writing, nor does it seem to have been intended that any record should be made or kept of it." This agrees with my own opinion, stated at the hearing; and I so decide.

The appeal will be allowed; costs to the defendants in any event.

On settling the minutes of the order of RIDDELL, J., a clause was inserted providing that the report of the doctor was to be privileged from production.

The minutes were spoken to before RIDDELL, J., who struck out this clause, saying that he decided nothing concerning the doctor's report if he should make one.

Judgment accordingly.

TORONTO GENERAL TRUSTS Co. v. CITY OF REGINA.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

BONDS (§IIIB—100)—MUNICIPAL—PAYABLE IN STERLING IN CANADA—DEPRECIATION IN EXCHANGE—PAYMENT IN CANADIAN CURRENCY—CURRENCY ACT R.S.C. 1906, CH. 25, SEC. 2—THE CURRENCY AND BANK NOTES ACT 1914 (IMP.) CH. 14 SEC. 1—THE BILLS OF EXCHANGE ACT R.S.C. 1906, CH. 119 SECS. 163, 186.

Bonds issued by the City of Regina in 1908 contained an interest coupon as follows. "The City of Regina will pay the bearer at the Bank of Montreal at its principal office in any of the following cities viz.: London, Eng.; New York, Montreal, Toronto, or Regina on the First Day of March, 1921, the sum of two pounds ten shillings." The Court held that the holder was entitled on presentation in Toronto to be paid in Canadian currency, the amount which one would at the time of presentation have to pay to obtain in the market two sovereigns and one half sovereign delivered at Toronto, and not at the rate of $4.86 to the pound.

APPEAL by defendant from the trial judgment in a test action to determine the liability of the defendant corporation, on certain bonds issued by it, the amount payable on interest coupons attached thereto being expressed in English currency. Reversed.

C. F. Blair, K.C., for appellant.

J. F. Frame, K.C., for respondent.

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

LAMONT, J.A.:—The facts in this appeal are not in dispute. In 1918 the City of Regina sold certain debentures. These debentures contained the promise of the city to pay to the bearer

at the Bank of Montreal at its principal offices in any of the following cities, namely, London, England; New York, Toronto, or Regina, the sum of one hundred pounds sterling (£100) on March 1, 1938, and to pay interest thereon at the rate of 5% per annum on presentation at the said bank of the interest coupons attached to the debenture. Each interest coupon contained the promise of the city to pay at the said bank in any of the said cities the sum of two pounds ten shillings (£2.10) on the date specified therein. Subsequently, the plaintiffs became the holder of 91 of these debentures, and on March 1, 1920, presented for payment coupons for interest falling due on that date amounting to £227.10 at the Bank of Montreal, Toronto. They were offered therefor the amount of Canadian currency equivalent to £227.10, calculated at the then current rate of exchange at which sterling could be purchased. The plaintiffs refused to accept this amount, claiming to be entitled to have the amount of Canadian currency equivalent thereto calculated at the rate of $4.86 2-3 to the pound. This the defendants declined to pay. Subsequently, on September 1, 1920, and March 1, 1921, the plaintiffs presented coupons amounting on each occasion to the said sum of £227.10, and on these occasions were offered the equivalent thereto calculated at the current rate of exchange on the days on which the coupons were payable. Failing to obtain the amount they claimed to be due, the plaintiffs brought this action, claiming the said sums, or $682.10 in all, together with interest on overdue payments. No objection is taken to the tender of Canadian money instead of that of the United Kingdom. The sole question is as to the amount of Canadian money necessary to pay the £227.10 on each of the days on which the coupons were presented.

The trial Judge held that under the debenture, the pound meant a British sovereign and ten shillings a half-sovereign, and he gave judgment for the plaintiffs. The city now appeals.

In my opinion, this is simply a matter of contract. What was the obligation of the city to the plaintiffs on March 1, 1920, when they presented coupons amounting to £227.10? Clearly that obligation was to hand over to the bearer of the coupons the sum of £227.10. In his evidence, Mr. Williams, manager of the Bank of Montreal, gave the following testimony:—

"Q. So when you say a pound sterling—for instance, one hundred pounds sterling means a hundred gold sovereigns, does it not, ordinarily? A. Not necessarily. It might. Q. What else could it mean in 1908 than 100 gold sovereigns? A. Bank

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of England notes. Q. They were made legal tender for sums over five pounds were they not? A. Yes."

This evidence establishes that the obligation of the city in respect of payments under the debentures could be fulfilled by a payment of the amount in Bank of England notes. These notes could be purchased in Toronto at the current rate of exchange.

On March 1, 1920, therefore, when the plaintiffs presented their coupons, the city could have redeemed its promise to pay in respect of these coupons by tendering the sum of £227.10 in Bank of England notes. The equivalent of this in Canadian currency is the amount necessary to purchase such notes at the rate of exchange existing on that day.

In *Cash* v. *Kennion* (1805), 11 Ves. 314, 32 E.R. 1109, the Lord Chancellor said at p. 316:—

"I cannot bring myself to doubt that where a man agrees to pay £100 in London upon the first of January he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him the law of that country ought to give him just as much as he would have had if the contract had been performed."

In *Barry* v. *Van Den Hurk*, [1920] 2 K.B. 709, an action was brought to recover damages for the failure of the defendant to accept and pay for 5000 cases of skimmed and sweetened milk. According to the contract, it was to be paid for in America in dollars. The defendant did not take delivery, nor did he pay. The plaintiff sold the goods, and sued in England for the difference between the amount realised and the contract price. In giving judgment Bailhache, J. said at p. 712:—

"In my view of the law it is immaterial whether it is the seller or the buyer who is in default; in either case the damages must be fixed as at the date of the default, and therefore the sum to be awarded as damages is such a sum in English currency as would at the rate of exchange prevailing at the date of default produce the sum in foreign currency."

See also *Manners* v. *Pearson and Son*, [1898] 1 Ch. 581; *Di Ferdinando* v. *Simon, Smits & Co.*, [1920] 3 K.B. 409.

I am, therefore, of opinion that the tender of the city of the amount of Canadian currency necessary to purchase in Toronto £227.10 on each of the days on which the coupons were presented was a tender of a sufficient amount to discharge the city's obligation.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the city in terms

of the agreement of the parties declaring that upon payment of the amount tendered the action will be dismissed with costs.

J. F. Frame, K.C., for respondent.

TURGEON, J.A.:—In 1908 the City of Regina, the appellant in this appeal, issued and sold certain debentures, bearing coupons for the payment of interest. Certain of these debentures were acquired by the respondent, each of them being a promise on the part of the appellant to pay to the bearer on March 1, 1938, "the sum of one hundred pounds sterling (£100)" at the principal office of the Bank of Montreal in any of the following cities: London, England; New York, U.S.A., and Montreal, Toronto or Regina in Canada, with interest at the rate of 5% per annum. Each interest coupon expressed the appellant's promise to pay the bearer £2.10.0 at any one of the aforesaid places. The coupons in question in this action were duly presented for payment by the respondent at the principal office of the Bank of Montreal in Toronto, when payment was offered in Canadian currency at the rate of exchange which prevailed on the date fixed for the maturity of the different coupons. In every case, the amount thus tendered was less than the amount normally required to purchase English currency in Canada ($4.86 2/3 to the pound), Canadian money being at the time at a premium over English money.

The question to be determined herein is whether this was a proper tender, the respondents contending that it was not, and that they are entitled to be paid at the normal rate of 4.86 2/3 to the pound, regardless of fluctuations in the rate of exchange. The trial Judge gave judgment in favour of the respondents and ordered payment to be made accordingly.

Although the amounts of principal and interest mentioned in the debentures and in the coupons are set out in pounds and shillings, this action was brought for the recovery of dollars and cents in Canadian money and it is admitted that a tender in Canadian money is a good tender, provided it is for the proper amount, and that judgment, if obtained, should likewise be expressed as recoverable in dollars and cents. And this, no doubt, is in accordance with proper practice (*Manners* v. *Pearson*, *supra*. But this case of *Manners* v. *Pearson*, which enunciates the rule above referred to, is also, I think, clear authority for the further rule that the proper amount recoverable, in actions such as this between creditor and debtor, is the amount of Canadian money necessary to purchase the sum payable in pounds on the basis of the rate of exchange on the date when the said sum became payable in Canada or on the date of judgment, according to the circumstances of each case. In the case

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at Bar, the date in relation to which the amount payable is to be fixed is admittedly the date upon which the respective payments of interest became due, and the date of judgment does not enter into consideration; although, of course, this can make no difference to the respondents if the right which they assert to receive $4.86 2/3 for each pound at all times is well founded. The appellant is, therefore, clearly entitled to succeed in his contention that the payment is to be governed by the rate of exchange on the date of maturity unless some other rule can be shewn to apply, either on account of an express agreement made at the time the debentures were issued or on account of legal decisions which would oust the authority of *Manners* v. *Pearson*, *supra* and the decisions which have followed it, such as *Barry* v. *Van Den Hurk*, [1920] 2 K.B. 709; *Lebeaupin* v. *Crispin*, [1920] 2 K.B. 714, and *Di Ferdinando* v. *Simon, Smits & Co.*, [1920] 3 K.B. 409. It was held in the United States Supreme Court in *Black* v. *Ward* (1873), 15 Am. Rep. 162, 27 Mich. 191, that a promissory note made in the United States and expressed to be payable there in Canadian dollars, is governed as to the amount it sells for, in case of an action brought in the United States, by the same rule as if it had been made in Canada and payable in Canada in so many Canadian dollars, without more. This decision was cited with approval in the Ontario case of the *Third National Bank of Chicago* v. *Morgan* (1877), 41 U.C.Q.B. 402, and it seems to me to be sound.

The result of all this makes it apparent to me that all the respondents are entitled to is judgment for so much money in Canadian currency as would have been required to purchase the pounds and shillings payable upon the coupons in Toronto on the date of their maturity; unless, as I have already said, they can show that another course must be followed for one of the reasons above suggested.

The respondents do contend, in the first place, that an intention on the part of the parties to pay these debentures and coupons according to a different method than that which would obtain under the above authorities is manifested, on the one hand, by the steps taken by the appellant city in enacting its borrowing by-law and in providing the amount to be levied annually to establish a sinking fund for principal and interest, and, subsequently, in the actual making of its levies: the whole of which, apparently, contemplated the raising and paying of a fixed and unvarying amount in Canadian money; and, on the other hand, by the fact that the relationship between the parties of creditor and debtor was created wholly in Canada. Al-

though the argument based on these facts was urged upon us with great force, I do not think, after giving it due consideration, that it can prevail to alter the general rule. Nor do I think that the respondents' contention can be sustained on the ground advanced by counsel that the Parliament of Canada had, prior to the time the debentures were issued, authorised the use of the British sovereign and other British gold coins as currency and legal tender in Canada, at the fixed rate of $4.86 2/3 to the Sovereign and does still so authorise it. They cannot, I think, succeed upon this ground in establishing a right to have paid to them in Toronto a sufficient sum of Canadian money to purchase British gold coins of the face value of the coupons. These coupons contain a promise to pay pounds and shillings, and nothing more, and there is no express provision that the amount is to be provided in gold or at a fixed rate of exchange, as was the case in *Brown* v. *Alberta and Great Waterways R. Co.* (1921), 59 D.L.R. 520, 16 Alta. L.R. 252.

The respondents rely, in the second place, upon the authorities cited in the judgment of the trial Judge, and particularly the case of *N.S. Telegraph Co.* v. *American Telegraph Co.* (1864), 1 Oldright, (5 N.S.R.) 426. Whether or not all the reasoning set out in this Nova Scotia decision can be said to be sound,—and I am free to say that I entertain some doubt as to that,—an examination of the main facts involved will show that they are clearly distinguishable from the facts in this case. In the Nova Scotia case, the contract called for the payment in Nova Scotia of $3,250 "in dollars and cents of United States currency." Upon this amount falling due, the debtors tendered in payment, not a sum of money in Canadian currency sufficient to purchase 3,250 American dollars, but certain United States treasury notes for this amount. These treasury notes were issued under an Act of Congress passed subsequently to the making of the contract, and were declared to be currency in the United States for limited purposes only. The judgment of the Nova Scotia Court refers to these notes as "spurious currency," and lays stress upon the fact that, if the creditors were compelled to accept them, they might not be able to use them in the United States for purposes for which they might expressly require them. I do not think this decision has any application to the case at Bar, and in any event it cannot prevail against the authority of the English decisions to which I have referred.

I think the other cases referred to in support of the judgment appealed from have even less application than the Nova Scotia case. The old case of *Pilkington* v. *Comm's of Claims for*

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France (1821), 2 Knapp 7, 12 E.R. 381, which is much relied on, is a case wherein the principles which prevail in an action in tort were made to apply. Grant, M.R., in giving the judgment of the Privy Council in the *Pilkington* case, says at p. 19 in part:—

"We think this has no analogy to the case of creditor and debtor. There is a wrong act done by the French Government; then they are to undo that wrong act, and to put the party into the same situation as if they had never done it. . . . . Therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrong-doer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at the value of 50d, he does not make compensation by returning an assignat which is only worth 20d; he must make up the difference between the value of the assignat at different periods."

This statement expressly points out the distinction to be drawn between the *Pilkington* case and cases where the relationship of creditor and debtor is involved. The recent case of *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544, which is also relied on by the respondents, is distinguishable upon the same grounds, Lord Sumner, in this case, quoting and following the citation from Sir William Grant's judgment given above.

I do not think it is necessary to enter upon an analysis of the other decisions referred to in support of the judgment. I may say briefly that, in my opinion, they contain no authority which may be relied upon to defeat the appellant's contention that they were at liberty to pay the amount called for in the coupons in Canadian money on the basis of the rate of exchange which prevailed in Toronto on the date of maturity.

I think, therefore, that the appeal should be allowed with costs, and judgment entered accordingly in the Court of King's Bench.

MCKAY, J.A. concurred with TURGEON, J.A.

Appeal allowed.

CROMBIE v. THE KING.

Ontario Supreme Court, Meredith, C.J.C.P. January 19, 1922.

DISCOVERY AND INSPECTION (§I—2)—CAUSE COMMENCED BY PETITION OF RIGHT—PRODUCTION OF DOCUMENTS.

The general rules respecting production of documents are, subject to the control of the Court, applicable to each of the parties to a cause in the Supreme Court of Ontario commenced by petition of right. Where the only discovery which the plaintiff should have, should be an affidavit, disclosing all the documents in the possession of the Crown, no order for production of them should

be made so long as the usual right of inspection of public documents is open to the plaintiff, and in all cases the inspection should be made where the documents are.

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AN appeal by the Crown from an order of the Master in Chambers refusing an affidavit of documents to be filed by the Crown in a cause in the Supreme Court of Ontario commenced by petition of right.

Edward Bayly, K.C., for the Crown.

Frank Arnoldi, K.C., for the suppliant.

MEREDITH, C.J.C.P.:—The question involved in this appeal is: whether, in proceeding upon a petition of right, the suppliant is entitled to any such "discovery" as that provided for in Rule 348*

Unless that rule is in some way applicable to such a case, the suppliant cannot have any such aid in the prosecution of his claim: the general rule was: "that the Crown is entitled to full discovery, and that the subject as against the Crown is not:" per Rigby, L.J., in the case of *Attorney-General* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q.B. 384, at p. 395.

The question was pointedly raised and determined in the case of *Thomas* v. *The Queen* (1874), L.R. 10 Q.B. 44. The Petition of Right Act, 1860 (Imp.), ch. 34, was, and had been for some length of time, in force in England when that case was decided; and it was contended that discovery of documents was included in the provisions of its seventh section; but the answer of Cockburn, C.J., to that contention was: that, if it had been intended to extend the law as to the discovery of documents to the case of petitions of right, there would have been inserted some enactment saying that an officer should answer, as in the case of bodies corporate.

Section 7 of the Act of 1860 provided that nothing in the Act should be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of that Act; but that was not at all relied upon in that case; it is difficult for me to see how it well could have been. That which it means is that, though the mode of procedure shall be assimilated to that of an action, the remedy by way of petition of right is

*348. Each party, after the defence is delivered or an issue has been filed, may by notice require the other within 10 days to make discovery on oath, of the documents which are or have been in his possession or power, relating to any matters in question in the action; and produce and deposit the same with the proper officer for the usual purposes. A copy of such affidavit shall be served forthwith after filing.

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not extended. I mention this only because the Master in Chambers stumbled upon it.

This provision was not contained in the original provincial Act of the same character—the Petition of Right and Crown Procedure Act, 1872—but was, in effect, added to it by an amendment to that Act contained in sec. 6 of the Statute Amendment Act, 1887, 50 Vict. ch. 7. It was probably unnecessary, and added only to remove any cause for doubt.

The English enactment was in substance brought into the statutes of this Province in the year 1872: 35 Vict. ch. 13 (O.); and thence was carried into the Revised Statutes of the Province, 1877, ch. 59: but was repealed in the revision of 1887, because its provisions had meanwhile been carried into and become part of the Rules of Court.

The Rules of Court were consolidated by a commission of Judges, and others, appointed under legislative authority: and, as so consolidated, came into force on the 1st day of September, 1897; and by legislation they were given the validity of an Act of the Legislature: see the Judicature Act, R.S.O. 1897, ch. 51, sec. 129.

The provincial enactment and the amendment of it, before referred to, thus became Rules 922 to 936, inclusive, of the Consolidated Rules, and thus had the validity of legislative enactment given to them.

These Rules and the amendments of them were again consolidated and were curtailed in the year 1913, and as so curtailed and consolidated came into force on the 1st day of September of that year; and, as with the other Rules, have been given the validity of legislative enactment.

In these rules, Rules 922 to 936 of the former consolidation are reproduced as Rules 738 to 750, inclusive; but, in the curtailment of words, some unintentional change of right may have been effected.

Rule 929 of the consolidation of 1897, and the rules and statute from which it was taken, set out in detail a number of proceedings in an ordinary action which it made applicable to a petition of right, to which was added a general clause making the Rules, Orders, practice, and course of procedure in actions applicable to petitions of right unless the Court or a Judge otherwise ordered.

In the curtailed consolidation, for brevity's sake no doubt, the earlier part of Rule 929 was omitted, and the whole rule was embodied in these words: "744. When no other provision is made and so far as the same are applicable, these rules shall apply to petitions of right C.R. 929."

In the English enactment, in the provincial enactment, and in all the rules down to those of 1913, there was the enumeration of certain proceedings in an action, but the very important one of discovery was not included, and that fact had, no doubt, much weight in the easy conclusion of the Court of Queen's Bench in England that an order for production of documents could not be made against the Crown.

If it were not for the change in the Rule made in 1913, and for some other legislation and some circumstances to which I shall refer presently, I should have had no doubt that the ruling of the Court in England should be the ruling in this case, because, apart from it, that should have been my conclusion; having regard to the character of the documents in the possession of the Crown; how accessible they are to the public and how they may be proved: see Taylor on Evidence, part 3, ch. 4, and the Evidence Act, R.S.O. 1914, ch. 76; and especially to the conspicuous absence of discovery from the enumerated proceedings in the Acts and Rules—it should be difficult to reach any other conclusion. But, if that were not so, I should have given effect, here, to the ruling in England. Whether bound to do so or not, when we borrow enactments from England we ought to accept the interpretation put upon them there, especially by such a Court as that which settled the practice there, by its ruling in *Thomas's case, supra*. See also *Tomline* v. *The Queen* (1879), 4 Ex. D. 252.

But, in view of the change so made in the rules, supported by the enactment contained in sec. 2 of the Judicature Act now in force (R.S.O. 1914, ch. 56) that the word "action" means a civil proceeding begun in such manner as may be prescribed by the rules, as well as begun by writ: I am of opinion that the general rules respecting production of documents are, subject to the control of the Court, applicable to each of the parties to an "action" such as this.

The circumstances to which I referred are these: the observation of the Lord Chief Justice in *Thomas's* case, which I have already repeated, is no longer applicable: there is now no special provision as to discovery by corporate bodies; all parties come under the general rule: see Rules 349 and 350: and the notion, which once prevailed, that it was necessary, in order to obtain discovery, that a person should be made a party to the action, has long since been brushed away: see *United States of America* v. *Wagner* (1867), L.R. 2 Ch. 582; and *Republic of Liberia* v. *Roye* (1876), 1 App. Cas. 139.

Having regard to the character of the documents, and to that which I have already said regarding them, and to the character of the action, it is obvious that the discovery which the

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suppliant should have should be of a limited character: the most should be an affidavit by some one, as capable as any one else to make it, disclosing all the documents in the possession of the Crown in the usual manner: no order for production of them should go so long as the usual right of inspection of public documents to which I have referred is open to the plaintiff; and in all cases the inspection, if any, should be where the documents are.

That which the plaintiff gets under the order appealed against is less than that.

Therefore the appeal should be dismissed: the costs of it shall be costs in the action.

Appeal dismissed.

REX v. WOODWARD AND WILLCOCKS.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. June 23, 1922.

BETTING (§I—1)—COMMON BETTING HOUSE—GUESSING CONTEST ON GAMES OR SPORTS—NEWSPAPER COUPON SCHEME CALLING FOR CASH TO ACCOMPANY COUPONS—DISTRIBUTION OF ENTIRE FUND IN PRIZES LESS EXPENSES—CR. CODE SECS. 227, 235, 1920 (CAN.) CH. 43, SEC. 6.

The operation of a guessing contest by a newspaper in respect of a series of football games where the contest is promoted by the newspaper, and money to accompany each coupon is received at the newspaper office, brings the newspaper office within the definition of a common betting house (Cr. Code sec. 227 as amended 1910, ch. 10, sec. 1) although the newspaper disburses in prizes all of the money received with the coupons less costs of advertising and disbursements only. The limitation upon Cr. Code sec. 227 made by 1920 (Can.) ch. 43, sec. 6 in amending sec. 235, does not absolve from criminal liability the person who besides becoming a stakeholder of the money wagered on the contingency of the game or sport by the coupon holders advertises for and solicits money to be sent to him in the guessing competition.

[*R.* v. *Hobbs*, [1898] 2 Q.B. 647, 67 L.J. (Q.B.) 928, distinguished.]

STATED case for the opinion of the Court of Appeal submitted by Sir. H. J. Macdonald, police magistrate for the city of Winnipeg, in the following terms: "Was I right in holding that the facts as agreed upon and the exhibit filed were not sufficient to establish that the office of the *One Big Union Bulletin* was a common betting-house within the meaning of section 227 of the Criminal Code?" Question answered in the negative, Cameron, J.A. dissenting.

R. B. Graham, K.C., for the Crown.

W. H. Trueman, K.C., for the accused.

PERDUE, C.J.M.:—The accused were charged under sec. 227 of the Criminal Code that they did at the city of Winnipeg during the month of December, 1920, keep a disorderly house.

to wit, a common betting house. The accused are respectively the editor and the business manager of the *One Big Union Bulletin*, a weekly newspaper published and sold in Winnipeg, and owned by the Central Labour Council of the One Big Union, a voluntary labour organisation composed of working men. The business of managing and publishing the newspaper is carried on at room 7, Strang Block, Winnipeg, and is a *bona fide* labour or trade publication.

The issue of December 29, 1921, which was put in evidence, contains a notice or advertisement headed:

ONE BIG UNION BULLETIN

Football Competition.

"Big money prizes each week. Prize money to be divided on last week's coupon, $257.

Money sent in each week will constitute prize for following week."

The "Rules of Competition" are stated in the advertisement as follows:—

"1. All forecasts must be made on coupons taken from the *O.B.U. Bulletin*. Name and address must be written plainly. Coupon may be mailed to Contest Editor, *O.B.U. Bulletin*, or placed in *O.B.U.* letter box, at Room 7, 449 Main Street, or placed in ballot box in *O.B.U.* Office.

2. Any alterations or defacement of coupon will disqualify.

3. If any matches on coupon are abandoned, full time not played, or results not reported along with other games, such matches will not be taken into consideration, and the prizes will be awarded from results of remaining matches.

4. Prizes will be divided in the event of ties among winners. If more than one are entitled to first prize, judges may so divide prize that first prize will exceed second.

5. Place no other written matter along with coupon. No interviews relative to competition will be given and no communication relative to same, either by telephone or letter, allowed.

6. There is no limit to the number of coupons that may be sent per person. Each coupon must be accompanied by twenty-five cents (25c). (Don't send stamps).

7. Coupons must not be fastened together.

8. Judges shall have the power to disqualify any coupon, for what they may consider sufficient reason, and their decision must be considered as legally binding in all matters pertaining to the competition.

9. All entries must reach the *Bulletin* office not later than ten o'clock Friday morning preceding date of games. Any entry

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reaching us after that time will be disqualified. Letters insufficiently stamped will be refused. Letters containing insufficient money to cover coupons will not be taken into consideration. Proof of postage will not be taken as proof of delivery.

10. Salaried employees or officers of the *O.B.U. Bulletin*, or employees of its printers will not be allowed to compete. No person under eighteen years of age may compete.

11. No money sent in can, under any circumstances be withdrawn.

12. Results of games, as published in Monday's *Free Press Evening Bulletin* must be regarded as final, and prizes will be awarded accordingly, and names of successful candidates will be published in next issue of the *O.B.U. Bulletin*, and cheques mailed to successful candidates. All cheques so mailed are at person's risk to whom they are made payable.

13. This competition is open to persons residing east of the British Columbia and Alberta boundary and west of and including Sudbury, Ontario.

Prizes will be divided as follows:

1st Prize ..... 50 per cent. of the prize money
2nd Prize ..... 30 per cent. of the prize money
3rd Prize ..... 20 per cent. of the prize money

How to Fill in Your Coupons.

If you think the "Home" team will win, place an (X) in the column headed "Home." If you think the "Away" team will win, place an (X) in the column headed "Away." If you think the result will be a draw, place an (X) in the column headed "Draw." Only one (X) must be entered for each match. Do not delete names of teams. Coupons must be completely filled out."

Following this was the coupon containing a schedule of English and Scottish football matches to be played on January 7, 1922, with spaces to be marked as directed. At the bottom of the coupon was the following:—

"Coupons Must be Cut—Not Torn Out.

I enter the O.B.U. Bulletin Football Competition in accordance with the rules and conditions as published, and agree to accept the judges' decision as final and legally binding, and enter upon this understanding, and declare that I am over 18 years of age.

Name in full .....

Address ..... "

The charge was dismissed by Macdonald, Police Magistrate, upon the ground that the facts did not constitute the place

named in the information a betting house within the meaning of the above-mentioned section of the Code. At the request of counsel for the Crown the Magistrate stated the following question for the opinion of this Court:—

"Was I right in holding that the facts as agreed upon and the exhibit filed were not sufficient to establish that the office of the *One Big Union Bulletin* was a common betting-house within the meaning of sec. 227 of the Criminal Code."

The facts as to the publication of the newspaper, the place of publication and the connection of the accused with the newspaper were admitted. It was also admitted that all prizes or moneys distributed to successful parties in the competition were exclusively made up of moneys contributed by the contestants which moneys are kept apart from the funds of the newspaper; that all moneys received in the competition are distributed as prizes, except deduction therefrom to cover stamps on letters remitting prizes to contestants, and cost of advertisement of the competition in the newspaper at usual rates; that no part of the moneys offered or distributed as prizes is contributed by proprietors or by accused; that neither the proprietors of the newspaper nor the accused have any interest in the monetary result of the competition. It is also admitted that the moneys received by accused in the competition were received through the mail or the letter box attached to the outer door of the premises; that the sole object of the competition is to increase or stimulate the circulation and popularity of the newspaper; that the newspaper is not issued solely or substantially with the object of furthering said competition; that the premises are not used solely for the purpose of the competition; that the prizes are distributed by mail; and that each of the accused knew of the advertisement in said issue of the newspaper:

Section 227 of the Code, as amended 1910 (Can.), ch. 10 sec. 1, declares that:—

"A common betting-house is a house, office, room or other place,—

(*a*) opened, kept or used for the purpose of betting between persons resorting thereto, and (i) the owner, occupier or keeper thereof, (ii) any person using the same, (iii) any person procured or employed by, or acting for or on behalf of any such person, (iv) any person having the care or management, or in any manner conducting the business thereof; or,

(*b*) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration (i) for any as-

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surance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game or sport; or, (ii) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency . . . ''

Section 228 provides the penalty for keeping a common betting house.

The Police Magistrate rested his decision upon the judgment of Lord Russell of Killowen, C.J. in *Reg.* v. *Hobbs*, [1898] 2 Q.B. 647, 67 L.J. (Q.B.) 928, the facts in which he considered to be on all fours with the present case. With respect, I think they are quite distinguishable. In the *Hobbs* case the accused, the licensed occupier of the premises known as ''The Yorkshire Grey,'' promoted a sweepstake on the Derby races, consisting of 1,000 subscriptions of 2s. 6d. each in order to raise £125, of which 10% was to be deducted for expenses, and the balance was to be distributed in prizes. A ticket was given to each subscriber on payment of 2s. 6d. The tickets were bound up in a book and the name and address of each subscriber was written on the counterfoil. A drawing afterwards took place in which each holder of a ticket drew a ticket bearing a number corresponding to the number attached to the name of some horse entered for the Derby, and appearing on a list of such horses prepared and recognised by all as the list of horses in respect of which the sweepstake is established. Lord Russell, C.J., said ([1898] 2 Q.B. at p. 657):—

''It is clear that the event or contingency in respect of which the money was to be paid was not the horse-race, but the drawing, and, as has been pointed out, that drawing would be equally good if it took place after the race had been run.''

He had previously intimated the view that what took place in fact amounted to a lottery, and nothing but a lottery, ''and'' he added, ''I am quite clear that in no sense was it a betting transaction within the meaning of 16-17 Vict. ch. 119,'' being the statutory provision corresponding to sec. 227 of our Crim. Code.

Lord Russell expressed the opinion that the first requirement in such a case is that there should be contractual transaction between the owner or occupier of the house and the person desiring to bet, and that was absent in the *Hobbs* case.

In the case at Bar it is clearly an express ''assurance or undertaking'' on the part of the *One Big Union Bulletin* that it will distribute the money received with the coupons, less

certain expenses, amongst the winners of the competition. Each person sending in a coupon must sign the undertaking at the foot of it agreeing to be bound by the rules as published and to accept the judges' decision as final and binding. I do not think that the case before this Court is governed by *Reg.* v. *Hobbs*.

The later decision of the Court of Appeal in *Reg.* v. *Stoddart*, [1901] 1 Q.B. 177, 70 L.J. (Q.B.) 189, is, in my opinion, more closely applicable to this case. The headnote to the report is as follows ([1901] 1 Q.B. 177):—

"The defendant was the occupier of an office and the proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a "coupon competition"—that is to say, of a promise by the defendant to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled up to the defendant's office, together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to the defendant's office coupons filled up as aforesaid, accompanied by remittances of money. The defendant was upon these facts convicted under the Betting Act, 1853 (Imp.) ch. 119, of having unlawfully kept the office for the purpose of money being received by her as the consideration for undertakings to pay thereafter money on events relating to horse-races.

Held, that the conviction was right."

In giving his judgment Lord Alverstone, C.J. said, [1901] 1 Q.B. at p. 183:—

"In this case the defendant was convicted under sec. 1 of the Betting Act, 1853, which provides that "No house . . . shall be . . . kept or used . . . for the purpose of any money . . . being received by or on behalf of such..... . . keeper . . . as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race."

If we add to this quotation the words "game or sport," which are found in both the English and the Canadian statute, the application of Lord Alverstone's judgment to the present case will be more clearly apprehended. He says [1901] 1 Q.B. at pp. 183-184:—

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Perdue, C.J.M.

"In my view we ought not to put a limited construction on those words. I have no doubt in my own mind that the framers of the statute thought that there might be some transactions, which might not strictly be called bets, and yet would involve the promise of individuals to pay a sum of money on an event or contingency relating to a horse-race; and, in my opinion, we ought not to decline to give effect to plain words when the same section mentions both betting and also these other transactions, even assuming that there is any foundation for the argument that the transaction in question is something different from a bet. Speaking for myself, I am not able to see the distinction, for the purposes of this section, between the transaction with which we have to deal and ordinary betting. The person who pays the extra pence does so because the person to whom the money is paid comes under a promise to pay a certain sum if the horse named by the person sending in the coupons wins the race."

The only difference between the above case and the present one is that in the first the person who received the money sent with the coupons promised to pay a certain sum to the sender who named the winning horse. In the present case the promise is to pay the money received, less expenses to the persons who shall name the greatest number of winners in certain football games to be played on a certain day. This is an undertaking to pay money on a contingency relating to a game or sport, and, in my opinion, is covered by para. (*b*) (i) of sec. 227. I do not think that it matters that the money promised to be paid is received from the persons who send it to the defendants in accordance with the advertisement. It merely alters the complexion of the bet, so that the sender of each coupon is betting against all the other senders. Para. (*b*) (ii) would also apply in such case. The newspaper office would be "used for the purpose of any money . . . being received by or on behalf of such . . . occupier or keeper . . . as or for the consideration for securing the paying or giving by some other persons of . . . money on an event or contingency *of or relating to . . . a game or sport.*"

It is argued that the amendment to the Crim. Code introduced by 1920 (Can.) ch. 43, sec. 6, absolves the defendants from liability. That section repeals sub-sec. 2 of sec. 235 of the Code and enacts a new sub-section, the important portion of which, so far as the present case is concerned, is as follows:—

"(2) The provisions of this section and of sections 227 and 228 shall not extend to any person or association by reason of

his or their becoming the custodian or depository of any money, property or valuable thing staked or to be paid to the winner of any lawful race, sport, game or exercise, or to be paid to the owner of any horse engaged in any lawful race, or to be paid to the winner of any bets, or to a private bet between individuals not engaged in any way in a business of betting."

The section then proceeds to deal with bets made or records of bets made through the agency of a pari-mutuel system as thereinafter provided.

Examining the part of the amending section quoted above, I think that its purpose plainly is to exclude from the operation of secs. 227 and 228 a person who has become the mere custodian or depository of a bet on a lawful race, sport, game or exercise. It protects the person who is a mere stakeholder. He cannot be convicted of keeping a betting house if he receives the money so staked in his own house, office or hotel. But I do not think that the amendment extends to and protects the defendants in this case. They advertise for and solicit money to be sent to the office of the Bulletin, not to be staked on, or to be paid to the winner of, any lawful race, game, or sport, but to be paid, less expenses, to the winners in a guessing competition conducted by the advertisers under rules laid down by them. The expenses of the persons organizing and conducting this competition are to be paid out of the money sent in. Coupons sent by competitors may be rejected for any reason that may appear sufficient to the judges, whose decision shall be final, and no money sent in can, under any circumstances, be withdrawn. In my opinion, the amendment of 1920 (Can.) ch. 43, sec. 6, does not apply to the present case.

I would answer in the negative the question stated for the opinion of this Court.

CAMERON, J.A. (dissenting)—In this case the Police Magistrate dismissed the charge on the ground that the facts did not constitute the place in question kept by the accused (one of whom is editor and the other manager of the *One Big Union Bulletin*) a betting house within the definition contained in sec. 227 of the Crim. Code for the reasons given in the judgment attached to the question submitted to the Court (at the request of counsel for the Crown) which is:—

"Was I right in holding that the facts as agreed upon and the exhibit filed [a copy of *One Big Union Bulletin* of December 29, 1921] were not sufficient to establish that the office of the *One Big Union Bulletin* was a common betting house within the meaning of sec. 227 of the Criminal Code."

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According to the agreed statement of facts, the moneys distributed to successful contestants in the football competition advertised in the said newspaper were exclusively made up of moneys contributed by the contestants and not mixed with any other moneys of the newspaper or its proprietors or of the accused, and were all distributed except deductions for stamps on letters remitting prizes and the cost of the advertisement in the newspaper. No coupons attached to the advertisements were purchased by the said proprietors or the accused who had no interest in the "monetary result" of the competition.

The method and procedure followed in these operations are to be found in the "Rules of Competition" set forth in the advertisement of which the coupon is the concluding part. The sum of 25 cents is to be enclosed with each coupon, and the aggregate amounts of the money sent in is to be divided in the proportions and manner indicated therein.

For reasons that are more fully stated by other members of the Court, I am of the opinion that this case is not governed by *Reg.* v. *Hobbs*, [1898] 2 Q.B. 647, 67 L.J. (Q.B.) 928. In that case the determination of the results was by lottery. In this each of the numerous individual transactions was a betting transaction. The judgment of Wills, J. in *Reg.* v. *Stoddart*, [1901] 1 Q.B. 177, at p. 185, 70 L.J. (Q.B.) 189, seems to me conclusive on that point. I am unable, therefore, to adopt the reasoning of the Police Magistrate, who considered himself bound by *Reg.* v. *Hobbs*.

The amendment to the Code 1920 (Can.) ch. 43, sec. 6, presents difficulties in interpretation. Its provisions are as follows:—

"Sub-section two of section 235 of the said Act, as enacted by ch. 19 of the statutes of 1912, is repealed, and the following is substituted therefor:—

(2) The provisions of this section and of sections 227 and 228 shall not extend to any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked or to be paid to the winner of any lawful race, sport, game or exercise, or to be paid to the owner of any horse engaged in any lawful race, or to be paid to the winner of any bets, or to a private bet between individuals not engaged in any way in a business of betting, or to bets made or records of bets made through the agency of a pari-mutuel system only as hereinafter provided, upon the race-course of any association incorporated in any manner before the twentieth day of March, one thousand and nine hundred and twelve, or incorporated after that date by special

Act of the Parliament of Canada or of the Legislature of any province of Canada, during the actual progress of a race-meeting conducted by such association upon races being run thereon. . . . ''

It is to be noted that sub-sec. 2 of sec. 235 of the Crim. Code, R.S.C. 1906, ch. 146, was repealed in 1910 (Can.), ch. 10, sec. 3, and re-enacted with amendments. Sub-section 2 of sec. 235 as so enacted was repealed in 1912 (Can.) ch. 19, sec. 1, and re-enacted as further therein amended. In 1913 (Can.) ch. 13, sec. 13, para. (*b*) of sec. 235 was repealed and a new paragraph substituted, but this is not material here. Section 235 after these repeals and amendments stood as it is to be found in Tremeear's Annotated Criminal Code of Canada. And in 1920 there followed the repeal and re-enactment above referred to.

It is in the amending sub-section of the statute of 1920 that the words ''or to be paid to the winner of any bets'' first appear.

The history of this legislation as it is to be found in these successive enactments makes it appear that one of its principal objects was to extend the privileges of racing associations and exempt them and their patrons and attendants in their betting transactions, from the penalties of the Crim. Code. It might be argued that the provisions of the substituted section of 1920 after the words ''lawful race, sport, game or exercise'' are confined to transactions ''upon the race-course of any association, etc.'' but a careful reading shews that this cannot be done. The words, therefore, ''to be paid to the winner of any bets'' must be taken as having their meaning subject to no limitation imposed by the sub-section itself. It is true the accused acted in certain other capacities in the matter, but that does not alter the fact that they were custodians or depositories of funds to be paid to winners of bets. The words are as comprehensive as they can be and in my humble opinion we cannot modify or restrict them by bringing in extraneous considerations. To do that would, it seems to me, be equivalent to amending the plain statutory words.

The words of the sub-section that its provisions ''shall not extend to any person or association by reason of his or their becoming the custodian, etc.'' are not as definite and precise as they might be. But their meaning is clear enough. When a person or an association becomes a custodian of moneys or other property for the purposes named, one of which is the payment thereof to the winners of any bets, he or it is not liable under secs. 227 and 235 of the Code. He or it cannot

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therefore be held liable for keeping a common gaming house under sec. 227.

In my judgment, for the reasons I have stated, I would answer the question stated by the Magistrate in the affirmative.

FULLERTON, J.A.:—This is a case stated for the opinion of this Court by Macdonald, Police Magistrate.

The accused were charged that they did, at the city of Winnipeg, during the month of December, 1921, keep a disorderly house, to wit, a common betting house.

The question stated for the opinion of the Court is:—

"Was I right in holding that the facts as agreed upon and the exhibit filed were not sufficient to establish that the office of the *One Big Union Bulletin* was a common betting house within the meaning of sec. 227 of the Criminal Code?"

The accused Woodward is the editor and the accused Willcocks the business manager of a weekly newspaper published at the city of Winnipeg known as *One Big Union Bulletin*. This newspaper advertised what was called a "Football Competition." Three prizes of 50, 30 and 20% respectively of the prize money were promised to the persons who should correctly guess the winners of the several matches. The advertisement contained a coupon shewing the names of the several teams competing and these coupons were to be filled up and mailed to the Contest Editor, *O.B.U. Bulletin*, accompanied by 25 cents. The prize money was exclusively made up from these contributions and all money so received, after deducting an amount to cover stamps on letters remitting prizes and the cost of advertising the competition, was distributed.

The prosecution was laid under sec. 228 of the Code, which provides that (amended 1909 (Can.) ch. 9, sec. 2):—

"Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting-house, . . . as hereinbefore defined."

A common betting house is defined by sec. 227 and the portion of the section which it is contended covers the case of the defendants reads as follows [See sub-sec. (*b*) (i) set out in the judgment of Perdue, C.J.M. *ante* p. 555-6.]

I think the defendants come squarely within the above definition. The premises were used "for the purpose of money being received" by the defendants and the consideration was "an assurance or undertaking . . . to pay thereafter money" on an "event or contingency of or relating to . . . a sport."

While no reference was made on the argument to sec. 227 (*b*) (ii), or sec. 227 (*c*), it appears to me that the former

clearly covers the charge against the defendants, and it is arguable that the latter does also. These sub-sections read as follows:—

"(ii) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency; or

(c) opened, or kept for the purpose of recording or registering bets upon any contingency or event, horse-race or other race, fight, game or sport . . . "

The defendants are receiving money from the different competitors and the consideration is that the money contributed by such competitors shall be given to the successful competitors. In other words, the defendants are securing the giving of the money of the unsuccessful competitors to the successful competitors within the meaning of (ii).

The defendants contended that all they were doing was distributing the competitors' own money and that this did not constitute betting as between the defendants and the competitors. That may be so, but it is clear that the competitors, as between themselves were betting on the result of the games and the defendants were receiving the money and distributing it among those who won. The statute does not require that there should be betting as between the keeper of the house and some outside party in order to constitute the house a common betting-house.

Section 235 of the Code, as amended by 1920 (Can.) ch. 43, in so far as relevant here, reads as follows:—

"The provisions of this section and of section 227 . . . shall not extend to any person or association by reason of his or their becoming the custodian or depository of any money . . . to be paid to the winner of any bets. . . "

It is contended that, even assuming that the office of the *One Big Union Bulletin* is a common betting house within the meaning of sec. 227 of the Code, this amendment excludes the defendants from the operation of that section. I was at first strongly inclined to take this view, but on further consideration I have arrived at the conclusion that this amendment is intended to protect *bona fide* stakeholders only.

To put upon this amendment the construction contended for would mean that a person operating a betting house within the meaning of sec. 227 would cease to come under the section the moment he assumed the role of a "custodian or depository." I

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cannot believe for a moment that Parliament ever intended the amendment to have any such effect. The amendment should, in my opinion, be read as if the word "only" were inserted after the words "by reason."

The answer to the question in the stated case should be in the negative.

DENNISTOUN, J.A.:—The charge in this case is laid under the provisions of sec. 227 of the Crim. Code as amended 1910 (Can.) ch. 10, sec. 1 from which I quote, in part, as follows:—[See (*b*) (ii) as set out in judgment of Perdue, C.J.M. *ante* p. 556.]

The case of *Reg.* v. *Hobbs*, [1898] 2 Q.B. 647, 67 L.J. (Q.B.) 928, is relied upon by the Magistrate as an authority governing the case at Bar, but I point out with deference that the *Hobbs* case concerned a lottery, as indicated by Lord Russell of Killowen, and on that ground it was held that the provisions of the Betting Act of 1853 did not apply.

There the winners were successful because they drew tickets by chance, which bore numbers indicating horses, which subsequently took leading places in a specified race. It was the result of the drawing which determined who should have the prizes; the drawing might take place as well after the race as before it.

In the case at Bar there is, in my view, not a lottery, but a straight betting transaction, in which each participant bets twenty-five cents against the money of the other participants, that he will name a larger number of winners of future foot ball matches than they will, the stakes to be paid over as the actual matches played may determine. Each participant puts his money in hazard against the money of the others and the winner of the bet is determined by the result of a contingency named in sec. 227, viz., one of or relating to a game or sport. The advertisement published by the accused gives a clear undertaking to secure the paying of the winners by means of the money of the losers.

The admissions made in this case show that the premises which are kept by the accused are used for the purpose of receiving money on behalf of each of the persons who desires to tender it upon the consideration that the accused will secure the payment by other persons who also use the premises, of money, on the contingency of the results of a series of foot-ball matches.

This in my humble view is a violation of sec. 227 and the accused should be found guilty unless they are absolved by a recent amendment of the Crim. Code to which I now refer;

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1920 (Can.) ch. 43, sec. 6, amending sec. 235 of the Criminal Code reads in part as follows: [See judgment of Perdue, C.J.M. *ante* p. 558.]

It is argued that because the accused in the case under consideration are stakeholders, or custodians, or depositories of money, sec. 227 cannot apply to them; that they are immune from prosecution because although they are inducing and promoting this betting scheme, they have also undertaken the care and custody of the sums wagered.

I do not think sec. 235 means anything of the kind. It is probably restricted in its application to persons acting as stakeholders on a lawful race-course, but in any event it only applies to persons who do nothing more than act in that capacity.

By reason of a person becoming a stakeholder it is not to be inferred that he is keeping a common betting house, office, room, or place. That is all the section says.

Here the accused are doing much more than acting as stakeholders; they are by advertisement, soliciting and inducing the public to make bets through their agency, and to use their premises for the purpose of having such bets recorded and paid, and they are offering the undertaking or consideration which the statute condemns, to secure payment to the winners.

I refer to *Reg.* v. *Stoddart*, [1901] 1 Q.B. 177, 70 L.J. (Q.B.) 189; *Stoddart* v. *Hawke*, [1902] 1 K.B. 353, 71 L.J. (K.B.) 133; *Lennox* v. *Stoddart*, [1902] 2 K.B. 21, 71 L.J. (K.B.) 747.

The learned Magistrate asks if he was right in holding that there was not sufficient evidence to establish the keeping of a common betting-house within the meaning of sec. 227 of the Criminal Code.

My answer is—No.

PRENDERGAST, J.A., concurred in answering the question reserved in the negative.

Crown's appeal allowed.

REX v. YARROW.

Ontario Supreme Court, Meredith, C.J.C.P. January 19, 1922.

INTOXICATING LIQUORS (§IIIA—55)—EXPORT OF LIQUOR LAWFULLY MADE IN ONTARIO TO PLACE OUTSIDE—CARRIAGE BY LAND AND NOT BY RAILWAY—NO OFFENCE UNDER LIQUOR LAWS—CONVICTION UNDER CANADA TEMPERANCE ACT, SEC. 154 (1) C—QUASHING CONVICTION ON CERTIORARI—LACK OF JURISDICTION IN CONVICTING MAGISTRATE.

Paragraph c of sec. 154 (1) of the Canada Temperance Act, as enacted by the amending Act 1919, 2nd sess. (Can.) ch. 8 does not apply to the carrying of intoxicating liquor lawfully made in Ontario to a place outside of the Province, and such liquor may

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be lawfully carried by land and not by railway, and there being no offence under the Canadian Temperance Act or any other temperance or liquor law a conviction purporting to be under the section will be quashed on *certiorari*, there being want of jurisdiction in the inferior Court.

MOTION to quash a conviction of the defendant, by a magistrate for an offence against the Canada Temperance Act, R.S.C. 1906, ch. 152, as amended 1919, (2nd sess. Can.), ch. 8. Conviction quashed.

James Haverson, K.C., for the defendant.

F. P. Brennan, for the Magistrate.

MEREDITH, C.J.C.P.:—Although the argument of this motion has covered the whole field of controversy as to the validity or invalidity of the mixed legislation—federal and provincial—respecting intoxicating liquors, the validity or invalidity of the conviction in question, which covers but a very small part of that whole field.

The offence with which the applicant was charged, and of which he has been convicted, is that he "did transport liquor through the Province of Ontario by truck . . . contrary to para. (*c*) of section 154 (1) of the Canada Temperance Act, as enacted by the amending Act 10 Geo. V. ch. 8 (Dom.)"

That enactment provides that:—

"(*c*) The carriage or transportation of intoxicating liquor through such Province shall only be by means of a common carrier by water or by railway and not otherwise. . . . "

That which the applicant was doing, when stopped by this prosecution in which he has been convicted, was conveying intoxicating liquor, lawfully made in this Province, to a place or places out of the Province, by land, but not by railway.

It is more than difficult for me to understand how the convicting magistrate could have considered that such an act is within the provisions of para. (*c*): and the magistrate's reasons for convicting give me no aid.

Goods may be carried into a Province—imported; may be carried from one place to another within a Province: may be carried through a Province—transported; and may be carried from a Province—exported.

Paragraph (*c*), in the plainest words, applies only to carriage "through such Province"—"transportation." Paragraph (*a*) deals with the bringing of such liquor into such a Province: and the Ontario Temperance Act, 1916 (Ont.), ch. 50, deals with their carriage within that Province: nothing in legislation of this character interferes with the export of them: they may not be sent into another Province contrary to the provisions of para.

(*a*); not because they shall not be exported, but because they shall not be so imported.

The first section added by the amending Act (sec. 152) makes plain the reasons for its enactment, in these words: "That the importation and the bringing of intoxicating liquors into such Province may be forbidden."

The Legislatures seem to have looked upon such liquors as vipers which they—St. Patrick-like—should banish: and, that being so, its export should be aided and hastened, hindering should be out of the question.

Obviously, as it seems to me, there is no ground or reason upon which it can be even plausibly contended that such a case as this is within any of the provisions of the enactment in question, or illegal under any such laws. The conviction, in my opinion, is, upon the admitted facts, plainly bad: and jurisdiction cannot be conferred by a misinterpretation of any enactment upon which jurisdiction depends.

But, although the conviction is here, in *certiorari* proceedings, and there is no motion to quash them, it was said, and was argued without objection, that such a conviction may, notwithstanding, stand and be enforced: that the Canada Temperance Act has taken away all the rights of this Court to quash such a conviction, however bad it may be. There is, however, in my opinion, nothing to support any such contention. It should be deplorable if there was.

Section 148 of the Canada Temperance Act, R.S.C. 1906, ch. 152, provides that no conviction in respect of any offence against Part II. of the Act shall be removed by *certiorari*. That of which the applicant has been convicted is not an offence against that part of the Act or any other part of it, or of any other "temperance" or "liquor" law. And, apart from this, the general rule has always been that even express words do not take away the supervising power of this Court when there is want of jurisdiction in the inferior Court. It is admitted that no appeal lies against the conviction. Counsel have dealt with all these matters in an amicable, if not altogether regular, manner, and I am following them.

The conviction must be quashed.

Conviction quashed.

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P.M. Ct.

REX v. LEDUC et al.

Police Magistrate's Court, Montreal, Hon. H. Lanctot, P.M.
May 6, 1921.

CRIMINAL LAW (§IE—25)—PARTIES TO OFFENCE—UNAUTHORISED SALE OF NARCOTIC DRUG BY EMPLOYEE OF PHARMACY—EMPLOYEE NOT LIABLE TO CONVICTION—CR. CODE, SEC. 69—OPIUM AND NARCOTIC DRUG ACT, 1911 (CAN.), CH. 17 AND AMENDMENTS.

The illegal sale of narcotic drugs in contravention of the Opium and Narcotic Drug Act, is a crime, and the proprietor of a drug store is not criminally liable thereunder for a sale made by his clerk contrary to orders and without any participation or connivance by the proprietor.

[See Annotation 31 D.L.R. 233.]

CHARGE against proprietors of a drug store for illegal sale of drugs by their employee. Dismissed.

P. Monette, for the prosecution; *G. A. Marsan*, K.C., for defence.

LANCTOT, P.M.:—The prosecution has been forced to admit that no proof has been made against the accused, but persists in asking that they be found guilty on the ground that they are responsible in law in their quality of employers for the criminal act of their servant.

The question is put in such a way that I might perhaps dispose of the case briefly; but as the attorneys of both parties have gone to enormous trouble in preparing very elaborate factums, upon which I congratulate them heartily, and in view of the importance of this case from the point of view of pharmacists, I regard it as my duty to give at some legnth the reasons for my decision.

To reach a just and impartial decision in this case, one must bear clearly in mind that the statute concerning drugs was not enacted for the purpose of swelling the country's revenue by levying a tax, but to prevent the commission of a crime and to punish criminals. We must distinguish between a criminal or indictable offence on the one hand and a contravention or offence on the other. The statute in question was passed to prevent the commission of a crime and not to raise a revenue. Those who contravene the statute are parties to a crime, not parties to an offence, according to the general division of English criminal law.

I shall cite the opinions of certain Canadian jurists, both English and French, who have written on the subject with which we are concerned, because they are in a better position to appreciate the spirit of our laws and the mentality of our people. I shall then review our jurisprudence. It will then be easier to understand the reasons for my decision.

I.—The doctrine on this point as explained by Paley on Summary Convictions, 7th ed., pp. 80, 160. Seager's Magistrates' Manual 1st ed., pp. 161, 249;—*Chisholm v. Doulton* (1889), 22

Q.B.D. 736, 16 Cox C.C. 675;—Phipson, Law of Evidence, 3rd ed., pp. 70, 76, 77;—Dandurand et Lanctot Criminal Law, p. 76.

II.—Some rulings taken from judgments dealing with the matter: *Farley* v. *Higginbotham* (1898), 42 Sol. Jo. 309;—*Patenaude* v. *The Paquet Co.* (1916), 31 D.L.R. 229, 26 Can. Cr. Cas. 205;—*Rex v. Vachon* (1900), 3 Can. Cr. Cas. 558;—*Chisholm* v. *Doulton*, 22 Q.B.D. at p. 741.

If the clerk had feloniously sold drugs to bring about abortion, do you think the employer could be held responsible? *Rex* v. *McAllister* (1913), 14 D.L.R. 430, 22 Can. Cr. Cas. 166;—*Reg.* v. *Prince* (1875), L.R. 2 C.C.R. 154, 13 Cox C.C. 138, 24 W.R. 76.

Mr. Justice Cross in his judgment in the case of *The Minister of Inland Revenue* v. *Huot* (1918), 33 Can. Cr. Cas. 100, 25 Rev. de Jur. 119, made a very characteristic remark which by analogy seems to decide the case before us. He said at p. 105:—"If I could be considered to have had doubts of the soundness of the decision in the *Ethier* case (1916), 32 D.L.R. 320, 27 Can. Cr. Cas. 12, at the date when it was given, I have none now."

It will be remembered that at that time Justices Chas. Langelier and L. P. Pelletier, both since deceased, had dismissed several cases taken by the Minister of the Interior against pharmacists whose clerks had omitted to affix the stamps required by law. If then these judges rendered such judgments and if Mr. Justice Cross had doubts in purely penal matters relating to the contravention of a statute giving the government a right to collect a tax thereby imposed, then, *a fortiori*, they would certainly have dismissed cases brought against pharmacists or employers for criminal acts committed by their employees and of which they were ignorant.

No case has been cited and I have myself found none where a person has been found guilty of a crime committed by another and in which he took no part, either directly or indirectly, as required by sec. 69 Cr. Code, and I have never seen a text of law authorizing such a proceeding.

As regards the question as to whether the act complained of is really a criminal act or a contravention of a statute, the Act concerning opium and drugs furnishes us with an answer. The English version of this Act 1920 (Imp.), ch. 46, says, at sec. 5, "an offence" and sec. 13 (3) "an offence." The French version says, in section 5, p. 10: "Est coupable d'un acte criminel" and at page 111, 3rd para. of sub-sec. 3 of art. 5a: "*Est coupable d'une contravention.*"

Conclusions:—If the question of personal responsibility on

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the part of an employer for the acts of his employee in the stamp cases was the object of many disputes before it was finally decided in the affirmative by the Court of Appeal, I do not think I am in error in saying that in the present case the employer cannot be held criminally responsible for the offence committed by his employee in defiance of his instructions.

The legislator was right in saying that a pharmacist who sells these drugs without a prescription is a criminal and is liable to suffer severe punishment; but I cannot reach the conclusion that it was intended to include in that category pharmacists who, like the accused in this case, do everything in their power to insure the observance of the law in their establishments.

"Considering, then, that there is room for distinction between contraventions of revenue laws involving pecuniary penalties, and criminal laws;

"Considering that the offence charged is declared to be an indictable offence;

"Considering that a person cannot be held criminally responsible for the fault of his employee committed against his instructions, unless he contributed thereto in some manner;

"Considering that the Defendants have proved beyond all doubt that the offence wherewith they are charged was committed in spite of their precise and formal instructions; for these reasons, I dismiss the charge."

Charge dismissed.

N. B.—An appeal was taken from this judgment before the Court of King's Bench, under sec. 749 Cr. Code. This appeal was dismissed by Mr. Justice Monet, November 8, 1921.

***SHEPPARD v. SHEPPARD.**

Ontario Supreme Court, Latchford, J. January 27, 1922.

HUSBAND AND WIFE (§IIIB—146)—MARRIED WOMAN—SLANDER OF BY PARENTS OF HUSBAND—DESERTION—RIGHT OF ACTION.

A married woman is not debarred from bringing an action against the parents of her husband for having slandered her to their son and causing an estrangement between him and the plaintiff and for inducing him to abandon the plaintiff and go to the United States and there enter suit for a divorce against her. [*Lellis* v. *Lambert* (1897), 24 A.R. (Ont.) 653, distinguished.]

MOTION by the defendants to set aside the delivery of the statement of claim in this action, upon the grounds that the action does not lie, under the circumstances stated in the headnote. Dismissed.

H. S. White, K.C., for the defendants.

J. M. McEvoy, K.C., for the plaintiff.

LATCHFORD, J.:—It is objected and admitted that the plead-

Note. An appeal from this decision was quashed; see p.—ante.

ing was not delivered within the time prescribed by the rules. For this lapse a remedy should of course be prescribed.

Another objection is that the action does not lie in view of the decision of the Court of Appeal in *Lellis* v. *Lambert* (1897), 24 A.R. (Ont.) 653, overruling the judgment of the Queen's Bench Division in *Quick* v. *Church* (1893), 23 O.R. 262.

In *Lellis* v. *Lambert* a married woman sought to recover damages from another woman who was alleged to have alienated the affections of the plaintiff's husband and to have committed adultery with him. The Court held, reversing the judgment of the Divisional Court and of the trial Judge, that such action was not maintainable. This decision was followed in the parallel cases of *Lawry* v. *Tuckett-Lawry* (1901), 2 O.L.R. 162, and *Weston* v. *Perry* (1909), 1 O.W.N. 155.

The Married Women's Property Act in force when the action of *Lellis* v. *Lambert* was tried in 1895, R.S.O. 1887, ch. 132, provided (by sec. 3 (2)) that a married woman should "be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a *feme-sole*."

The revision of 1887 omitted the words "either in contract or in tort or otherwise," appearing after the word "sued" in the Married Women's Property Act of 1884, 47 Vict. ch. 19, sec. 2 (2), and in sec. 1, sub-sec. 2, of the English Married Women's Property Act, 1882, 45 & 46 Vict. ch. 75. The words "in all respects" were not used *instead* of the omitted words, as is erroneously stated in the judgment of one of their Lordships in *Lellis* v. *Lambert*. They appeared in the original and in all the revisions. In the revision of 1897, ch. 163, sec. 3 (2), the omission was again made of the words "either in contract or in tort or otherwise." However, in 1913, in 3 & 4 Geo. V. ch. 29, sec. 4 sub-sec. 2, and in the Revised Statutes of 1914, ch. 149, sec. 4, sub-sec. 2, the words "either in contract or in tort or otherwise" reappear.

Osler, J. in *Lellis* v. *Lambert* thought that the sense of the paragraph was unaffected by the omission or retention of these words.

The decision of the Court of Appeal is binding on me, and I should be obliged to follow it if this case was not clearly distinguishable. This is not an action analogous to the criminal conversation action which a husband may bring, while a wife cannot maintain a similar action.

The present suit is of an entirely different character, and I see no reason whatever for determining that the plaintiff is not entitled to maintain it.

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The statement of claim needs revision, and leave is granted to the plaintiff to make whatever amendments may be thought necessary. The time for filing is extended to the 8th February.

Costs of and incidental to this application will be costs in the cause.

Judgment accordingly.

REX v. PROCUPUCK.

New Brunswick Supreme Court, Appeal Division, Sir J. D. Hazen, C.J., White and Grimmer, JJ. November 18, 1921.

RECEIVING STOLEN GOODS (§I—1)—INFERENCE FROM POSSESSION OF GOODS RECENTLY STOLEN—FAILURE OF ACCUSED TO EXPLAIN POSSESSION—CR. CODE SEC. 399.

It is misdirection upon a charge of receiving stolen goods to instruct the jury that they must find the accused guilty upon its being established that he was found in possession of goods recently stolen unless he makes a satisfactory explanation of how they came into his possession. The proper direction in that regard would be that the jury may convict under such circumstances, not that they are obliged in law to so do.

APPEAL (§VIIJ—435)—CROWN CASE RESERVED—MISDIRECTION OF JURY NOT AFFECTING VERDICT—CURATIVE PROVISIONS OF CR. CODE SEC. 1019.

The conviction will be affirmed by the Court of Appeal under Cr. Code sec. 1019 notwithstanding misdirection of the jury at the trial for receiving stolen goods, if the Court of Appeal finds that the wrong direction in no way affected the verdict and that the jury could not do otherwise than convict irrespective of anything the trial Judge had said in his charge. In such event there is no substantial wrong or miscarriage of justice and the misdirection is cured by Code sec. 1019.

Crown Case Reserved by Armstrong, J., Judge of the St John County Court, on order of the Appeal Court, granted at the previous term.

The conviction was affirmed.

D. Mullin, K.C., for defendant, moves to quash conviction.

P. J. Hughes, for Crown, contra.

The judgment of the Court was delivered by

GRIMMER, J.:—The prisoner was granted leave to appeal on the following ground:—

"Was the trial Judge in error in telling the jury unless the person in whose possession the goods were found could satisfactorily explain how they came into his possession then you have a right and must bring in a verdict against the person so charged."

The facts are that one Howard, being a policeman on duty on Chapel street in the City of St. John, about 1.30 o'clock in the morning of September 20, 1920, saw two men approaching the foot of the street which is known as a blind street, and coming

across the Sayre mill-yard, so-called, from the direction of the Long Wharf, one of whom was carrying a bundle. At the foot or end of the street there is a fence in which there is a hole large enough for a man to pass through. The policeman remained out of sight behind the fence on the street side, and testified the accused came to the fence, passed through the hole on to Chapel street, and received the bundle of stolen goods from the man on the other side who was with him, it being passed to him through the hole. Howard thereupon placed the accused under arrest. He then dropped the bundle and was taken to the police station, searched, and placed in a cell. Howard with another policeman then went back to Chapel street, recovered the bundle which had been dropped by the accused, and found upon examination it contained several webs of cloth which later on were found to have been recently stolen. The evidence as to the recovery of the bundle at the place where it was alleged the accused dropped it was confirmed by Policeman Gibbs, who accompanied Policeman Howard to the spot. That the arrest was made and that the goods recovered had been recently stolen was also conclusively proved. The defendant testifying on his own behalf flatly contradicted the officer as to his having received the goods through the hole in the fence, and denied stealing or having anything to do with them at or before his arrest.

The jury having seen and heard the witnesses, it is quite clear that with a proper direction there was evidence upon which they could properly find that the accused had committed the offence with which he was charged. The only question, therefore, for determination is whether the Judge at the trial gave a proper direction to the jury, and if not should or must the conviction therefore be quashed. The jury must determine the facts for themselves, but they must also accept from the trial Judge the principles of law upon which they must act. It has been held in recent cases such as this, that when a charge is made against a person of receiving stolen goods knowing them to have been stolen, and the prosecution has proved that the person charged was in possession of the goods which had been recently stolen, the jury should then be told that they may, not that they must, in the absence of any explanation which may reasonably be true, convict the prisoner. But if an explanation be given by the accused then it is for the jury to say whether upon the whole of the evidence they are satisfied the prisoner is guilty. If the jury is satisfied the explanation given may reasonably be true, although they are not convinced it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have

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failed to discharge the burden imposed on it by our law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. The onus of proof is never changed in these cases. It always remains on the prosecution. That is the law. This is not a new but a re-statement of the law, gathered from many decisions in cases of a similar nature, but, in construing the charge to the jury, Courts must not be too critical of the language used by the Judge, where arguments have been heard on behalf of the defence and prosecution alike from counsel very familiar with this class of cases and the administration of the criminal law, and this Court must be satisfied that the jury in returning the verdict of guilty have applied the right principles of law to the facts of the case.

Upon an examination of the authorities I cannot but come to the conclusion there was wrong direction in law, on the part of the trial Judge, upon which the leave to appeal was granted in this case. The question therefore arises whether there is a remedy, and what remedy, for the misdirection.

It was argued by counsel for the Crown that even if this conclusion was reached, the Court ought not to quash the conviction, inasmuch as under the provisions of sec. 1019 of the Criminal Code (R.S.C. 1906, ch. 146) no miscarriage of justice had taken place, notwithstanding the Court was of opinion the trial Judge had given a wrong direction in law. This section, which is very large, comprehensive and to my mind quite conclusive, provides that:—

"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. . . . ."

It has been frequently held that the principle to be applied in cases of this character where the Court is of the opinion there has been some misdirection in law is that the Court will not interfere with the verdict if it is satisfied the jury must have come to the same conclusion upon proper direction on the law.

The most recent English cases in point are those of *Cohen and Bateman* (1909), 2 Cr. App. R. 197; *James Morgan* (1912), 7 Cr. App. R. 63; *Arthur William Monk* (1912), 7 Cr. App. R. 119; and *R.* v. *Schama* (1914), 11 Cr. App. R. 45, 84 L.J. (K.B.) 396.

The decisions in these cases are an interpretation of the provisions, meaning and purpose of sec. 4 of the Imperial Statute,

1907, ch. 23, which confers special powers upon the Court of Appeal, and provides that notwithstanding the Court is of opinion the point raised on appeal might or should be decided in favour of the appellant, yet it shall dismiss the appeal if of opinion no substantial miscarriage of justice has been done. The provisions of the section in our Code as recited are more comprehensive than those of the English Act, and there are the cases of *R.* v. *Lew* (1912), 1 D.L.R. 99, 19 Can. Cr. Cas. 281, 17 B.C.R. 77; *R.* v. *Vanbuskirk* (1921), 57 D.L.R. 513, 35 Can. Cr. Cas. 203, 48 N.B.R. 297, decided by this Court the current year, both of which are similar in many respects to the present case, and particularly in that the effect of sec. 1019 of our Code in cases of misdirection on the part of the trial Judge is very fully discussed and dealt with and follow the decisions of the English Courts, whose deductions and conclusions I have related in cases of this nature. [Footnotes (*a*) (*b*)]

In this case the jury has found as a fact that the prisoner was found with the goods which had been recently stolen in his possession, and have entirely discredited his denial both in respect to his having stolen the goods and having them in his possession, and having carefully read and considered the evidence and the Judge's charge, wherein he particularly pointed out to the jury that they were the judges under the evidence of the fact of the guilt or innocence of the accused, who was entitled to the presumption of innocence until his guilt was established beyond all reasonable doubt, and that while the detection and prevention of crime was of importance, yet persons accused of crime should not be punished in order to create an example, and otherwise discussed the duties and functions of juries, I am of the opinion, that had the charge been absolutely correct in

(*a*) In *R. v. Hamilton* (1917), 13 Cr. App. R. 32, 87 L.J. (K.B.) 734, Darling, J., speaking for the Court of Criminal Appeal said that *R.* v. *Schama* (1914), 11 Cr. App. R. 45, 84 L.J. (K.B.) 396, was decided on particular facts and was a perfectly proper decision on those facts, but was not of universal application.

In *R.* v. *Badash* (1917), 87 L.J. (K.B.) 732, the *Schama* case was followed by that Court; but Darling, J., took occasion to remark with reference to the judgment in the *Schama* case that it was "a mistake to suppose that there is any special sanctity to be attached to the words of that judgment, although the principle established by it remains and must be observed."

(*b*) As to the meaning of the phrase "substantial miscarriage of justice" in the English Criminal Appeal Act 1907, ch. 23, see the *Harold Jones* case (1922), 16 Cr. App. R. 124; *Alfred Williams* (1920), 14 Cr. App. R. 135; *R.* v. *Rodley*, [1913] 3 K.B. 468, 9 Cr. App. R. 69, 82 L.J. (K.B.) 1070; *Cohen and Batemans'* case (1909), 2 Cr App. R. 197.

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law, the jury must have found as they did, and the wrong direction given them in no way affected the verdict they rendered. Upon the evidence I am unable to conclude how the jury could have done other than convict the accused, irrespective of anything the trial Judge said in his charge, and I think the objection raised is one more of form than of substance.

It follows then that in my opinion no substantial wrong was done the accused, nor was there any miscarriage of justice, arising out of the matter complained of, that the misdirection is covered and cured by the statute, and the appeal must be dismissed.

Conviction affirmed.

REX v. HEWITT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. and Sutherland, J. January 30, 1922.

BETTING (§I—5)—DISTRIBUTING BETTING INFORMATION—INTENTION—CR. CODE SEC. 235.

In order to obtain a conviction under sec. 235 (*f*) of the Criminal Code, where the paper distributed is used by and is useful to breeders, owners, race track officials etc, as well as bookmakers and bettors, it is necessary to prove that it was the intention of the person publishing or distributing that it should be used in connection with book-making, pool-selling, betting or wagering on horse races.

[*Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918; *Bank of New South Wales* v. *Piper*, [1897] A.C. 383 followed; *Rex* v. *Roher* (1916), 26 Can. Cr. Cas 376, applied.]

CASE stated by one of the junior Judges of the County Court of the County of York and one of the Police Magistrates of the City of Toronto.

The case stated is as follows:—

"William Hewitt was tried before me, as Police Magistrate in and for the City of Toronto, on an information and complaint that the accused 'on the 14th day of September, 1921, did, contrary to law, advertise, publish, exhibit, sell, or supply, or offer to sell or supply, information intended to assist in or intended for use in connection with book-making, pool-selling, betting or wagering upon horse races'.

The evidence for the Crown was that on September 14, 1921, the accused distributed in Toronto the paper called 'Daily Racing Form' (Canadian edition). The accused admitted that he brought this paper into Toronto, and that he was the sole distributer in Toronto. The rest of the evidence for the Crown consisted of the opinion of a witness who might be called an expert, and his explanation of certain words, phrases, and figures appearing throughout the paper.

The evidence for the defence consisted of the opinion of a witness who might be called an expert, and his explanation of certain words, phrases, and figures appearing throughout the paper, together with a statement by the proprietor of the paper as to the purposes of the paper, and a statement by an officer of the National Live Stock Records at Ottawa as to the uses made of the half-yearly edition of the paper.

On October 27, 1921, I gave judgment convicting the defendant of an offence as charged, and fined the defendant $25 and costs.

At the request of counsel for the prisoner I granted this stated case.

The information, the evidence taken at the trial, and the exhibits and my reasons for judgment, are forwarded herewith and made part of this case. I reserve the following question for the opinion of the Court:—

'Was there evidence on which I could properly convict the said William Hewitt of the offence charged?' ''

I. F. Hellmuth, K.C., for the defendant.

Edward Bayly, K.C., and *J. C. McRuer*, for the Crown.

HODGINS, J.A.:—(after setting out the stated case as above)—Section 235 (*f*) of the Criminal Code (as enacted by 9 & 10 Edw. VII. ch. 10 sec. 3) deals with any information ''*intended to assist in*, or *intended for use in* connection with, book-making, pool-selling, betting or wagering upon any horse-race or other race,'' etc., and the offence may be either advertising, printing, publishing, exhibiting, posting up, selling, supplying, or offering to sell or supply, that information.

It was argued for the accused that criminal intent in the persons charged must be shewn, and *Rex* v. *Luttrell* (1911), 2 O.W.N. 729, 18 Can. Cr. Cas. 295, 18 O.W.R. 659, where a newsboy had been convicted, was relied on.

That case is not decisive either way. Meredith, J.A., does say that the intention ''must be that of the accused,'' but he sums up in this way: ''There was no reasonable evidence of the criminal intention, which the enactment is aimed against, in either publisher or seller.'' Magee, J.A., says: ''Whether intention of the publisher alone is sufficient and whether if so scienter must be proved against the seller, are questions upon which there may be much to be said.''

The conviction was, in fact, for something which was not a crime, so both Judges say, and therefore the conviction was quashed. But there is no means of ascertaining whether the concurrence of the other three Judges was given for that reason only, or whether they agreed with the dictum I have quoted

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from the judgment of Meredith, J.A.

The question, therefore, still remains, is the intention that of the person who is responsible for the characteristics and contents of the information itself, to be gathered from those elements, or proved by direct testimony; or must there be an intention, in the person accused, to sell or distribute information which from its character he knew or must be taken to have known could only be intended to assist in betting or to be used therein?

In other words, is the offence the sale of contraband information with or without knowledge of its contents, or the sale of information intended by the seller to assist in or to be used in betting?

The exception in subsec. 2 of sec. 235 should be noticed. Under it no offence is committed by "the sale of such association" (one legally entitled to conduct a race-meeting) "of information . . . to assist in or enable the conducting of book-making, pool-selling, betting or wagering," etc. That is to say, a sale by an association, for the very purpose struck at by the section, of information intended by them to assist in betting, is not illegal under the circumstances named. What is legalised thereby is a sale with a present intention in the seller to assist in betting.

I think the law on the subject is well stated in two cases, *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, and *Bank of New South Wales* v. *Piper*, [1897] A.C. 383.

In the first case, Wright, J., said (p. 921): "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

In the second case, Sir Richard Couch said: "The questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." (at pp. 389-390.)

The evil to be guarded against is identical with that excepted

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by the subsection for a limited time and in a particular case. In my opinion, if the advertiser, printer, exhibitor, seller, etc., possesses the intent that the information he makes public or distributes shall be used to assist or to be used in betting, and if the literature be of such a nature as to be useful to promote betting, or if the literature is in itself such that it is only capable of being an assistance to or useful in betting, so that the possession of such an intent in selling it may be naturally and reasonably inferred in the person accused, I think an offence within the statute has been established.

This appears to have been the opinion of the late Chief Justice of the King's Bench in *Rex* v. *Roher* (1916), 10 O.W.N. 303, 26 Can. Cr. Cas. 376, and is quite in accord with the opinion of Meredith, J.A., already quoted, and with such cases as *Rex* v. *Farrington* (1811), Russ. & Ry. 207, and *Rex* v. *Karn* (1903), 5 O.L.R. 704, 6 Can. Cr. Cas. 479.

In the latter case the words of the Code (sec. 179 (*c*), now 207 (*c*)) were, "offers to sell . . . or has for sale . . . any . . . drug . . . intended or represented as a means of . . . causing abortion." Osler, J.A., said (5 O.L.R. at p. 706): "If that meaning could not be drawn from the circular, the notice, and the printed directions, the case for the prosecution necessarily failed, as there was no extraneous evidence to give point to the language of the printed papers, and to shew that the medicine had *been sold for the purpose said to be intended or represented.*" The full Court held that, if the trial Judge had concluded that the circular, etc., were incapable of the meaning set out in the statute, he might have withdrawn the case from the jury; but, if he held them capable, it was then for the jury to decide whether or not they had such meaning, having regard to the context and the circumstances of the case.

There remains to be decided whether there is any evidence, having regard to the foregoing, to warrant the conviction. If the section is to be properly construed as prohibiting the sale and distribution of literature which could profitably be used in betting, apart from intention that it should be so used, then there is sufficient evidence that parts of "Daily Racing Form" are really only useful in that direction. But, if the offence must include intent in the accused or *mens rea*, either directly proved or to be inferred from facts from which only one conclusion can be drawn, as I think it does, there is nothing to support a finding of guilt. This publication has run, practically in its present form, since 1893. It is used by and is useful to breeders, owners, race-track officials, the Canadian National Live Stock Records Association, as well as book-makers and bettors. Its proprietor says: " I have no disposition to deny that the

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'Daily Racing Form' can be used for betting, but that is not its purpose." The Police Magistrate says in his judgment: "I do not think that the accused knowingly intended to break the law."

In the face of this uncontradicted evidence and this finding, it is impossible for this Court, if intent or *mens rea* is an essential element, to find that it existed either in the accused or in those who sold him the paper for distribution.

It would be very easy to put such information as is objected to here in the category of forbidden publications, as was done so completely during the war in respect to those papers which tended to sap the morals of the people or weaken their belief in their cause and its ultimate success: see the War Measures Act, 1914, 2nd Sess. (Can.) ch. 2, sec. 6 and the language of the orders in council which were enacted under it. But this step has not been taken, and it is one for Parliament and not for the Court to take.

I think the question reserved must be answered in the negative and the conviction quashed.

I may add that it would be most convenient if the Judge who reserves a case to this Court would, in all cases, set out exactly the terms of the conviction.

MEREDITH, C.J.O.:—I have had the opportunity of reading the opinion of my brother Hodgins and agree in the conclusion to which he has come that the question asked in the stated case should be answered in the negative.

To read the statutory provision under which the conviction took place as it must have been read by the learned Police Magistrate is to substitute for the word "intended" the word "calculated" or some other word.

The essence of the offence which the statute creates is the dissemination of information intended to assist in or for use in connection with book-making, etc. The information must be intended for the purpose mentioned in the statute.

It is unnecessary to decide whether it is the intention of the publisher or of the person who distributes that is to be proved, for there was no evidence of the forbidden intention by either of them. The most that can be said is that the information might and perhaps would be of use in betting, but that is far from establishing that it was intended to be used in connection with betting.

MACLAREN AND MAGEE, JJ.A., and SUTHERLAND, J., agreed with MEREDITH, C.J.O.

Question answered in the negative and conviction quashed.

REX v. WINDSOR JOCKEY CLUB, Ltd.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. January 30, 1922.

BETTING (§I—1)—COMMON BETTING HOUSE—JOCKEY CLUB—POWERS UNDER CHARTER TO CONDUCT RUNNING HORSE RACES—EXCEPTION UNDER SEC. 235 (2) CR. CODE AMENDMENT 1912 (CAN.) CH. 19—EXEMPTION FROM LIABILITY UNDER SEC. 228.

The word "driving" in the charter of the Windsor Jockey Club, wherein the club was given power to acquire grounds for driving park purposes, and for driving competitions, cannot be restricted to trotting and pacing races, but, includes driving by the rider in a running race, and even if the word "driving" did include only trotting and pacing competitions, the corporation has by reason of the supplementary and incidental powers conferred on it by sec. 17 of the Ontario Companies Act, 1907 (Ont.), 34 and also because it is an association incorporated before March 20, 1912 with the capacity and powers of a common law corporation, capacity and power to carry on racing competitions between running horses, and so is within the exception of sec. 235 (2) of the Cr. Code as amended 1912 (Can.), ch. 19, sec. 1, and is exempt from the operation of sec. 228, on carrying on such running races.

[See Annotations 27 D.L.R. 611; 62 D.L.R. 158; 66 D.L.R. 234.]

CASE reserved and stated by W. E. Gundy, Police Magistrate for the City of Windsor, pursuant to sec. 1014 of the Criminal Code, as follows:—

"The defendant, with the consent of its attorney, was tried summarily before me, in the city of Windsor, in the County of Essex, on the 25th day of August, 1921, on the following charge:—

'That on July 14, 1921, it did keep a disorderly house, that is to say, a common betting house, at the premises known as the Windsor Jockey Club Limited, contrary to sec. 228 of the Criminal Code.'

It was established in evidence that betting on the 'pari-mutuel system' took place on the race-track of the defendant upon the day named in the charge; that there were about 12,000 people present, a large proportion of whom were engaged in betting on the races then being conducted upon the said race-track, and I acquitted the defendant because, in my opinion, it came within the provisions of subsec. 2 of sec. 235 Cr. Code, as amended 1912 (Can.) ch. 19, sec. 1, and the prohibition against keeping such common betting house contained in sec. 228 of the Criminal Code did not apply to it.

It also appeared from the evidence that prior to March 29, 1912, racing was being carried on upon the track of the association in the same way as at present, except that the 'pari-mutuel system' of betting had not been installed, and the betting was conducted by book-making.

The Windsor Jockey Club was originally incorporated by

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letters patent of the Province of Ontario, dated May 3, 1884, under the name of the Windsor Fair Grounds and Driving Park Association, with powers to acquire grounds for agricultural fair and driving park purposes, for the erection of all necessary buildings and stands thereon for that purpose, the fencing in of the said grounds for the holding of agricultural fairs, cattle exhibitions, driving competitions, etc.

On December 18, 1912, an order in council was passed changing the name of the Windsor Fair Grounds and Driving Park Association to the Windsor Jockey Club Limited.

On January 6, 1913, supplementary letters patent were issued increasing the capital stock of the Windsor Jockey Club Limited from the sum of $50,000 to the sum of $200,000, and extending its powers to include racing competitions.

The question reserved for the Court is:—

Whether the Windsor Jockey Club Limited is entitled to the quotation of subsec. 2 of sec. 235 of the Criminal Code and so exempt from the operation of sec. 228 of the Criminal Code."

Edward Bayly, K.C., for the Crown.

E. S. Wigle, K.C., for the defendant.

FERGUSON, J.A.:— (after setting out the stated case as above):—The result turns on whether or not the club ever had the power to carry on "running" races. Counsel for the Crown contended that the words "driving park purposes" and "driving competitions" do not cover race-meetings, and consequently do not authorise the corporation to own and conduct a park where running races are carried on; that running race-meetings are not driving competitions within the meaning of the charter. He argues that the words of the charter restrict the operations of the corporation in respect of horse-racing to trotting and pacing races and to a park used for such purposes.

I am of the opinion:—

1. That the word "driving" cannot be properly restricted to trotting and pacing races but includes driving by the rider in a running race.

2. That, even if I be wrong, and the word "driving" should be construed to include only trotting and pacing competitions, yet that on the 20th March, 1912, the defendant corporation had, by reason of the supplementary and incidental powers conferred upon it by sec. 17 of the Ontario Companies Act, 7 Edw. VII. ch. 34, capacity and power to carry on racing competitions between running horses as distinguished from trotting and pacing horses. That section in part reads:—

"17. A company having share capital shall possess the following powers as incidental and ancillary to the powers set out in the letters patent or supplementary letters patent:—

(*a*) To carry on any other business (whether manufacturing or otherwise), which may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights;

(*i*) To purchase, take on lease or in exchange, hire or otherwise acquire, any personal property and any rights or privileges which the company may think necessary or convenient for the purposes of its business . . . "

3. That, both by reason of the fact that the company's charter was issued under the Great Seal of the Province, and that it is a company to which sec. 6 (210) of the Companies Act, R.S.O. 1914, ch. 178, as enacted by sec. 6 Geo. V. ch. 35 (1916), applies, it was an association incorporated before the 20th day of March, 1912, with the capacity and powers of a common law corporation, and as such had capacity and power to carry on a running race-meet. See *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105, and cases there collected; also *Jenkin* v. *Pharmaceutical Society of Great Britain*, [1921] 1 Ch. 392.

I would, for these reasons, answer the question in the affirmative.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with FERGUSON, J.A.

MEREDITH, C.J.O.:—I agree with the conclusion to which my brother Ferguson has come.

If the words of the statute are to be read literally, the bets made upon the respondent's race-track come within the exception mentioned in subsec. 2 of sec. 235 of the Criminal Code, for they were bets made at a race meeting upon the race-track of an association incorporated before the 20th day of March, 1912.

It was argued that the words of the statute must be read with some qualification, for otherwise it would bring within the exception bets made upon a race-track of an association incorporated for purposes altogether foreign to horse-racing, and the case of a cemetery company was suggested for the purpose of shewing the absurdity to which the literal interpretation would lead.

It may be that the words of the statute ought to be read with some qualifications; but, if so, the farthest limitation which, in my judgment, should be imposed would be that the association is one endowed with power to possess race tracks and to hold race meetings, and that the respondent association was. I see no reason why those powers were not possessed by it, though they had not been exercised before the day mentioned in the

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section, as ancillary powers under the Companies Act quoted by my brother Ferguson, or powers inherent in the association as a common law corporation.

I see no reason why a manufacturing corporation, incorporated before March 20, 1912, may not own a race-track and hold race-meetings for the amusement of its employees and their friends, and why should bets made upon such a race-track not be held to come within the exception mentioned in the section?

I agree with my brother Ferguson that the word "driving" used in the charter does not restrict the respondent's right to "trotting and pacing races," and that running races are included.

Question answered in the affirmative.

REX v. WESTERN RACING ASSOCIATION.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 30, 1922.

BETTING (§I—1)—CRIMINAL CODE SEC. 235—ASSOCIATION INCORPORATED BEFORE MARCH 20, 1912—RACE TRACK ESTABLISHED AFTER THAT DATE—APPLICATION OF SECTION.

The Criminal Code sec. 235 (2), 1912 (Can.) ch. 19, sec. 1 prohibits betting upon race-courses, except upon the race-course of any association incorporated in any manner before the 20th of March, 1912, on the proper construction of this section the date of incorporation is the sole criterion, and if the corporation has never ceased to exist as an entity, corporation or association, it is within the section although the race track is established after that date.

[See Annotation 68 D.L.R. 237.]

CASE reserved and stated by W. E. Gundy, Police Magistrate for the City of Windsor, pursuant to sec. 1014 of the Criminal Code, as follows:—

"The defendant, with the consent of its attorney was tried summarily before me, in the city of Windsor, in the county of Essex, on August 25, 1921, on the following charge:—

That on August 2, 1921, it did keep a disorderly house, that is to say, a common betting house, at the premises known as the Devonshire Park Race Track, contrary to sec. 228 of the Criminal Code.

It was established in evidence and admitted by the defendant that betting on the 'pari-mutuel system' on a large scale took place on the race-track of the defendant at Devonshire Park upon the day mentioned in the charge; that there were about 10,000 people present, a large proportion of whom were engaged in betting on the races then being conducted upon the said race-track; and I therefore found that the defendant did on that day keep a disorderly house, that is to say, a common betting house, but acquitted the defendant because, in my op-

inion, it came within the provisions of subsec. 2 of sec. 235 Cr. Code as amended 1912 (Can.) ch. 19, sec. 1, and the prohibition against keeping such common betting house contained in sec. 228 of the Criminal Code did not apply to it.

The defendant was incorporated as the Ottawa Racing Association Limited, by letters patent of the Dominion of Canada bearing date November 27, 1903, with powers to acquire real estate in the city of Ottawa, or in the neighbourhood thereof for the purpose of constructing and maintaining thereon a race-course and steeplechase-course with grand stands, stables, and all the accessories of a modern race-course, and for the establishment of a racing association, jockey club, and hunt club, and for the purpose also of establishing and maintaining one or more social clubs in connection with the said racing association, and generally for the purpose of encouraging and promoting horse-racing and horse-riding and social intercourse among persons interested in such matters.

On December 19, 1914, supplementary letters patent were granted changing the name of the company to that of the Western Racing Association Limited, and the powers granted to the said company by the letters patent of incorporation were expressed to be cancelled and the following objects and purposes were expressed to be substituted therefor:—

(a) To hold race-meetings and races and other contests or trials of skill and endurance of man and beast.

(b) To establish and maintain racing associations, jockey clubs, and hunt clubs, and to maintain social clubs in connection with the said racing associations, and particularly to conduct under the same auspices and control a series or circuit of race-meetings at or near the cities of Montreal, in the Province of Quebec, Toronto, in the Province of Ontario, and Winnipeg, in the Province of Manitoba, and other cities in the Dominion of Canada.

(c) To construct and maintain race-courses and steeplechase-courses, with all accessories of a modern race-course and club-house, and to encourage and promote horse-racing and horse-riding and other races and contests and trials of skill and endurance of man and beast.

The Devonshire Park was established and put into operation subsequent to March 20, 1921.

The question reserved for this Honourable Court is:—

'Is the defendant within the provisions of subsec. 2 of sec. 235 of the Criminal Code, and so exempt from the operation of sec. 228 of the Criminal Code?' ''

Edward Bayly, K.C., for the Crown.

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R. L. Brackin, for defendant.

FERGUSON, J.A. (after setting out the stated case as above):—Section 235 of the Criminal Code (as enacted by the amending Act of 1912, 2 Geo. V. ch. 19, sec. 1) exempts from the operation of sec. 228 "bets made or records of bets made upon the race-course of any association incorporated in any manner before March 20, 1912."

The questions for consideration seem to me to be:—

1. Is a race-course acquired and operated in a locality other than the locality designated in the original charter of the corporation within the exemption of sec. 235 if the power to acquire and operate such a track was granted by supplementary letters of patent issued after March 20, 1912?

2. Did the supplementary letters of patent which purported to cancel the powers expressly conferred by the charter and substitute others therefor, take this corporation out of the class of corporations whose race-courses are exempted by sec. 235 of the Code?

The first question was passed upon by Middleton, J., in *Hepburn* v. *Connaught Park Jockey Club of Ottawa* (1916), 10 O.W.N. 333, as follows:—

"The Ottawa Racing Association Limited, which afterwards became the Western Racing Association Limited, was incorporated, by letters patent issued under the Dominion Companies Act, on the 27th November, 1903, and by the letters patent was empowered to acquire real estate at Ottawa for the purpose of constructing and maintaining a race-course and its accessories and the establishing and maintaining a racing association, jockey club, and hunt club in connection therewith. This statement of the objects of incorporation was followed by the words, 'the operations of the company to be carried on throughout the Dominion of Canada and elsewhere.' These words in a similar context were considered by me in the case of *O'Neill* v. *London Jockey Club* (1915), 8 O.W.N. 602, and I adhere to the view then expressed, that they do not confer upon the association the right to establish a race-course elsewhere than at the place named.

"Supplementary letters of patent were granted on December 19, 1914, changing the name of the association and also substituting much wider powers. Under these substituted powers the company is authorised to hold race-meetings and to construct and maintain race-courses at certain named cities in Canada, 'and other cities in the Dominion of Canada.'

The Criminal Code, as now amended, prohibits betting upon race-courses save 'upon the race-course of any association incorporated in any manner before March 20, 1921.'

This association has not yet established any race-course; but the charter has been purchased by the plaintiffs for the purpose of establishing a race-course elsewhere than in the city of Ottawa, the place named in the original letters of incorporation; and the question is, whether this race-course falls within the exception of the Criminal Code. If it does, it is then said by the plaintiffs' counsel that he has no reason for complaint, and that the action, subject to the other question to be considered, will fall to the ground.

The words of the statute must be construed as they stand, and I am not at liberty to consider the policy of the legislation, nor what the Legislature would have done if the precise question before me had been present to the mind of the draughtsman of the Act. It may well be that, as contended, the intention of the Legislature was to protect only existing race-courses; but that is not what the statute says. It permits that which would otherwise be gambling, upon the race-course of an association incorporated in any manner before the date named. Any race-course which this association establishes under its charter falls within these precise words. It is the race-course of an association incorporated before the passing of the Act. The statute has not said 'on any race-course already established or upon any race-course that may hereafter be established under powers conferred upon any racing association;' but the date of incorporation has been made the sole criterion."

I concur in the opinion of Middleton, J. and have nothing to add.

That brings me to the second question. I am of the opinion that, even if the supplementary letters patent be construed as cancelling the express powers conferred by the charter, yet that the corporation never ceased to exist as an entity, corporation, or association, but has always continued to be an entity, and as such an association that was incorporated before March 20, 1912, with power at that date to operate a race-course within the meaning of sec. 235.

For these reasons, I would answer the question submitted in the affirmative.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with FERGUSON, J.A.

MEREDITH, C.J.O.:—For the reasons given by my brother Ferguson, and those stated by me in *Rex* v. *Windsor Jockey Club* (1922), 69 D.L.R. 581, I am of the opinion that the question should be answered in the affirmative.

Judgment accordingly.

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WELCH v. DOMINION TRANSPORT Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 30, 1922.

NEGLIGENCE (§IB—5)—DRIVER OF LORRY—LEFT STANDING IN PRIVATE LANE—DAMAGE TO AUTOMOBILE—LIABILITY OF OWNER.

The owner of a lorry whose driver, drives his horses from the highway onto a private lane or courtyard, and leaves them there insecurely weighted and unattended while he enters a building to deliver goods, is liable for injuries caused by the lorry to an automobile left on an unfenced vacant lot adjoining such lane with the permission of the owner of the lot.

[*Street* v. *Craig* (1920), 56 D.L.R. 105, 48 O.L.R. 324, distinguished.]

APPEAL by defendant from the County Court judgment, in an action for damages for injuries caused by the horses attached to a lorry colliding with an automobile. Affirmed.

The following statement of facts is taken from the judgment of Meredith, C.J.O.:—The automobile was standing upon a vacant lot, and was there by the permission of the owner of the lot. The lorry was employed in delivering goods to one of the occupants of a building adjoining the vacant lot, between which and the building there was no fence. The lorry had been driven from the highway on to a private lane or court-yard adjoining the building, and the driver had left it unattended while he went into the building on his errand. He had, however, before going in, attached to one of the horses two weights, weighing about 25 pounds, which rested upon the ground. While the driver was in the building, the horses walked away from where they were left standing, and caused the injury of which the respondent complains, by the tongue of the lorry being driven against the automobile. The evidence does not disclose the reason for the action of the horses, and there is nothing to shew that anything unusual occurred to cause them to do what they did.

H. W. A. Foster, for the appellant company.

Gideon Grant, K.C., for respondent.

The judgment of the Court was read by

MEREDITH, C.J.O. (after setting out the facts as above):—The appellant seeks to escape liability by the application of the rule of law which was applied in *Street* v. *Craig* (1920), 56 D.L.R. 105, 48 O.L.R. 324. That rule, as stated by my brother Middleton (p. 110), is that "where a beast is being lawfully driven upon a highway, and escapes upon adjoining unfenced land, trespass is not actionable without proof of negligence."

The rule has, in my opinion, no application to the case at Bar. The appellant's horses did not escape from a highway upon which they were lawfully being driven, but from private property on to the adjoining lot.

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The rule of law which is invoked by the appellant is, as my brother Middleton says, an unsatisfactory one, and, in my opinion, ought not to be extended beyond the limits which have been assigned to it by the decided cases.

It cannot be said that the damages are too remote: they were, I think, a natural consequence of the way in which the horses were left standing. As the result shewed, they were not securely weighted, and there was evidence of an onlooker that they were restive. If it were necessary for the respondent to establish negligence, it was, I think, established. *Appeal dismissed.*

CLARKE v. HURON COUNTY FLAX MILLS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 30, 1922.

APPEAL (§IB—5)—FINALITY OF JUDGMENT—TAXATION ORDER.

An order for taxation of costs in an interpleader matter is not final in its nature and, therefore, not appealable. It is not "disposing of any right or claim," within the meaning of sec. 40 (d) of the County Courts Act (R.S.O. 1914, ch. 59).

APPEAL by the claimants in an interpleader matter from an order of the County Court of the County of Huron, dated December 21, 1921, dismissing their appeal from the taxation of certain costs which they were (by an order of the County Court dated October 7, 1921), directed to pay. Affirmed.

J. R. Roaf, for appellants.

D. C. Ross, for the respondent, the Sheriff of Huron.

W. M. Sinclair, for respondent, the execution creditors.

MEREDITH, C.J.O.:—It was objected *in limine* that no appeal lies to this Court from the order which the appellants attack.

Section 40 of the County Courts Act, R.S.O. 1914, ch. 59, makes provision for appeals from these Courts.

It provides that:—

"40—(1) An appeal shall also lie to a Divisional Court at the instance of any party to a cause or matter from . . . . . .

(b) Every decision or order made by a Judge in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees;

(c) Every decision or order in any cause or matter disposing of any right or claim; and from

(d) Any decision or order of a Judge, whether pronounced or made at the trial, or an appeal from taxation or otherwise, which has the effect of depriving the plaintiff of County Court costs on the ground that his action is of the proper competence of the Division Court, or of entitling him to County Court costs on the ground that the action is not of the proper competence of the Division Court.

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(2) This section shall not apply to an order or decision which is not final in its nature, but is merely interlocutory."

In *Leonard* v. *Burrows* (1904), 7 O.L.R. 316, it was decided, by a Divisional Court, that an order made by the Judge of a County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon a taxation of the plaintiffs' costs of the action awarded by the judgment was in its nature interlocutory and not final, within the meaning of sec. 52 of the County Courts Act, R.S.O. 1897, ch. 55, and that no appeal lay to a Divisional Court of the High Court.

Delivering the judgment of the Court, Street, J., said:—"It is argued for the defendant that this order disposes of the plaintiffs' right to costs on the County Court scale, and that, therefore, it is in its nature final; but it is manifest that the Act did not contemplate an appeal from every order made by a Judge of a County Court. Appeals are limited to those orders which are in their nature final and not merely interlocutory. In the present case the rights of the parties as to the matters in litigation were finally disposed of by the learned Judge after the trial of the action, and it was in working out that judgment that the order appealed against was made. If an appeal lies in the present case, then it must follow that it will lie from the ruling of the taxing officer upon any disputed item in a bill of costs in the County Court, which has first been dealt with by an order of the Judge of the County Court affirming or disaffirming it."

Section 52 of ch. 5, of R.S.O. 1897 is the same as sec. 40 of ch. 59, R.S.O. 1914, with the exception of the provision contained in clause (d), which was enacted by sec. 13 of 4 Edw. VII. ch. 10, doubtless, in consequence of the decision to which reference has been made.

So far as I am aware, the correctness of this decision has never been questioned in any decided case; and, according to the well-established rule in matters of practice, such a decision ought not now to be departed from, even though we were of opinion that it is wrong. I do not, however, think it is wrong. The reasoning of my brother Street commends itself to me as sound.

There is, besides this, another reason why we should hold that the order in question is not, in the present state of the law, appealable. The provisions of clause (d) indicate clearly, I think, that the Legislature intended that an order made on an appeal from a taxation should not be appealable. If the right of appeal in such a case were conferred by clause (c) it is clear that such an appeal as is provided for by clause (d) would be within it, and therefore I think that the enactment

of clause (d) shews that only such matters of taxation as the clause deals with should be the subject of appeal to a Divisional Court.

It is to be observed that the words of clause (c) are, "disposing of any right or claim." I do not think that these words extend to matters that may arise on a taxation—but rather to what may be called substantive rights or claims. In one sense a right to particulars is a right, and a final one, but it can hardly be contended that it is such a right as clause (c) deals with, or that an order for particulars or dismissing a motion for particulars is appealable.

In *Talbot* v. *Poole* (1893), 15 P.R. (Ont.) 274, it was decided by a Divisional Court consisting of Armour, C.J., and Street, J., that an order dismissing an appeal from a certificate as to the taxation of costs of a High Court action was appealable. No reasons for the decision are given, and it is singular that that case was not cited or referred to in *Leonard* v. *Burrows, supra.*

I express no opinion as to the right to appeal from an order made upon an appeal from a taxation in an action in the Supreme Court of Ontario. Granting that an appeal lies, in my opinion the provisions of clause (d) of sec. 40 (1) require that a different construction be placed upon the general words of clause (c). There is also a difference between the provisions of sub-sec. 2 and the provision of the Judicature Act. The language of sub-sec. 2 is: "an order or decision which is not final in its nature, but is merely interlocutory:" but the provision of sec. 68 of the Judicature Act, R.S.O. 1887, ch. 44, is that there shall be no appeal to a Divisional Court or to the Court of Appeal from an interlocutory order in case prior to the Ontario Judicature Act, 1881, there would have been no relief from a like order, by an application to a Supreme Court or by an appeal to the Court of Appeal, and that is substantially the provision of sec. 25 of the present Judicature Act.

It was argued by Mr. Roaf that clause (b) gives the right of appeal from any order or decision in interpleader proceedings. The answer to that argument is that the general words of sub-sec. 2 exclude from right to appeal an order or decision which is not final but is merely interlocutory.

I would dismiss the appeal without costs. I say without costs because I think that the taxing officer allowed costs to which the respondents were not entitled.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—The reason for the decision in *Leonard* v. *Burrows*, 7 O.L.R. 316, is found in this sentence: "In the pre-

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sent case the rights of the parties as to the matters in litigation were finally disposed of by the learned Judge after the trial of the action, and it was in working out that judgment that the order appealed against was made." In other words, the right or claim to costs was decided by the trial Judge, and the order appealed from affected only the correctness of the construction put by the taxing officer on the language used by the trial Judge—clearly an interlocutory matter. The right to the costs had been in fact disposed of, though not in clear terms, and this order did nothing but interpret it. The view of Street, J., thus understood, is in accord with that of the Court of Appeal in England in *Blakey* v. *Latham* (1889), 43 Ch. D. 23, where an order setting off judgments for costs under different orders in an action was held to be interlocutory, as it was merely working out the directions contained in the final judgment in the action. The judgment in *Leonard* v. *Burrows, supra,* may be correct and yet may not govern this case. Notwithstanding the narrow foundation on which the judgment rests, its effect is of more importance in most cases than the question of quantum. Hence the statutory provision, R.S.O. 1914, ch. 59, sec. 41 (d) which recognises the restricted character of that decision. I am not disposed to quarrel with the views expressed by the eminent Judges in either case, but I do not think they should be extended so as to include what is not literally "working out" or interpreting the judgment by the officials of the Court; in other words, the substantive rights conferred by the judgment itself which the parties may enforce by process or otherwise. Nor do I think these decisions preclude us from holding that under our practice a different rule may exist on appeals from taxation in actions in the Supreme Court of Ontario. The right to appeal from a Judge in Chambers in such a matter, affirmed in *Talbot* v. *Poole, supra,* has been exercised for nearly 30 years, and in 1905 was exercised in *Campbell* v. *Baker* (1905), 9 O.L.R. 291.

It may be that this right is now, if the Judge's order is treated as an interlocutory one, as to which I decide nothing, subject to Rule 507.

This appeal should be dismissed, but without costs. It is hard to understand how it comes that the counsel fees objected to could have been taxed as at a trial in a case where the interpleader issue was neither delivered nor tried.

Appeal dismissed.

McCOLL v. C.P.R. Co.

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Judicial Committee of the Privy Council, Viscount Cave, Lord Parmoor and Duff, J. October 26, 1922.

STATUTES (§IIA—96)—WORKMEN'S COMPENSATION ACT, MAN. STATS. 1916 CH. 125—SECTIONS 13 (1) AND 61 (4)—CONSTRUCTION—RAILWAY ACT, 9 & 10 GEO. V. CH. 68—CONSTRUCTION—PERSON INJURED WITHIN THE MEANING OF SEC. 385.

Sections 13 (1) and 61 (4) of the Workmen's Compensation Act, 1916 Man. Stats. ch. 125, read together mean that where in any case there are the two elements of (1) employment and (2) injury (or accident in the sense of accidental injury) arising during the employment then every right of action which the plaintiff or his dependents might otherwise have under sec. 13 (1) of the Act is taken away by the order of the Workmen's Compensation Board under sec. 61 (4) determining that the only right of the workingman or dependent is to compensation under the Act. The element of tort is not a factor and may or may not be present in the case.

The words "to any person injured" in sec. 385 of the Railway Act, 1919 (Can.) ch. 68, are used in the sense of "any person having received an injury recognised by law," and the death of a human being, though clearly involving pecuniary loss, not being at common law a ground of action for damages, the above section does not give a right of action, in case of death, to the widow and administratrix of the person killed.

APPEAL from the judgment of the Manitoba Court of Appeal (1921), 65 D.L.R. 784, affirming the judgment at the trial (1921), 60 D.L.R. 1, permanently staying an action by the widow and executrix of a workman killed in the course of his employment with, and as a consequence of the negligence of the defendant company. Affirmed.

The judgment of the Board was delivered by

DUFF, J.:—This appeal presents a question as to the construction of sec. 385 of the Railway Act 1919 (Can.), ch. 68, and one as to the construction and effect of the Workmen's Compensation Act of 1916 (Man.) ch. 125 sec. 13.

The appellant's husband, a workman employed on the respondents' railway, was killed when travelling on one of the respondents' trains in the course of his employment, when the car on which he was riding came into collision with an obstruction and was wrecked. The accident was due to the neglect of the company's servants in not observing an order of the Board of Railway Commissioners for Canada, which required the defendant company in loading its railways cars to be governed by "the clearance limits" of the road over which they passed.

The section of the Railway Act (sec. 385 1919 (Can.), ch. 68), with which we are concerned, is in these words:—

"385. Any company which, or any person who, being a di-

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rector or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor in Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages shall not be subject to any special limitation except as expressly provided for by this or any other Act."

The appellant's husband having received the injury which caused his death from a contravention of an order of the Board of Railway Commissioners, on behalf of the appellant it is contended that she herself (as well as her infant daughter, for whose benefit she sues), is in respect of the loss accruing to her in consequence of his death, a "person injured," within the meaning of the section, and that the effect of the section is to create, without regard to provincial law, a liability to each of them in respect of such loss. On behalf of the respondents, counsel argues that the section creates no liability independently of the law of the Province where the injury occurs, and that its office is limited to affirming the responsibility of the company, and of the persons to whom it applies according to the principles of provincial law for acts or omissions falling within it. Their Lordships consider it unnecessary to express any opinion upon this view advanced by the respondents as to the construction and effect of the section.

The contention of the appellant in effect is that sec. 385 establishes in respect of acts and omissions to which it applies a new principle of responsibility; new in the sense that independently of provincial legislation it creates a liability to pay damages in a civil action for causing the death of a human being and new in the sense that the liability so created extends to consequences which are neither the immediate or the direct result of the act or omission complained of nor within the intention actual or presumed of the defendant.

It must indeed be apparent that if under this section the dependents of a person suffering death in consequence of a dereliction falling within it are entitled to be indemnified in respect of "the full amount of damages sustained" by reason of such death, then the statutory right of indemnity must, by strict

analogy, be shared by other classes of persons having legal or business relationships with the deceased and suffering loss in consequence of being deprived of advantages which they might reasonably have expected to enjoy if he had continued to live. Nor, if this be the effect of the section in cases in which death has ensued, can responsibility be limited to such cases. It must exist in numerous other cases where loss is indirectly inflicted upon persons other than those who suffer directly in their persons or property by reason of a default within the section; as for instance where a breach of statutory duty causes an injury disabling the immediate sufferer from performing his contractual obligations or carrying out his business or professional engagements or making provision in the usual way for his family.

It is of course conceivable that interests thus indirectly affected might be considered by a legislator to be fit subjects for protection by remedial process; but the difficulty of prescribing limits for the operation of such a method of assigning responsibility is obvious, and the common law, speaking generally, regards the protection of such interests as impracticable. As Blackburn, J., (as he then was) said in delivering the judgment of the Court of Queen's Bench in *Cattle* v. *Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453 at p. 457:—

"It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley* v. *Gye* (1853), 2 El. & Bl. 216, at p. 252. 118 E.R. 749, Courts of justice should not 'allow themselves in the pursuit of perfectly complete remedies for all wrongful acts to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree."

"Instances might be indefinitely multiplied" Lord Penzance observed in *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, at p. 290, of claims indistinguishable in principle from that now advanced "giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel."

Their Lordships think that an intention to establish a novel principle of responsibility of such indefinite scope in relation to a special class of acts and omissions ought not to be inferred from general words which are not apt for the purpose, and to which full effect can be given by a construction in harmony

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with the policy of the law in granting redress in other cases of *injuria cum damno*.

The Courts below have taken the view that the operation of the section is subject to the rule of the common law that an action does not lie for damages suffered in consequence of the death of a human being. Their Lordships see no reason to differ from this conclusion; and their Lordships agree with the observation of Prendergast, J. (1921), 60 D.L.R. 1, 31 Man. L.R. 387, that in this connection the absence of anything specifying the class or classes of persons entitled to indemnity in such circumstances is significant.

Since Lord Campbell's Act was enacted in 1846 similar legislation has been passed by many legislatures in the United States as well as in British Dominions. Many of these statutes are collected in an appendix to Shearman & Redfield's Law of Negligence, 6th ed., vol. 3, pp. 2051 *et seq.* and it appears to be the general practice in enacting such statutes to define the class or classes of persons for whose benefit an action may be brought; and the fact that the Railway Act is silent upon this matter affords, their Lordships agree, an indication that the section is not addressed to the subject of indemnity for damages arising from death.

The opinion already indicated touching the effect of the general words employed in sec. 385 is not without support from the analogy of decided cases dealing with similar language in other statutes. In *The Vera Cruz* (*No. 2*) (1884), 9 P.D. 96, for example, the plaintiff contended that an action *in rem* for damages under Lord Campbell's Act 1846 (Imp.) ch. 93, was within the jurisdiction created by the Admiralty Court Act of 1861, (Imp.), ch. 10, sec. 7, which gave power to that Court to entertain an action *in rem* when brought to enforce "any claim for damage done by any ship." In the judgments of the Lords Justices there are observations apposite to the question now presented for decision. Bowen, L.J., at p. 101, said:—

"The plaintiff is in this dilemma. The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injuriously affecting of their interests is not done by the ship in the above sense. It arises partly from the death which the ship causes; and partly from a combination of circumstances, pecuniary or other, with which the ship has

nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship."

And Fry, L.J., added at p. 101:—

"Secondly, assuming injury to the person to be within the section, is an action under Lord Campbell's Act within it? Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury sustained by relatives resulting from the death of a person which resulted from the damage done to him by the ship. It cannot be correctly said that it is an action *for* damage done (which are the words of the Act) though it is for damage resulting from or arising out of damage done."

Again, in the *B.C. Electric R. Co.* v. *Gentile*, 18 D.L.R. 264, 18 C.R.C. 217, [1914] A.C. 1034, the question before this Board was whether a clause in the appellant company's special Act affecting actions against the company "for indemnity for any damage or injury sustained by reason of the railway or the operations of the company" with a certain time limit applied to an action under the British Columbia Statute R.S.B.C. 1911, ch. 82, re-enacting Lord Campbell's Act, 1846 (Imp.) ch. 93, taken by the dependents of a person killed in circumstances which, if he had survived, would have brought his right of action within the clause. Lord Dunedin in delivering the judgment of the Board said 18 D.L.R. at p. 266, that "indemnity" in the clause mentioned "obviously means indemnity to the plaintiff in the suit in respect of the wrong done to the plaintiff and the damages sustained by him owing to the railway or the operations of the company," and the Board held 18 D.L.R. at p. 267, that "a suit brought under the provisions of that Act [Lord Campbell's Act] is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants" which "operations" *ex hypothesi* had been the cause of the death that was the foundation of the claim; in other words, an action under Lord Campbell's Act is not an action for "damage sustained by the plaintiff by reason of" the wrongful act which caused the death in respect of which the claim is made.

Their Lordships therefore think that the appellant's claim cannot be sustained by force of sec. 385 alone.

The next question for consideration is that raised by the appellant's contention that a right to compensation is vested in her by the combined operation of the provision of the Rail-

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way Act already discussed and secs. 2 and 3, of R.S.M. 1913, ch. 36, which, in substance, reproduce the principal enactments of Lord Campbell's Act, 1846 (Imp.), ch. 93.

On behalf of the respondents, it is not disputed that the appellant would have a valid claim under this statute, were it not for certain provisions of the Workmen's Compensation Act, a statute of Manitoba, which, it is contended, deprive her of any such right. The Workmen's Compensation Act makes provision for a fund from which compensation is to be paid to workmen injured by accidents arising out of and in the course of their employment, and to their dependents where such injury results in death, and creates a Board, known as the Workmen's Compensation Board, for its administration. By sec. 13 it is enacted that the right to compensation given by the Act shall be "in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are, or may be, entitled against the employer of such workman for, or by reason of, any accident" in respect of which a right of compensation is given, and it is further provided that (as amended 1919 (Man.), ch. 118, sec. 8), "no action in any Court of law in respect thereof shall . . . lie." By sec. 61 of the Act, sub-sec. 4, and by sec. 13, sub-sec. 2, it is in substance provided that the Board shall upon the application of any party to an action brought by a workman or his dependent against an employer, have jurisdiction to determine whether the party bringing the action is entitled to maintain it, or only to compensation under the Act, and that such decision shall be final and conclusive between the parties. The Board on November 24, 1920, after the commencement of the action from which the appeal arises, declared that the accident in respect of which the action was brought was one in respect of which the dependents of the deceased William McColl had a right to compensation under the Act, and that the right of action asserted was not maintainable.

It is quite clear that if sec. 13 of the Workmen's Compensation Act applies to the claim advanced by the appellant, then that section affords an answer to the claim. On the part of the appellant it is contended that sec. 13 does not apply because on any admissible construction of sec. 385 of the Railway Act, a right of action is thereby given to the employees of the railway company injured in consequence of any act or omission within the section, even though the circumstances of the injury should be such as would give the workman a right to compensation according to the terms of the Workmen's Compensation Act.

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It follows, it is argued, that sec. 13 cannot apply to accidents giving rise to rights of action under sec. 385, because it must be presumed that the Manitoba Legislature did not intend to enact legislation in conflict with the statutes of the Dominion Parliament within its undoubted jurisdiction.

Their Lordships cannot agree that such an implied exception could properly be introduced into sec. 13 of the Workmen's Compensation Act. Section 385 of the Railway Act (a Dominion statute) deals with the consequences, by way of civil liability, of the contravention of statutory enactments and regulations on the subject of railways. It was passed by Parliament in exercise of its jurisdiction over that subject. The Workmen's Compensation Act is an Act passed by the Province of Manitoba in exercise of its jurisdiction over civil rights imposing upon employers certain responsbilities and giving employees certain rights in respect of injuries arising out of industrial accidents. The enactments deal with different subjects-matter, although the circumstances of a particular case may bring it within the scope of both enactments, in which case, if a conflict arises, it is the Dominion legislation which prevails. But such conflicts arise only incidentally, and the fact that they do arise is not a legitimate ground for implying words of exception in one of the sections of the Provincial statute, excluding from its application, cases in which the Dominion Act does not apply.

The appellant and her infant daughter, having a right to compensation under the Workmen's Compensation Act, it follows that all rights which otherwise would have accrued to them under Lord Campbell's Act, are displaced by sec. 13 of the later statute.

For these reasons, the appeal from (1921), 65 D.L.R. 784, in their Lordships' opinion, fails, and they humbly advise His Majesty that it should be dismissed.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. January 30, 1922.

EXECUTORS AND ADMINISTRATORS (§IVB—95)—DISCRETION OF TRUSTEES AS TO SALE OF PROPERTY—PROTECTION OF RIGHTS OF INFANTS AND INCOMPETENT PERSONS—ADMINISTRATION UNDER CONTROL OF COURT—INTERFERENCE WITH DISCRETION OF TRUSTEES.

While the Court will not as a rule interfere with the discretion of trustees as to the exercise of a power of sale where the testator has given them pure discretion as to its exercise, and they have not been guilty of any misconduct, neglect or unwarranted delay, an order for the administration under the direction of the Court will be given, if it appears necessary in the interests of infants

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or incompetent persons, but the Court may in such order direct that as to the time, manner, and terms of sale, regard shall be had to the wishes of the trustees, unless it is shewn that they are unreasonably refusing their consent to such sale.

APPEAL by the executors and trustees from the judgment of Masten, J. on an application by Mary I. Benedict for an order for the administration under the direction of the Court of the estate, real and personal, of the Honourable Peter McLaren, deceased. Varied.

The judgment appealed from is as follows:—

Masten, J.:—The material filed on the application is voluminous. Exception is taken by those supporting the motion to para. 11 of the affidavit of James L. T. McLaren and to the latter part of clause 2 of the affidavit of George Ritchie, sworn on the 19th November, 1921, as being scandalous. I have read and considered the paragraphs complained of, and I am clearly of opinion that the statements objected to are not admissible in evidence to shew the truth of any allegation that is material and relevant with reference to the question whether an administration order should be granted or refused. I therefore hold that the paragraphs in question are scandalous and should be expunged from the affidavits, with costs fixed at $20 to be paid by the respondents: see *Christie* v. *Christie* (1873), L.R. 8 Ch. 499.

Coming now to the main application, I am of opinion that the respondents as trustees and executors are not on this application proved guilty of any moral misconduct nor of any wilful neglect or default, nor am I able to say that, considering the nature of the estate, any unwarrantable delay or dilatoriness on their part has been established.

It seems clear to me, however, that technical breaches of duty in the distribution of the estate—and these of a serious nature—have occurred; also that questions of grave difficulty have arisen in the administration of the estate and remain unsolved; and, further, that from the very nature of the assets constituting the estate further complications and difficulties are bound to arise. For these reasons, I am of opinion that an order for administration under the direction of the Court should be made; and I should add that I think it will be not less in the interest of the executors and trustees themselves than in that of the beneficiaries that they should have the protection of the Court in the further administration of the estate.

The usual order for administration will go, with a special clause that unless and until the further order of the Court the

executors and trustees shall have the conduct of the reference.

The reference is directed to J. A. McAndrew, Official Referee.

H. J. Scott, K.C., and *J. B. Clarke*, K.C., for appellants.

E. D. Armour, K.C., and *A. D. Armour*, for Mary I. Benedict, the applicant for the administration order, respondent.

FERGUSON, J.A.:—Appeal by the trustees and executors named in the will of the Honourable Peter McLaren, deceased, from an order made or judgment pronounced by Masten, J., dated December 2 whereby on the application of Mary Benedict, under Rule 608, he directed administration of the estate of the deceased.

The applicant is a legatee, and her application was supported by her sister Mary Hall, also a legatee, and by the Official Guardian; three of the trustees are legatees; and Mr. Ritchie, the other, is beneficially entitled to a share in the proceeds of the sale of the Virginia property.

The main, if not the sole, purpose of the applicant is to divest the trustees of the power to fix the time, manner, and terms of any sale of the Virginia property, and counsel were agreed that, if the order stands without amendment, that purpose will have been accomplished, for Rule 611 reads:—

"(1) Where judgment for administration is granted the Master to whom the matter is referred shall proceed to administer the estate in the most expeditious and least expensive manner, and in doing so shall, without special direction, take:—

(*a*) An account of the personal estate of the deceased, in the pleadings mentioned, come to the hands of his executors (or administrator); (*b*) An account of his debts; (*c*) An account of his funeral expenses; (*d*) An account of the said testator's legacies; (*e*) An inquiry as to what parts, if any, of the real and personal estate are outstanding or disposed of; (*f*) An inquiry as to what real estate the deceased was seised of, or entitled to, at the time of his death; (*g*) An inquiry as to what incumbrances affect the real estate; (*h*) An account of the rents and profits of the real estate received by any party since the death; (*i*) An account of what is due to such of the incumbrancers as shall consent to sale in respect of their incumbrances; (*j*) An inquiry as to what are the priorities of such last mentioned incumbrances.

(2) The Master shall, under any such reference, have power to deal with both the real and personal estate, including the power to give all necessary directions for its realisation, and shall finally wind up all matters connected with the estate,

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without any further directions, and without any separate, interim, or interlocutory reports or orders, except where the special circumstances of the case absolutely call therefor.

(3) All money realised from the estate shall forthwith be paid into Court, and no money shall be distributed or paid out for costs or otherwise, without an order of a Judge, and on the application for an order for distribution, the Judge may review, amend, or refer back the report, or make such other order as may seem just."

The power of sale, as granted by the will, reads:—

"All the residue of my property, wheresoever situate, shall be sold for cash or on credit, at such times, in such manner, and upon such terms as my said trustees in their direction shall deem proper or expedient."

The Judge whose order is appealed from found "that the respondents as trustees and executors are not on this application proved guilty of any moral misconduct nor of any wilful neglect or default, nor am I able to say that, considering the nature of the estate, any unwarrantable delay or dilatoriness on their part has been established. It seems clear to me, however, that technical breaches of duty in the distribution of the estate — and these of a serious nature — have occurred; also that questions of grave difficulty have arisen in the administration of the estate and remain unsolved; and, further, that from the very nature of the assets constituting the estate further complications and difficulties are bound to arise."

The technical breaches of trust alleged are:—(1) That the executors and trustees advanced sums to the applicant, her sisters, mother and brothers, before setting aside funds amounting to $250,000 to provide income for the widow and for each of the daughters of the deceased. (2) That the trustees have not sold the Virginia property and some small properties in Ontario. (3) That by refusing information to Mr. Osler, solicitor for Mrs. Hall, they prevented him from interesting possible purchasers. (4) That the time for distribution has arrived and the estate is not converted.

After a careful perusal of the affidavits, I am of opinion that the applicant and Mrs. Hall, having received advances, cannot, while retaining the payments, set up these and like advances to their brothers as a basis of complaint; to allow them to do so would, I think, be contrary to the well-known principle that one cannot make his own wrongful act the basis of a claim for equitable relief; the Court will not lend its aid to such as a claimant.

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But the application was supported, and this appeal is opposed, by the Official Guardian; he represents one of the daughters of the deceased who is *non compos;* she cannot be said to have lost her right to complain of advances being made before a fund of $50,000 directed to be set aside for her benefit had been set aside. It is the duty of the Official Guardian to protect his wards, and to complain if the trusts have been ignored to their prejudice or possible prejudice. Great weight should be given to the statement of the Official Guardian that he deems it in the interest of Miss McLaren and the infants to support the application; had he taken a different position I would have thought that the order should not have been made, for I am of opinion that the adult applicant is not in a position fairly to complain of the making of the advances, also that the advances made were such as most men placed, pressed, and driven as these trustees were by the real necessities of their cestuis que trust, would have made. Though, in the eyes of the law, the making of the advances was a breach of trust, it was, I think, a mere technical breach of trust within the meaning of secs. 36 and 37 of the Trustee Act, R.S.O. 1914, ch. 121. It is due to these executors and trustees to say that, in making the advances now complained of as a breach of trust, they acted honestly, and did what they, in good faith, believed to be in the best interest of all, and did not prefer one to another. To my way of thinking, these technical breaches of trust cannot fairly be made a ground for removing the trustees from their office or of controlling them in the management of the trust-estate except in so far as it is necessary to right the wrong done to those represented by the Official Guardian and to protect them against future acts of a like nature.

I shall now deal with the complaints of delay in realising and of refusal of information to Mr. Osler.

The Judge whose order is appealed from has found (1) no misconduct, (2) no wilful neglect or default, (3) no unwarranted delay, (4) no dilatoriness on the part of the trustees.

These findings are justified by the evidence, but counsel for the applicant stressed the refusal of information. Mr. Osler's letters, the reasons he therein set forth for making the request for information as to the Virginia property, and his statements as to the use he proposed to make of the information, demonstrate that the Virginia property is not one that may be advantageously sold and converted by following the usual and ordinary methods of sale or the practice in the Master's Office—clearly the property is an exceptional one, for which there are

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few purchasers, and these, purchasers who must be sought out and interested by an agent experienced in such transactions and acquainted with not only the proprietors but with the "market," that is, in touch with dealers, traders, promoters and operators in that kind of property. I am confident that such an agent would not devote his time, energy, and ability to the promotion and completion of such a sale if he were to be subject to outside interference or to the loss of his commission or other fruits of his labour by reason of the property being placed in the hands of another before he had had reasonable opportunity to complete the transaction and reap his just rewards.

The trustees assert (and their assertion is not questioned) that, at the time Mr. Osler requested the information, a sale of the Virginia property for $6,000,000 was being negotiated, and that the negotiations have not yet been determined. In these circumstances, I am not only unable to find fault with the trustees, but am of opinion that they acted wisely and exercised reasonably the powers and discretion given them by the testator when he entrusted to them, and to them only, the power of sale.

That brings me to a consideration of the question: Is the order appealed from improper? Should it be rescinded and set aside or should it be amended?

The executors and trustees have acted honestly and diligently, and come into Court prepared to exercise the powers and discretions vested in them by the testator, for their own benefit and the benefit of all persons interested, and asserting the right to do so—but they have been guilty of a technical breach of trust, of which the Official Guardian is entitled to take advantage.

The debts are paid, so that the applicant and those supporting her are persons applying to enforce the trusts created by the testator for their benefit.

"The sole ground, on which courts of equity proceed in cases of this kind, is to be deemed the execution of a trust:" Taylor's Equity, p. 171, para. 390.

And the question arises: Does the order appealed from direct the execution of the trusts? or does it, without just or sufficient cause, deprive the objecting beneficiaries of a substantial right, i.e., the right to have the time, manner, and terms of sale of such a speculative and valuable property as the Virginia estate fixed by these trustees?

By the will, the period of distribution is fixed at the time the testator's youngest child shall have arrived at the age of 40 years: that period had arrived at the date of the testator's

death, from which it is argued that the trustees were obliged to convert immediately; but I am of opinion that this argument is not sound, for, if given effect to, it would deprive the trustees of the power expressly given them to fix the time of sale—which, it seems to me, was not the intention of the testator, and is not the meaning of the words of his will. Yet such is the meaning and effect of the order appealed from, and it appears to me that therein lies error and just ground for complaint.

To allow the order appealed from to stand unamended would be to ignore the wishes of the testator, reverse his words, and substitute the direction of the Court for the direction of the testator, and for the discretion, opinion, and judgment of persons whom the testator deliberately selected and named as the persons who should fix the time, manner, and terms on which his property should be sold, the discretion, opinion and judgment of a Court Official.

The testator was a man of wealth, understanding, and affairs, and for many years a member of the Senate of Canada. He knew his properties, he knew his family, and he knew and trusted the men he selected to be his executors and trustees; he conferred upon them wide powers, which he no doubt deemed necessary and advisable in the interest of all the objects of his bounty, and to my way of thinking the Court should not ignore or disregard his wishes and desires, unless it is clearly demonstrated that these men have been shewn unwilling or unworthy to perform and execute the duties and trusts imposed and assumed. I am not impressed with the idea that the Court or its officers are better equipped than are the persons named by the testator to say when and for what price or on what terms and conditions a valuable and speculative property such as the Virginia property should be sold, or what steps should be taken or efforts made to bring about a sale thereof.

Opinions as to the salable value of the Virginia property will probably differ by millions of dollars—and, if the Court takes away from the objecting beneficiaries the right to say that this property shall not be sold except when and in such manner and on such terms as are approved by the persons named by the testator, it would seem to me the Court would be seriously interfering with the rights of the parties, and interfering in a way not justified by the circumstances or the authorities, for I am of opinion that the weight of authority is that if the trustees are given a discretion as to conversion or non-conversion of property, or are given a power and directed to convert, but the time and manner of the exercise of the power are discretionary,

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the Court will not interfere with the exercise of such discretion.

I do not mean that trustees directed to sell, but having a discretionary right to postpone, may postpone indefinitely, but rather that, so long as they are able, ready, and willing to sell, and exercise the powers and discretions honestly, reasonably, and in good faith, the Court ought not to interfere.

In *Re Sievert*, Middleton, J., affirmed by this Court (1921), 67 D.L.R. 199 at p. 200, 51 O.L.R. 305, states the law (setting out the words of Middleton, J.).

See also *Re Charteris, Charteris* v. *Biddulph*, [1917] 2 Ch. 379.

There is no evidence to support a suggestion that these trustees have not acted in good faith, or are not prepared, honestly, faithfully, and reasonably to convert the testator's estate, in accordance with the powers and discretions given them by the will. Therefore, if the Official Guardian were not supporting the applicant, I would allow the appeal; but, in view of the position taken by the Official Guardian and his rights and duties, and because I think it in the interest of the trustees, as well as those represented by the Official Guardian that the trustees be protected against being coerced or influenced into further or future indiscretions, and against assertions that the Virginia property is not being handled fairly and honestly, or if sold was not sold to advantage—I would not rescind the order, but would amend it, so that the trustees and those represented by the Official Guardian may be protected as indicated without depriving those appealing of their right to have the time, manner, and terms of sale fixed by the trustees.

That, I think, is the meaning and effect of an administration order granted under Order LV., r. 4, of the English practice—see Williams on Executors, 11th ed. (1921), pp. 1615, 1616, where the law is stated as follows:—

"Even a judgment for administration does not deprive executors or trustees of the right to exercise a discretionary power vested in them, except so far as the exercise conflicts with the order; for instance, they can exercise a power of appointing new trustees but the Court will see that improper persons are not appointed, and if a person of whom the Court does not approve is appointed, it will call on the trustees to make a fresh appointment. The fact that the decree directs the appointment of new trustees does not take from the trustees their right of appointment, though after decree they can only exercise it sub-

ject to the supervision of the Court. An administration decree does not prevent trustees from exercising a power of sale.

Where a testator has given a pure discretion to trustees as to the exercise of a power, the Court will not enforce the exercise of the power against the wish of the trustees or one of them, if such one reasonably entertains a different opinion from that of his co-trustees as to the desirability of exercising it in the particular manner proposed, but it will prevent them from exercising it improperly; and even where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it."

But I have not found in the English Rules one corresponding with our Rule 611, and, for that reason, I think it necessary that the effect of that Rule should be modified by special order and direction. See Rule 614.

For these reasons, I would amend the order appealed from by directing that, notwithstanding anything therein contained or contained in Rule 611, the Referee shall, in converting the estate pursuant to this order, have regard to the powers of sale conferred upon the trustees by the will, and their rights and discretion in reference thereto as to the time, manner, and terms of sale, and shall give effect thereto, and shall be guided and in these respects governed by the wishes of the trustees, unless it be shewn and he is of opinion that the trustees are neglecting or refusing, honestly, in good faith, or in a reasonable and timely manner, to execute the powers of sale and exercise their rights and discretions in reference thereto.

Costs of all parties out of the estate.

MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

HODGINS, J.A.:—I agree in the judgment proposed by my brother Ferguson, though I do not go as far as he is able to do in approving of the conduct of the trustees in refusing to give information to Mr. B. Osler as to the exact location and character of the Virginia property. The negotiations then pending were very dimly outlined. Nothing of value as to their present position has been vouchsafed to enable the Court to say that then or now they were or are of such a nature or ever arrived at such a stage that the giving of this information would imperil their successful conclusion. It is this consideration that leads me to think that the right of those interested to appeal to some authority would probably correct the impulse of the executors and trustees to resent inquiry.

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With regard to what are called technical breaches of trust in the advancing of moneys to the applicant and others, the circumstances under which they were made appear to me to give some local colour to the sardonic observation of Lord Justice Selwyn that the only use of a trustee was to commit judicious breaches of trust.

MEREDITH, C.J.O., agreed in the judgment of FERGUSON, J.A., with the doubt suggested by HODGINS, J.A.

Order varied in the manner stated by FERGUSON, J.A.

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*BURNS v. ROYAL BANK OF CANADA.

BURNS v. GRAHAM.

Ontario Supreme Court, Mulock, C.J.Ex. January 31, 1922.

Ontario Supreme Court, Mulock, C.J.Ex. May 23, 1922.

BANKRUPTCY (§IV—38)—PREFERENCES—WHEN NOT FRAUDULENT—MORTGAGE—PAYMENT TO BANK.

A mortgage by an insolvent company, given to secure a cash advance with which to reduce the company's indebtedness to a bank of which the mortgagee was guarantor, is presumptively a preference; but the intention to prefer, as would render the transaction a fraudulent preference under sec. 31 of the Bankruptcy Act, is rebutted by evidence shewing that it was in fact given for the purpose of enabling the company to continue in business.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

COSTS (§I—9)—LIABILITY OF TRUSTEE IN BANKRUPTCY.

Where a trustee in bankruptcy unsuccessfully attacks a fraudulent preference, and the action is not brought in accordance with the provisions of the Bankruptcy Act, he is personally liable for the costs.

THESE were two separate actions, brought by the same plaintiff, R. Easten Burns, the authorised trustee under the Bankruptcy Act of the Judge-Jones Milling Company Limited, against the Royal Bank of Canada and one Graham. In the action against the bank, the plaintiff asked that a payment of $40,000 made by the company to the bank should be declared a fraudulent and preferential payment and should be set aside, and in the action against Graham that a mortgage made by the company to Graham, securing $40,000, be declared a fraudulent preference and should be set aside.

A. B. Cunningham, K.C., for plaintiff.

H. J. Scott, K.C., and *W. Carnew*, K.C., for the defendant bank.

*[On the 2nd October, 1922, appeals from the judgment of MULOCK, C.J. Ex., in the two actions, were heard by the First Divisional Court of the Appellate Division, and were dismissed with costs, as regards the dismissal of the actions. The question of the costs of the actions was reserved for further consideration.]

Malcolm Wright, for the defendant Graham.

MULOCK, C.J. EX.:—Much of the evidence being common to both cases, it was agreed by counsel that the whole evidence in each case should be taken on one examination of witnesses, and be applicable, as far as possible, to the respective cases, and this course was pursued.

The impeached mortgage bears date November 30, 1920, and purports to be security to the defendant Graham for $40,000 lent to the company; but, in the negotiations which led up to this mortgage-transaction, it had been agreed between the company and the defendant Graham that the $40,000, when paid by Graham to the company, should forthwith be paid over to the bank on account of an indebtedness of the company to the bank. This agreement was carried out, Graham paying to the company the $40,000 by his cheques, which were immediately deposited by the company to its credit in the bank. The last cheque dated December 7, 1920, was for $17,295, and was deposited on December 9.

About the middle of December, Greenlees Limited, a creditor of the company for the sum of about $500, instituted an action against the company, whereupon the company called a meeting of its creditors for December 20. At this meeting, the financial position of the company was considered and an adjournment was had for 4 weeks in order to afford the company the opportunity of making financial arrangements for continuing in business; but at the adjourned meeting held on January 17, 1921, it was learned that the company had been unsuccessful in making such arrangements, whereupon it was unanimously decided to put the company into bankruptcy. The result of this decision was that on January 22, 1921, the Court adjudged the company bankrupt.

For the determination of the two issues, namely, the validity of the payment of $40,000 and the validity of the mortgage, it is expedient to consider the affairs of the company from its beginning, and the following is a review thereof as disclosed by the evidence.

The company was incorporated in January, 1922, with power to carry on a milling business, and shortly thereafter was organised, the defendant Graham being chosen president and George B. Jones general manager, and these two officers continued to hold their respective positions until the company's bankruptcy. At this date its paid-up capital was nominally $110,000, but it is difficult to ascertain from the evidence what proportion represented actual cash.

From the evidence of George B. Jones it appears that at

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its inception the paid-up capital stock amounted to $50,000, of which Jones held $25,000, paid for partly with cash and partly with machinery, and the defendant Graham, for himself and other members of his family, held $25,000 stock, paid for with $20,000 cash and a building valued at $5,000, conveyed to the company. Shortly thereafter Jones expressed to the company his opinion that the properties acquired by the company were worth from $75,000 to $80,000, and suggested that the capital stock of $50,000 be regarded as $70,000. This suggestion was acted upon, and thus the paid-up stock came to be treated in the company's books as amounting to $70,000.

In September, 1920, Jones subscribed for $20,000 additional stock in the company at par, and paid therefor in cash, namely, $20,000, and the defendant Graham subscribed for $20,000 additional stock, and paid therefor by conveying to the company certain real and personal property. No question, I think, can arise as to whether the property thus conveyed by the defendant Graham to the company was not worth the full amount of $20,000, for Jones, who paid for his stock in cash, was quite satisfied with the price of the defendant's property. Thus the apparently paid-up capital of the company became $110,000.

On its organisation the company had arranged with the defendant bank for a line of credit to the extent of $150,000, to be secured by warehouse receipts under sec. 88 of the Bank Act, and by the joint and several guarantees of the defendant R. J. Graham, George B. Jones, and Edgar Judge; and, by written guarantee bearing date January 14, 1920, the said Graham, Jones, and Judge became jointly and severally liable to the bank, to the extent of $150,000, in respect of any indebtedness of the company, and this guarantee was in full force when the company, on November 30, 1920, executed the impeached mortgage in favour of the defendant Graham to secure the loan by him to the company of $40,000 to be paid by the company, in reduction of its indebtedness to the bank.

The company's bank-account was carried on at the bank's branch office at Belleville, the manager there being W. A. Parker. In November, 1920, the company owed the bank $113,000 for loans collaterally secured by warehouse receipts; and Mr. Parker, being of opinion that the company's assets were insufficient to cover the $113,000, discussed the company's affairs with the manager, George B. Jones, and the president, Graham, when it was decided by Parker and Graham (as Parker expressed it) "that an audit should be made by a chartered accountant to learn the true condition of the company." Accordingly, Mr. Short was instructed to make an audit, which he

did, and the following is a copy of the company's assets and liabilities on October 31, 1920, as found and reported upon by Mr. Short:—

The Judge-Jones Milling Co. Limited

Balance Sheet as at 31st October, 1920.

Assets.		
Current Assets.		
Cash	51.94	
Victory bonds ($3,000 1934 issue)	2,760.00	
Accounts and bills receivable	49,132.51	
Judge Grain Company	331.18	
Stock-in-trade	94,912.72	
		147,238.35
Investments		200.00
Land, buildings, and equipment		86,198.18
Goodwill		20,000.00
Trademarks		30.00
		253,666.53
Liabilities.		
Royal Bank of Canada		161.484.87
Accounts and bills payable		46,645.89
Reserve for loss on outstanding orders		32,325.07
		$240,435.83
Surplus.		
Capital Stock	110,000.00	
Less loss for year ending 31st October, 1920 (as per profit and loss account)	96,789.30	13,210.70
		$253,666.53

The following are the items as shewn by the auditor which make the company's indebtedness to the bank:—

Amount of indebtedness on loans for which the bank held warehouse receipts	113,000.00
Trade bills in discount	34,801.58
Liability for draft drawn by the company on Gordon Grant & Company, without permission, against stock on consignment	13,126.52
Overdraft on current account	556.67
Making in all	$161,484.87

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Although the auditor's report was not in Parker's hands until about the 1st December, Parker, prior to that date, had learned from Short in a general way the result of the auditor's investigations; and, in consequence, on November 26, 1920, made a written demand on the sureties calling for a substantial reduction in the company's indebtedness to the bank; and, in conversation with the defendant and Jones, Parker verbally stated that he required "a payment of $40,000."

At this time Parker was aware that the company's plant was its only asset wherewith it could raise funds. The company, learning of the bank's demand for payment by the guarantors, offered to give the bank a mortgage on its plant, but this the bank declined, and then it was arranged between Graham and the company that the company would give to Graham a mortgage on its plant for $40,000, which money was to be paid through the company to the bank in reduction of the company's indebtedness, and this arrangement was carried out. Parker was aware of this arrangement; and, in order to enable Graham to raise the full amount of the $40,000, lent for the bank to Graham $17,295, which money Graham paid to the company, and the company paid to the bank on December 9, 1920.

The plaintiff's contention is that Graham was a creditor of the company because of his guarantee (Bankruptcy Act sec. 31 (1), as amended by 10-11 Geo. V. ch. 34. sec. 8, subsec 3), and that the effect of the mortgage, if allowed to stand, would be to give him a preference over the other creditors to the extent of $40,000 paid in reduction of the company's indebtedness and of his liability as such guarantor.

Subsection (1) of sec. 31 of the Bankruptcy Act, as amended by 10-11 Geo. V. ch. 34, sec. 8, declares that: "Every conveyance or transfer of property . . . every payment made . . . by any insolvent person in favour of any creditor, . . . With the view of giving such creditor a preference over the other creditors, shall if the person making . . . the same is adjudged bankrupt . . . within three months after the date of making . . . the same . . . . be deemed fraudulent and void as against the trustee in the bankruptcy . . ." Subsec. 2 of sec. 31, as amended, declares that: "If any such conveyance, transfer, payment . . . has the effect of giving any creditor a preference over other creditors or over any one or more of them it shall be presumed *primâ facie* to have been made . . . with such view as aforesaid, whether or not it was made voluntarily or under pressure, and evidence of pressure shall not be receivable or avail to support such transaction."

The first question to determine is whether the company was

insolvent when the impeached mortgage and payment were made. By subsec. (t) of sec. 2 of the Bankruptcy Act, it is declared that "insolvent person" and "insolvent" include a person, whether or not he has done or suffered an act of bankruptcy, (i) who is for any reason unable to meet his obligations as they respectively become due, or (ii) who has ceased paying his current obligations in the ordinary course of business, (iii) the aggregate of whose property is not a fair valuation sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient, to enable payment of all his obligations due and accruing due thereout."

I find that, when the mortgage transaction was entered into and the $40,000 was paid to the bank, the company was in fact unable to meet its obligations as they respectively became due. I think the evidence shews that the company was in fact insolvent on November 30, 1920.

At the trial leave was given to the plaintiff to amend his statement of claim in the action against Graham by making allegations to the effect that the mortgage transaction, including the payment of the $40,000, was a fraudulent preference within the meaning of sec. 31 of the Bankruptcy Act; and I assume that such amendment has been made. If this mortgage-transaction was merely a loan by Graham to the company on the security of the mortgage, the company being left free to make such use of the mortgage-money as it thought proper, and if Graham, the mortgagee, was in no way responsible for the payment over of the money to the bank, I fail to see how the mortgagee could be successfully attacked. To set it aside as a preference, it is necessary to shew that it was made with a view of giving a fraudulent preference to Graham or to the bank or to both of them.

The evidence is clear that the loan by Graham was not made for the purposes of the company generally, but for one purpose only, namely, for payment through the company to the bank in reduction of the company's indebtedness, for which indebtedness Graham, as surety, was liable. It appears from the Company's minutes that the Board was aware of the bank's demand upon the sureties, and that the amount required of them was $40,000; that the company had no assets whereby it could raise that amount except the property mortgaged to Graham; and that the Board authorised the making of the mortgage to Graham for the single purpose of obtaining from him $40,000 to be so paid to the bank. It further appears that Parker, the bank-manager, was aware of this plan for raising the money to be paid to the bank, and assisted in its being carried out by

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lending to Graham a portion of the mortgage-money. By December 9 the whole $40,000 lent by Graham to the company had been paid to the bank in reduction of the company's indebtedness, whereby Graham's liability as surety became also reduced by $40,000. As surety to the bank, Graham, within the meaning of the Act, was a creditor of the company. The company was insolvent when it made the mortgage, and within 3 months thereafter was adjudged bankrupt. Was this mortgage made to him, or the payment by the company to the bank made, with a view of giving him, or the bank, a preference over the company's other creditors? Section 31 of the Bankruptcy Act, as amended by 10 & 11 Geo. V. ch. 34 sec. 8 (2), has settled the much debated question whether a payment, etc., which has the effect of preferring one creditor is per se invalid, or whether in order to secure its invalidation it is necessary to shew that it was made with the view of preferring, i.e., that, although the effect is *primâ facie* evidence of an intention to prefer, such intention is rebuttable.

The mortgage-transaction, and in this expression I include the payment of the money by the company to the bank, reduced the company's indebtedness to the bank and the liability of the defendant Graham, the effect of which was, to give the bank and the defendant Graham a preference over the company's other creditors, and thus cast upon them the onus of rebutting the *prima facie* presumption of an intention to prefer. The issue thus raised is one of fact, and I will now deal with the evidence relied upon in support of and against the transaction.

[The learned Chief Justice abstracted the testimony of George B. Jones, a director and general manager of the company; of Jamieson Bowen, vice-president of the company and holder of a considerable amount of stock therein; of the defendant R. J. Graham; of George K. Graham, another director; of Mr. Short, the auditor; of Mr. Parker, the bank-manager; and continued:]

Edgar Judge, one of the company's directors had died before the trial, but all the surviving directors, namely George B. Jones, Jamieson Bowen, R. J. Graham, George K. Graham, gave evidence at the trial.

The effect of the mortgage-transaction having been, I think, to raise a *primâ facie* presumption that it was made with a view to preferring Graham or the bank over the company's other creditors, the question is, whether that presumption has been rebutted. I see no reason for disbelieving the evidence of any of the directors, George B. Jones, Jaimeson Bowen, R. J. Graham, and George K. Graham; on the contrary, I am of the op-

inion that they each gave truthful and reliable evidence. Their confidence in the company's possibilities was not without reasonable foundation. Mr. Jones, the manager, an experienced miller, reliable and intelligent, had embarked his whole fortune in the enterprise; he had built up for the company a profitable local trade; the flour was of a brand that commanded a good price, which largely took care of any loss because of the fall in the price of wheat; and he honestly believed that the company would be able to extricate itself from possible loss in the cost of wheat, both delivered and to be delivered. Further he had been led to expect a rise in the price of wheat, hence his optimism which he impressed upon his co-directors, men having no practical experience in the milling or grain business. As he gave his evidence, I formed the opinion that he was an upright, intelligent man, and I can readily understand his co-directors, more or less intimately associated with him in the conduct of the company's business, honestly accepting his views as to the company's possible promising future and being guided by him in their direction of the company's affairs.

The evidence rebuts the *primâ facie* presumption that the company, intended to prefer either Graham or the bank to its other creditors. The test is, was the operative and effectual object of the company to give both or either of the defendants a preference? The language of the statute is clear. In order to the invalidation of the impeached transaction it must appear to the Court that it was entered into with a "view of giving such creditor a preference over the other creditors." The intention of the company alone is to be considered. In seeking to ascertain what was such intention, it is proper to inquire into the attendant circumstances, but only for the purpose of enabling the Court to determine the crucial question, "What was the company's view?" A preference and a fraudulent preference are vitally different. The statute prohibits a fraudulent preference only, not what may in fact be a preference, but which lacks the element of intention on the part of the debtor to give to the preferred creditor a preference over the other creditors. The Bankruptcy Act does not apply to a preference of the latter nature. In other words, to constitute a fraudulent preference there must be present two circumstances, a preference in fact and an intention on the part of the debtor to prefer: ***Ex p. Blackburn*** (1871), L.R. 12 Eq. 358, 365; ***Ex. p. Griffiths*** (1883), 23 Ch. D. 69; ***Ex p.*** Hill (1883), 23 Ch. D. 695; ***Long*** v. ***Hancock*** (1885), 12 Can. S.C.R. 532; ***Ex. p. Taylor*** (1886), 18 Q.B.D. 295; ***New Prance and Gerrard Trustee***

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v. *Hunting*, [1897] 2 Q.B. 19; *Sharp* v. *Jackson*, [1899] A.C. 419.

The financial history of the company from its inception until its bankruptcy, as unfolded before me in the early part of the trial, caused me to regard the mortgage-transaction with grave suspicion, but the evidence in support of it imparted to it a different complexion. Nevertheless, the circumstances that the company, being in fact, at the time, insolvent, had made the mortgage to its president, a creditor, and had, within less than 2 months become bankrupt, demanded the closest scrutiny of the evidence. After having given to it the most careful consideration, I have reached the conclusion that the mortgage-transaction was free from any taint of fraud; that the company entered into it for the sole object and in the *bonâ fide* expectation and belief of being thereby enabled to carry on its business successfully, and not with the view of preferring either the defendant Graham or the defendant bank to the company's other creditors.

For these reasons both actions fail and should be dismissed with costs.

Some time after the delivery of judgment as above, a creditor of the Judge-Jones Milling Company, Limited, made a motion before MULOCK, C.J. Ex. for the purposes set out below.

J. J. Maclennan, for the applicant.

J. W. Pickup, for the defendant Graham.

MULOCK, C.J. Ex.:—This is a motion on behalf of a creditor of the bankrupt company for an order amending the style of cause by entitling the same as required by Rule 7* of the Bankruptcy Rules; and also for a re-consideration of the disposition which I made of the costs of the actions.

Both of the actions grew out of the same transaction, and were tried together before me at the Belleville sittings, and were dismissed with costs. The formal judgment has been entered in the action of *Burns* v. *Royal Bank of Canada*, and therefore I have no power to change it. Formal judgment has not been entered in the case of *Burns* v. *Graham*, and I am therefore still seised of that case and have power to deal with the motion on its merits.

The facts which I consider material to the determination of that motion are as follows. The plaintiff, as authorised

*7. Every proceeding in Court under the Act shall be . . . intituled in the name of the Court in which it is taken "In Bankruptcy," and then in the matter to which it relates. . .

trustee in bankruptcy of the Judge-Jones Milling Co., sought to have certain alleged fraudulent preferences set aside. The actions were each begun by writ of summons, followed by statements of claim and defence and joinders of issue, and what were tried were the issues raised by these pleadings. The plaintiff's counsel closed each case without shewing or suggesting any authority to the plaintiff from the inspectors in bankruptcy to institute these actions. In the course of the defence, the plaintiff on cross-examination was asked by what authority he brought the actions, and he said by the written authority of the inspectors, whereupon his counsel undertook to prove such authority, but did not do so; and, when considering the question of costs, it not appearing that the actions were brought by virtue of any provisions of the Bankruptcy Act, I did not assign reasons, as contemplated by Rule 54 (3)† of that Act, for my disposition of the costs, but dealt with them as in ordinary actions.

The moving creditor now invokes the provisions of Rule 54 (3), and states that before the trial an order had been made in Chambers directing what issue was to be tried, and that therefore the actions should be considered as brought in accordance with the provisions of the Act. This was the first intimation I had of such an order, but its existence does not cause me to change my disposition of the costs. The circumstances connected with the giving of the impeached preferences were suspicious; the plaintiff, however, apparently took no steps to ascertain whether such suspicion was well-founded, but launched these actions, charging fraud against the defendants. The charges were baseless, and the defendants were entitled to unqualified vindication of their conduct, a material element of which, in my opinion, is payment of their costs by the party responsible for the charges.

On the motion it was urged that the costs should have been made payable out of the estate; but from the evidence I doubt if there are assets wherewith to pay the defendant's costs. Even if there are, they should not be wasted in unwise and profitless litigation, as too often happened under the repealed Insolvent Act. If the estate were not good for the costs, and the plaintiff were not required to pay them, the defendants

†54. (3) Where an action is brought by or against an authorised trustee as representing the estate of their debts, or where an authorised trustee is made a party to a cause or matter, on his affiliation or on the application of any other party thereto, he shall not be personally liable for costs unless the Judge before whom the action, cause or matter is tried for some official reason otherwise directs.

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would be penalised in defending their rights and their honour. I therefore see no reason for changing my direction as to costs.

With reference to the other branch of the motion, namely, to change the style of cause, the proceedings were not begun under the Bankruptcy Act, and the style of cause should not be changed.

[On the 2nd October, 1922, appeals from the judgment of MULOCK, C. J. Ex., in the two actions, were heard by the First Divisional Court of the Appellate Division, and were dismissed with costs, as regards the dismissal of the actions. The question of the costs of the actions was reserved for further consideration.]

REX v. L.

Ontario Supreme Court, Riddell, J. February 1, 1922.

SUMMARY CONVICTIONS (§III—30)—OBSTRUCTING PEACE OFFICER—ACQUITTAL—RESERVED CASE.

The provisions of Part XV of the Criminal Code, as to summary convictions, applies to a charge, under sec. 169, for obstructing a peace officer, and the Crown may proceed by reserved case under sec. 169 from a summary acquittal of the accused by the magistrate.

OBSTRUCTING JUSTICE (§I—1)—HINDERING OFFICER SEARCHING FOR LIQUOR —COUNSELLING.

Advice not to give names to officers in search for liquor for alleged violations of the Temperance Act, or directing threatening or offensive words against them when performing the search, is an obstruction of the officers in execution of their duty, punishable as an offence under sec. 169 of the Criminal Code, and also amounts to "counselling to commit the offence" within the meaning of sec. 69(d).

CASE reserved and stated by one of the Police Magistrates for the City of Toronto, before whom the defendant was tried on a charge of obstructing constables in the execution of their duty, contrary to the Criminal Code, sec. 169. The Magistrate acquitted the defendant without calling on the defence; and, in the application of the Crown, reserved a case under sec. 761 of the Criminal Code.

Edward Bayly, K.C., for the Crown.

R. H. Greer, K.C., for the defendant.

RIDDELL, J.:—This case has been ably and exhaustively argued upon both sides and presents several questions of great interest from a legal point of view. Both parties desire me to dispose of it: it is stated that there is no intention to proceed further against the defendant, and that what is desired is a decision on pure law—"dry law"—though this is a whiskey case. It is desired to have a declaration of the law for the guidance of magistrates in the future.

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The defendant was tried before Mr. J. E. Jones, Police Magistrate at Toronto, on a charge of obstructing constables "in the execution of their duty, contrary to the Criminal Code, sec. 169"—the Police Magistrate acquitted without calling on the defence; but, on the application of the Crown, reserved a case for the Supreme Court under sec. 761 of the Criminal Code.

It is necessary first to dispose of the objection that the Court has no jurisdiction in the premises.

The argument is that the offence charged comes under sec. 773 (*e*) of the Code; that this section is in Part XVI.; that, except as to particular offences specially referred to in secs. 797, 798, the provisions of Part XV. are not applicable to the offences in Part XVI.; that sec. 773 (*e*) does not deal with any of such particular offences; and that, consequently, the provisions of Part XV. (sec. 761 *et seq.*) as to a case stated do not apply.

The distinction between the "Summary Convictions" of Part XV. and the "Summary Trial" of Part XVI. is well-known; and, if the present were a trial under any section of Part XVI., the objection would be fatal.

But the Code by sec. 169 provides that "Every one who . . . wilfully obstructs any peace officer in the execution of his duty . . . is guilty of an offence punishable on indictment or on summary conviction" and is liable, "on summary conviction before two Justices, to 6 months' imprisonment. . . ."

The information was laid and the trial was had under this sec. 169. There has been a difference of opinion as to whether one charged under this section could be summarily tried without his consent.

In *Reg.* v. *Crossen* (1889), 3 Can. Cr. Cas. 152, it was held by the Manitoba Court that he could not be tried without his consent, on the ground that sec. 783 (*e*) of the Criminal Code of 1892 (the present 773 (*e*)) was the controlling section, and that section did not authorise such a procedure. This decision came up for review in British Columbia in *Rex* v. *Nelson* (1901), 4 Can. Cr. Cas. 461, 8 B.C.R. 110. Drake, J. in a careful judgment discusses the Manitoba case, and gives what to my mind are sufficient reasons why it should not be followed. The case in our Appellate Division, *Rex* v. *West* (1915), 25 Can. Cr. Cas. 145, 35 O.L.R. 95, is conclusive so far as any Ontario Court is concerned—that case decided that the Crown may elect to proceed under sec. 169 rather than sec. 773 (*e*); and, if that course is pursued, Part XV. applies.

I must, therefore, overrule the preliminary objection.

Then as to the merits. The evidence before the Court is that

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for the prosecution—from this, the facts seem to be as follows.

On December 2, 1921, J. R. Smythe and F. B. Creasy, provincial constables, with G. Fielding, a special officer under the Ontario Temperance Act, went to the Mansion House at Sutton, a standard hotel, at which meals and refreshments are served. Fielding told Graham, the proprietor of the hotel, that he wished to search the hotel for liquor kept contrary to the Ontario Temperance Act; Graham consented; the three officers went to room 11 on the second floor of the hotel, and found there 8 men sitting and standing around the room, and two bottles of liquor underneath a small table in the room—there were no glasses. Fielding seized the bottles, one of wine, the other of whiskey, and passed them one to each constable. He continued searching the room—the defendant tried to enter the room, and finally succeeded.

So far the facts are preliminary, and not of great importance.

When the defendant entered the room, he asked what was going on in the room, and he was answered, "There are provincial police in the room." The constable Creasy said to his mate, Smythe, "Take the names of the men in the room," and the defendant then said: "Don't give your names to these skunks—give them Smith, Jones, or any old thing." Smythe asked a man in the room for his name, and was refused—the two officers "asked every one in the room their name," and they refused, they did not say why. One man who seems to have been known to Fielding gave his name as Smith, his name being T. A. The constables, on the defendant asking their authority for entering the room, shewed their provincial police badges and the defendant said, "Any fool could have a badge like that." He asked if they had a warrant, and was informed that no warrant was necessary, that they were from provincial police headquarters, "General Elliott's men"—the defendant then said that he did not think General Elliott sent them there; that they should have been thrown out of the window when they entered the room, and if he had been there he would have done it.

So far the story is from Fielding—Smythe says that when the defendant said, "Don't give these skunks your names—give them Smith, Jones, or any old thing"—"there was a chorus came from the crowd when Mr. L. (the defendant) said that, said they would refuse to give their names. Constable Creasy spoke up and said, 'Well, you all refuse to give your names?' and the chorus came back from the crowd, 'Yes'—all refused to give their names, they were going to abide by

what Mr. L. said." The evidence of Creasy does not add anything of value.

On the close of the case for the Crown, the Police Magistrate did not call on the defence; he said that the Act did not make it an offence "for somebody to advise somebody else not to give his name." He dismissed the charge upon this ground.

In the case stated under sec. 761, the Magistrate intimates that the dismissal was because he "was of opinion that anything the defendant may have said did not in fact influence any of the persons present to do any act that obstructed the constables in the execution of their duty."

Of course that is not the charge which was tried—the defendant was charged with himself obstructing, not with influencing others to do an act which did obstruct the constables. I must, however, consider the statement in the case as giving the magistrate's reason for the dismissal.

In my view, the magistrate is wrong.

The officers were acting under the provisions of the Ontario Temperance Act (1916), 6 Geo. V. ch. 50, and amendments. Section 66 authorises their entry into this "place of public entertainment," and also their search; while sec. 68 (2) provides that they "may demand the name . . . of any person found therein," when they seize liquor in any unlicensed premises.

It is argued that sec. 68 (2) gives this authority only when the officer is acting "in pursuance of the next two preceding sections or either of them," and that the Legislature by the Act (1920) 10 & 11 Geo. V. ch. 78, sec. 10, has introduced a section 67*a*, and thereby removed sec. 66 from the category, "the next two preceding sections." But the Legislature did not direct that the new section 67*a* should be interpolated; the direction was that the Act should be amended by adding it. The fact that in one edition of the Department compilation the amendment is printed between sec. 67 and 68 is of no more importance than that in another edition (now before me) it is printed as a mere subsection (*a*) without number. The legislation is the legislation of the Legislature, not that of a departmental officer, of a department, or of the Government itself—no act of an officer can affect the rights and duties of the subject. See *Hirshman* v. *Beal* (1916), 32 D.L.R. 680, 28 Can. Cr. Cas. 319, 38 O.L.R. 40.

To interpret a statute, words are taken in the sense which they bore at the time when the statute was passed, and they are not affected by matter subsequent: Craies' Hardcastle on Statutes, 2nd ed. (1911), pp. 87 *et seq.*, and cases quoted.

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The statute provides that the officers "may demand the name"—while it is true that the word "may" is *ex facie* permissive, it is also true that, in such a connection, it indicates an obligatory duty imposed upon these officers of the law. All the English cases from *Julius* v. *Bishop of Oxford* (1880), 5 App. Cas. 214, down to 1903, are collected in Stroud's Judicial Dictionary, *sub voce* "May"—and I do no more than refer to that valuable book.

It was within the realm of legal duty for the officers to demand the names; it, thereupon, became the legal duty of those asked to furnish the names. If they refuse to do so, they incur a penalty under sec. 68; that a penalty imports a prohibition is a principle almost as old as the common law itself. It was, perhaps, first articulately expressed by Holt, C.J., in *Bartlett* v. *Vinor* (1693), Carth. 252—"a penalty implies a prohibition, though there are no prohibitory words in the statute." See *Cope* v. *Rowlands* (1836), 2 M. & W. 149, at pp. 157 *et seq.*, per Parke, B. It may be noted that our Code does not forbid murder—all that it does is to provide (sec. 263) that "every one who commits murder is guilty of an indictable offence and shall on conviction thereof be sentenced to death."

It being the duty of the officers to demand and of the men in room 11 to supply, when demanded, the names, the sole question is, whether advice by the defendant to refuse to give the names—or, what amounts to the same thing, to give false names—is an obstruction of the officers in the execution of their duty.

It is, of course, elementary that it is the moral duty of every citizen to do his part in having the law obeyed—no one has any moral right to oppose the operation of any law, however much he may disapprove of it—there is a constitutional method of repealing obnoxious laws; but, so long as a law is on the statute-book, it must be obeyed by every law-abiding man.

This consideration does not at all conclude the case—there are many moral duties of which the law takes no cognisance, and many acts there are to be deplored, perhaps reprobated, which cannot be punished.

To come to the facts of this particular case—it is stated that the defendant is a lawyer—Fielding on cross-examination says that he knew he was a lawyer, but he does not give the grounds of what could only be a belief, not knowledge; and both the magistrate, Crown counsel and the defendant's counsel speak of him as such—the magistrate saying: "Mr. L. may, unintentionally perhaps, have encouraged his clients by bad advice to commit an offence themselves, but he, himself, I take it, has

not . . . committed an offence." There is no legal evidence here that he is a lawyer; but, if we assume that such is the fact, he is not advantaged—nor would he profit if the persons to whom he gave the advice were his clients, as to which there is no semblance of evidence. A lawyer has no more right to advise his clients to break the law than a layman so to advise another layman. Moreover, if from the manner in which the evidence of Fielding was brought out, it should be taken as a fact as against the defendant that he is a lawyer, it seems to me that it would tell against him, as advice on a legal matter from a lawyer would naturally be expected to have more effect than advice from a layman.

Whether the defendant, by giving advice to those whose legal duty it is to give their names, is or can be guilty under sec. 169, depends upon the meaning of the words "wilfully obstructs" in that section. That the acts of the defendant were wilful cannot be doubted, and we have only to interpret the word "obstruct."

Too much stress should not be laid on the cases of obstructing engines, carriages, &c., on a railway, as these are not wholly cognate matters—such are *Reg.* v. *Hadfield* (1870), L.R. 1 C.C. R. 253; *Reg.* v. *Hardy* (1871), L.R. 1 C.C.R. 278—these cases shew, however, that even in railway cases the obstruction need not be a physical obstruction. "The gist of the offence to my mind lies in the intention with which the thing is done:" per Darling, J., in *Betts* v. *Stevens*, [1910] 1 K.B., at p. 8.

While "obstruct" does imply opposition, it may be without active force, and the word "does not imply that the opposition was in the end effective:" *United States* v. *Williams* (U.S.), 28 Fed. Cas. 631, 633, quoted in "Words and Phrases," vol. 6, p. 4890. The criterion apparently adopted in this case by the magistrate, that there is no obstruction if what is complained of does not, in fact, prevent the officers from doing their duty, is not the true one.

That the obstruction need not be physical is shewn by the case of *Betts* v. *Stevens*, [1910] 1 K.B. 1—the opinion of Ridley, J., in *Bastable* v. *Little*, [1907] 1 K.B. 59, at p. 62, is not law. As our Court of Queen's Bench said in *Reg.* v. *Plummer* (1870), 30 U.C.R. 41, at p. 42, "A person may be obstructed in the performance of his duty and I think that threats may constitute an obstruction."

Obstruction then being not necessarily physical or effective, I think anything is obstructing an officer in the execution of his duty, the natural effect of which would or might be to pre-

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vent him from obtaining evidence concerning an offence, real or supposed, against the law, which it is his duty to investigate, or concerning which it is his duty to seek or obtain evidence (of course, this is not a definition, as it is far from being exhaustive). The fact that the officer might have proceeded against the recalcitrants here under the provisions of sec. 68 (3) of the Ontario Temperance Act is of no consequence: *Betts* v. *Stevens*, [1910] 1 K.B. at p. 7.

In my opinion, the natural effect of the defendant's words, especially if he is a lawyer, and more especially if, as has been stated, he is a member of the Legislature, and a man of great influence in that community, would be to prevent the names being given to the officers, and thereby to obstruct the officers in the execution of their duty.

The violence of the language is an element to be considered by the magistrate, though I cannot understand why an officer performing a statutory duty should be spoken of and to with an offensive epithet—no doubt the excitement of the time will account for, if it does not excuse, the language used—but surely there can be no more reason for insulting an officer performing this duty than any other.

There is another consideration which seems to have been wholly overlooked.

Section 69 (*d*) of the Code expressly provides that "every one is a party to and guilty of an offence who . . . counsels . . . any person to commit the offence."

This is a technical but not a substantial variation of the common law in some cases. At the common law, one who is not present at the commission of a felony but who procures, counsels, commands, or abets another to commit the felony, is an accessory before the fact: 1 Hale P.C. 615; Russell on Crimes and Misdemeanours, 7th ed., vol. 1 p. 116. If he is present so counselling, etc., but does not personally do the felonious act, he is a principal in the second degree. In misdemeanours, there is no distinction between the principals and accessories: *Reg.* v. *Burton* (1875), 13 Cox C.C. 7; *Der Cros* v. *Lambourne*, [1907] 1 K.B. 40; *Rex* v. *De Marny*, [1907] 1 K.B. 388.

Our Code makes no distinction between accessories before the fact and principals; and secs. 69 and 70 are clear.

Mere passive presence when an offence is committed is not necessarily a participation in it, but "wilfully encouraging" it is; *Reg.* v. *Coney* (1882), 8 Q.B.D. 534; 51 L.J. (M.C.) 66—see per Hawkins, J., at p. 78; *Howells* v. *Wynne* (1863), 32 L.J. (M.C.) 241, 15 C.B. (N.S.) 3; *Barrett* v. *Burden* (1893), 63 L.J. (M.C.) 33.

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That the defendant here counselled and "wilfully encouraged" the offence of refusing to give names is clear, so far as the evidence has gone—he, therefore, would be guilty of the offence itself on this evidence.

It can scarcely be argued that the refusal of those present to give their names was not obstructing the officers in the execution of their duty—and on this evidence the defendant was guilty of that offence.

The statement of the accused as to throwing the officers out of the window might justify a finding of obstruction, on the principle of the remarks of Wilson, J., in *Reg.* v. *Plummer*, already quoted—but the magistrate might prefer to look upon the language as Bole, Co. C.J., did on that employed by the defendant in *Rex* v. *Cook* (1906), 11 Can. Cr. Cas. 32, at p. 33; the Judge considered the defendant an "individual who evidently regards the police with disfavour and makes no secret of his opinions on the subject." In other respects, the defendant can get little comfort from that case, as the learned Judge expressly excepts from protection those who "are inciting others to break the law" (p. 33).

Whether the defendant could set up ignorance of the status of the officers, on the principle of such cases as *Rex* v. *Smith* (1921), 67 D.L.R. 273, 38 Can. Cr. Cas. 21, I do not decide. Probably such a defence would not be set up; at all events, there is no decision yet on the fact, and the matter should remain open. If and when the matter comes to be considered, such cases as *Reg.* v. *Forbes* (1865), 10 Cox C.C. 362, will receive attention.

The case has not been fully tried: under sec. 765 of the Code, I remit the matter to the magistrate with the opinion of the Court as above set out, and a direction to try the case and adjudicate thereon in accordance with the above opinion.

If I have power over the costs, I direct that the defendant pay the costs of the case stated.

Case remanded.

REX v. KAPLANSKY, SACHUK, AND SENILOFF.

Ontario Supreme Court, Riddell, J. February 7, 1922.

TRIAL (§IH—39)—JUDGE'S COMMENT—FAILURE OF ACCUSED TO TESTIFY. **The pointing out by the trial Judge, in his charge to the jury, that the evidence for the prosecution has been wholly uncontradicted, the accused not having testified, does not amount to comment upon the failure of the accused to give evidence in his own behalf, prohibited by the Evidence Act.**

EVIDENCE (§V—505)—VIEW BY JURY—VEHICLE—ROBBERY.

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A jury, hearing evidence in a trial for robbery, may be allowed view of a vehicle which figured in the robbery.

EVIDENCE (§XIT—885)—STATEMENTS AS TO ROBBERY.

The statements of a witness, who was on the scene of a robbery, as to the identity of and his conversations with the participants, are admissible in evidence on the trial of the latter upon such charge.

JURY (§IA—40)—TRIAL BY JUDGE OR JURY—CRIMINAL CASE.

The right to be tried by a County Court Judge is given only where there has been an actual election by the prisoner; and where the offence charged is punishable by imprisonment for more than 5 years, the Crown has the right to require the person charged to be tried by a jury.

MOTION for a reserved case. Refused.

J. G. O'Donoghue, K.C., for the prisoner Seniloff.

RIDDELL, J.:—At the current Toronto Criminal Assizes the three prisoners were convicted before me, under sec. 446 (*c*) of the Criminal Code, for robbery while armed. I sentenced Sachnak and Kaplansky to imprisonment for life, as I considered—and consider—them too dangerous to be at large. The jury recommended Seniloff to mercy, believing that he had been led into crime by the other two; and I postponed sentence upon him until I could make inquiry. The two have made confessions of their own guilt in the form of statutory declarations; but they declare that the only part played by Seniloff was lending them $900 (with which they bought the car in which the robbers escaped) on the promise of "payment of $100 for the use of it for a week or two," and that they "told him it was none of his business what they wanted it for." Seniloff received $1,000 of the money obtained in the robbery; and gave a false account of how he obtained it, to the police, to his counsel, and on oath at the trial.

I have been able to give effect to the recommendation to mercy made by the jury, by reason of the fact that I do not think him at all likely to repeat the offence. I sentenced him to 10 years' imprisonment.

He now asks me to reserve a case under sec. 1014 of the Code the following grounds being set out in the motion-paper:—

1. Did your Lordship comment upon the failure of Kaplansky to give evidence?

2. Was your Lordship right in directing the jury that they must not use information acquired by them from a view of the car?

3. Was your Lordship's charge to the jury a fair one?

4. Was the evidence of statements by the late Mr. Burns admissible under the circumstances?

5. Had the Crown the right, by a precipitate presentation of the charge to the grand jury at the Assizes, to deprive the accused of their right to elect to take a trial by a County Court Judge without a jury, under Part XVIII. of the Criminal Code?

1. In speaking of Joseph Burns (now deceased) charging Kaplansky to his face with having been the driver of the car in which the robbers escaped, I said, "And he did not deny it." This was following my remarks as to the effect of omission to deny a charge of crime (to be spoken of later); and no one could have imagined that it referred to anything else.

I proceeded in the charge thus: "There are Warren, Monkhouse, Brounscombe, Connell, and Burns" (these witnesses had identified Kaplansky). "Have you any evidence the other way? If so where do you get it?" Such statements I have heard a score of times, both before and after the statutory provision permitting an accused to testify in his own behalf. I certainly did not "suggest or intend to suggest to the jury that the prisoner might have given evidence in his own behalf, or that an inference unfavourable to him might be drawn from the fact that he had not done so." See per Osler, J.A. in *Rex* v. *Burdell* (1906), 11 O.L.R. 440, at p. 448, 10 Can. Cr. Cas. 365, at p. 374. In *Rex* v. *Aho* (1904), 8 Can. Cr. Cas. 453, 11 B.C.R. 114, directing the jury that the accused had not accounted for a particular circumstance was held not to be a comment. In *Rex* v. *Guerin* (1909), 14 Can. Cr. Cas. 424, 18 O.L.R. 425, I had told the jury that certain evidence was wholly uncontradicted; Mr. Curry moved for a reserved case on the ground that this was an indirect comment on the fact that the prisoner had not given evidence; I refused to reserve a case; and the matter was not taken further.

It seems to me that it must always be open to the Judge to point out that certain evidence is wholly uncontradicted; and to rule that such a remark as was here made was in contravention of the Evidence Act would have the effect of preventing this being done. To hold that this is prohibited by the Act would be to hold that the Act has not only authorised the accused to testify on his own behalf, but also has increased his protection if he chooses not to testify; it could not be pretended that such a statement would be objectionable at the common law. It appears to have been held that mention without unfavourable comment does not violate the Code: *Rex* v. *MacLean* (1906), 11 Can. Cr. Cas. 283.

2. This is probably the real ground of the application. It was sought by the Crown to establish that a car—now admitted

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to have been bought with Seniloff's money—was the car in which the robbers escaped. Some evidence was given on both sides as to certain marks upon the car bought with Seniloff's money, and at the time of the trial in a yard near to the court-room.

After the evidence was all in, and counsel were to address the jury, Mr. O'Donoghue said, "I suppose the jury will look at the car?" Under sec. 958 of the Code, I gave directions that the jury, during the adjournment for luncheon, should see the car, in the presence of counsel for both sides, who might point to anything, but not explain or argue about anything; and I warned the jury not to make up their minds upon the result of their examination "until both counsels have spoken to you and you have heard my remarks."

In my charge, I directed the jury to apply their "minds solely and entirely to finding a verdict according to the evidence which you have heard adduced here in the box. When I permitted you to go and see the car it was not in order that you might make evidence for yourselves, it is only so that you might have a picture of the car on your minds and be able better to apply to it the evidence you have heard here in the box. If one of you found out some facts about that car when looking at it which was not given in evidence in the box, it was your duty to go into the witness-box and give evidence about it so that your fellow-jurors would have knowledge of it as well as you. You have no right to use knowledge acquired from any other place than the witness-box when determining your verdict. I possibly might have warned you before you saw the car what your duty was in that respect. I did not think it necessary. The object in your seeing the car was that you would be able to apply to it the evidence given in the witness-box. You must determine the facts of this case upon the evidence you heard in the witness-box, such part of it as you believed."

Certain objections were taken to the charge, all of which were acceded to with the exception of that as to the effect of the view. Counsel for the defence argued that "the jury is entitled to have every exhibit in the case and are entitled to reach such conclusions as can be taken from a view of the exhibits." I said: "The car was not an exhibit. I was asked to allow the jury to see the car. It was never put in as an exhibit."

I stated my intention to ask the jury what would be the result if they used such knowledge and what if they did not, but I refrained from doing so, lest anything on my part might even throw doubt on law thoroughly established.

There is no foundation for the claim of the prisoner in history, principle, or authority.

Whatever may have been the rule at common law, as to which there seems to be some doubt, the modern practice of view began with the statute of (1705) 4 Anne, ch. 16, which by sec. 8 provided for a view by the jury of "the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trial of such issues." A quarter of a century afterwards, the statute (1730) 3 Geo. 11, ch. 25, sec. 14, followed, and then that of (1825) 6 Geo. IV, ch. 50, which by sec. 23 made a similar provision with the same object, "in order to their better understanding the evidence that may be given upon the trial" in any civil or criminal case.

The practice in England being quite clear, the Legislature of Upper Canada, as adjective to the Court of King's Bench just being established, in our first Jurors Act provided for a case "where a view shall be allowed," (1794) 34 Geo. III. ch. 1, sec. 14 (U.C.), but gave no direction as to the kind of case in which a "view shall be allowed," that being covered by (1792) 32 Geo. III, ch. 1 sec. 3, and (1794) 34 Geo. III. ch. 2, sec. 14 (U.C.), which last section introduced "each and every of the statutes for the amendment of the law excepting those of mere local expediency enacted respecting the law of England." The section providing for a view unaltered in the revision of 1802 (p. 34). So far a view could be had only in civil cases. But in 1850 the statute 13 & 14 Vict. ch. 55, (Can.), by sec. 50, introduced the provisions of the English Act of 1825, so that a view of "the place in question" was allowed "in any case either civil or criminal in order to their better understanding the evidence that may be given upon the trial." This went by the Board in 1850, when C.S.U.C. 1859 ch. 31, sec. 124, was substituted, but the object of the view was expressed in the same language.

In the *annus mirabilis* of criminal legislation, 1866, the Act of 1859 was *pro tanto* repealed and 29 & 30 Vict. ch. 46, by sec. 1, was substituted, with no change in terminology; this came forward as R.S.C. 1886, ch. 174, sec. 171, which was in force until the coming into effect of the Criminal Code of 1892. So far it was only a "place" of which a view could be had, but the Code of 1892, 55 & 56 Vict. ch. 29, by sec. 722, gave authority to the Court to "direct that the jury shall have a view of any place, thing or person;" there is no suggestion that such view is at all different in its purpose from the view already well-known, and nowhere is a view made evidence. This is the present statutory law, there is no historical basis for the prisoner's claim.

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Nor can the claim be supported on principle.

All the evidence is before "the Court and jury sworn;" it is the right and duty of the Judge to see and hear all the evidence: it is his right and it may be his duty to comment upon any part of the evidence. There is no law permitting the Judge to have a view: and if he had a view the trial would be abortive: *Regina* v. *Petrie* (1890), 20 O.R. 317. To make an object of which a view is had evidence, it would be necessary to bring it before the Court in the court-room or for the Court to be adjourned to the place where the object was. The latter I should have done had I been asked, but I was not asked. The matter, probably, was too trivial to justify the able and experienced counsel for the prisoner making such a request.

At all events I did not see the object, and it was not in evidence.

Authority is the same way. So far as I know, it has been uniformly laid down in the English Courts and our own, that "a view . . . is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence" per Lord Alverstone, C.J., in *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135, at p. 139. In that case Farwell, J., trying the action without a jury, viewed the two rival omnibuses of the parties and decided upon the evidence of his own eyesight that that of the defendant was an unlawful imitation of the other. On appeal, counsel for the plaintiffs (pp. 136, 137) said: "The practice is, where a jury has had a view, not to call evidence to shew what the facts are, the jury being able to see them for themselves." Lord Alverstone said: "I have never heard it suggested before that the plaintiff in an action for deceit could rely upon a view alone for proving his case." In giving judgment, Lord Alverstone gave the theory of the purpose of a view in the words already quoted. Rigby, L.J., entirely agreed in those observations (p. 140).

I can find no case which holds the contrary in the English reports or our own; and it has always been held that the object of a view in a case, civil or criminal, is that expressed in the original statute, 4 Anne ch. 16, sec. 8, "in order to their better understanding the evidence." See also *Chute* v. *State of Minnesota* (1872), 19 Minn. 271, at p. 281; *Brakken* v. *Minneapolis and St. Louis Railway Co.* (1881), 29 Minn. 41, at p. 43; *Close* v. *Samm* (1869), 27 Ia. 503, at p. 507; *Reg.* v. *Martin* (1872), L.R. 1 C.C.R. 378; Thompson on Trials, vol. 1, sec. 889; Taylor on Evidence, 11th ed., vol. 1, pp. 389-391.

Of course, a contrary rule obtains in some of the United

States, as is detailed in the voluminous works of Wigmore and Thompson; the decisions are not of authority with us, and I do not quote them.

The *obiter* statement in my charge that jurors cannot use private knowledge but must be sworn, I need not pursue. The *obiter* doubts of Armour, C.J., in *Reg.* v. *Petrie*, 20 O.R. 317, seem unfounded. See *Manley* v. *Shaw* (1840), Car. & M. 361; *Regina* v. *Rosser* (1836), 7 C. & P. 648; *Rex* v. *Sutton* (1816), 4 M. & S. 532; nor may a Judge use private knowledge; *Hurpurshad* v. *Sheo Dyal* (1876), L.R. 3 Ind. App. 259, at p. 268; *Reg.* v. *Sproule* (1881), 14 O.R. 375, at p. 386, and cases cited.

It has no effect on my judgment,, but it may be observed that the reason for the defendant's wishing a view was to dispute the identity of the car in the court-house yard with a car sworn by one Connell to have collided with a post. All this might have been omitted by the Crown without a weakening of the case against the accused.

3. I fail to apprehend the purport of the objection. I fully charged the jury that, as they could not take it upon themselves to correct me in my law, "when it comes to fact the reverse is the case; I do not dictate to you what facts you shall find; you have taken your oaths . . . to find the facts . . . and it is upon your responsibility to your Maker, you must find the facts." Speaking of the Judge expressing a view of the facts, I said: "If he does so, the jury are not bound by that at all . . . he in no wise takes away from them the responsibility on their oaths to find a verdict upon the evidence as they believe it." "You are not to be governed by what I think; it is for you to make up your mind what part of the evidence you believe, and upon that you find your verdict." Over and over again it was brought home to the jury that they were the sole judges of the fact, and no objection was taken to the charge in that respect.

4. Joseph Burns (now deceased) was sworn to have been on the scene of the robbery (Denike); then to have identified Kaplansky and Seniloff, to have said to Kaplansky that he ran the car and to Seniloff that he was the fellow that ran out with the bag. The prisoners did not deny the allegations. I am at a loss to understand how I could have excluded this evidence; Phipson on Evidence, 6th ed., pp. 255 *et seq.*

5. That an indictment could be preferred before a Court of Oyer and Terminer and General Gaol Delivery for an offence committed during the sittings of such Court and before the termination of the commission cannot be doubted. The Court at which this indictment was found was a Court having

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the same powers as the former Court of Oyer and Terminer and General Gaol Delivery; and Crown counsel may prefer an indictment in that Court under sec. 872 and 873 of the Code. That was, as I understand it, done in the present case, and properly so done. The provisions of Part XVIII. do not assist; the right to be tried by a County Court Judge is given only where there has been an actual election by the prisoner: *Rex* v. *Komiensky* (1903), 6 Can. Cr. Cas. 524; *Rex* v. *Sovereen* (1912), 4 D.L.R. 356, 20 Can. Cr. Cas. 103, 26 O.L.R. 16.

Moreover, as the offence here charged could be punished by imprisonment for more than 5 years, the Attorney-General had the right to require the persons charged to be tried by a jury: Code, sec. 825 (5), added by (1909) 8 and 9 Edw. VII. ch. 9, sec. 2.

I refuse to reserve a case.

The sheriff will be well advised not to remove the prisoner Seniloff to the penitentiary for 10 days or until after the disposition by the Court of Appeal on a reserved case, if such a case should be ordered. *Motion refused.*

Note. No further or other application was made.

***FLEXLUME SIGN Co. v. MACEY SIGN Co.**

Ontario Supreme Court, Orde, J. February 9, 1922.

CROWN (§II—20)—ACTION AGAINST—AMENDMENT OF COUNTERCLAIM—FIAT—COMMISSIONER OF PATENTS AS PARTY.

A counterclaim against the Crown, filed with its fiat in an action for infringement of patent, cannot be amended as to parties, or to any substantial matter, without further fiat. The Commissioner of Patents, being an official of the Crown, cannot be sued in his official capacity, and cannot, therefore, be added as a co-defendant to the counterclaim in such capacity.

WRIT AND PROCESS (§I—1)—SUMMONS OF CROWN.

(Per Orde, J.) It is questionable whether the writ of summons, issuing from the Sovereign, can properly be directed against the Crown.

APPEAL by His Majesty and George F. O'Halloran, made defendants to a counterclaim, from an order of the Master in Chambers, made under the application of the plaintiffs by counterclaim (the defendants in the action), allowing the statement of defence and counterclaim to be amended.

M. L. Gordon, for the appellants.

Frank Arnoldi, K.C., for the Macey Sign Co., plaintiffs by counterclaim.

ORDE, J.:—The action of the original plaintiffs, the Flexlume Sign Co., against the Macey Sign Co., involves the alleged

***Affirmed by the Appellate Division of the Supreme Court, June 12, 1922, 22 O.W.N. 470.**

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infringement by the latter company of a certain patent of invention belonging to the plaintiffs. The defendants delivered a statement of defence and counterclaim, and as a defendant to the counterclaim, in addition to the original plaintiffs, the defendants joined His Majesty the King (in the right of the Dominion Government), obtaining upon the counterclaim the fiat of His Excellency the Governor-General, which was of course necessary before the Crown could be brought into Court as a party defendant. Upon the filing of the counterclaim with the Governor-General's fiat, the plaintiffs by counterclaim procured from the central office a summons, in the form provided by Rule 113 for service upon any person other than the original plaintiff who is joined as a defendant to a counterclaim, and served it upon the Crown. I do not think anything turns upon this feature of the case, but I draw attention to the issue of this summons because of its anomaly. The summons is issued from the central office, and is in the form of a writ. Its opening words are as follows: "George the Fifth, by the Grace of God . . . To His Majesty the King. Whereas . . . We command you that within ten days." Whether the submission by the Crown of the counterclaim against it to the adjudication of the Supreme Court of Ontario so far imports a strict compliance with Rule 113 as to justifying issuing a summons by His Majesty to himself, may be open to serious question. For the Sovereign to issue a writ commanding himself to enter an appearance would be amusing if it occurred in Alice in Wonderland, or in some of the topsy-turvey countries visited by Gulliver, but would hardly seem possible in a British Court of Justice. It is highly improper that such a document should have issued from the office of the Supreme Court. No objection has been raised on this score, and what I have said must not be deemed a ruling as to the regularity or otherwise of the issue of a summons under Rule 113 directed to His Majesty.

By the counterclaim, as originally delivered, the Macey Sign Company set up certain alleged wrongful acts on the part of the Flexlume Sign Company, and of the Commissioner of Patents in Ottawa, in connection with the re-issue of the patent of invention upon which the Flexlume Sign Company's action was brought, and asked for judgment declaring the patent illegal and void and rescinding and setting the same aside, and for damages against the defendants by counterclaim jointly and severally.

On November 10, 1921, the Master in Chambers, on the application of the plaintiffs by counterclaim, made an order allowing the statement of defence and counterclaim to be amend-

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ed by adding as a party defendant to the counterclaim "George F. O'Halloran, personally and in his capacity as Commissioner of Patents," and by inserting certain allegations as against such added party and by varying the prayer of the counterclaim so as to include a claim "for the issue of a writ of *scire facias* to effect this purpose," that is, the rescinding of the patent in question, and further by limiting the claim for damages to the "Flexlume Sign Company and George F. O'Halloran, personally and as Commissioner of Patents, or in one of such capacities."

From that order, His Majesty and Mr. O'Halloran now appeal.

The appeal presents two distinct questions for determination: (1) whether or not the counterclaim against His Majesty can be amended without a further fiat; (2) whether or not an action can be brought against George F. O'Halloran "in his capacity as Commissioner of Patents."

On behalf of the Crown it is argued that no amendment can be made to the counterclaim without the further fiat of His Excellency. Mr. Arnoldi contends that by granting the fiat the Crown has submitted the subject-matter of the counterclaim and the claim against the Crown thereunder to the adjudication of the Supreme Court of Ontario, and incidentally to all the Rules of that Court, including those permitting the amendment of pleadings. No case exactly in point has been cited, and the situation is rather an unusual one; but, nevertheless, there are certain broad principles applicable to the questions involved which, in my judgment, simplify their determination. Mr. Arnoldi argues that the counterclaim is not a petition of right; but, if it is not a petition of right, it is not so merely as a matter of nomenclature, because in all other respects it is a petition of right. In so far as the Crown is concerned, it is not a counterclaim but a distinct action; and, even if it were a counterclaim delivered in an action brought by the Crown, it could not be delivered without the consent of the Crown: *Att'y-Gen'l of Ontario* v. *Hargrave* (1906), 11 O.L.R. 530; *Att'y-Gen'l for Ontario* v. *Russell* (1921), 64 D.L.R. 59, 49 O.L.R. 103. If a counterclaim sought to be pleaded against the Crown is to be treated as a distinct action, and as so requiring a fiat, in cases where the Crown is the original plaintiff, it cannot be that the Crown stands in any different or inferior position when the Crown is sought to be added as a party defendant with the original plaintiff to a counterclaim raised by the original defendant. The fact that the plaintiffs by counterclaim were obliged, before delivering their counterclaim, to obtain His Ex-

cellency's fiat—a procedure applicable only, so far as I know, to petitions of right—establishes, I think, beyond all question, that the counterclaim here is, in essence and in fact, a petition of right, by whatever term the parties may choose to style it. But, whether or not it is a petition of right, I can see no reason for applying to the question now raised any other principles than those applicable to petitions of right. Whether or not the Court has power in some cases to amend a petition of right without the consent of the Crown does not seem to be very clearly settled. But the trend of authority and principle would seem to be against the exercise of any such power. If exercisable at all, the power to amend must, in my opinion, be limited to minor matters, and cannot go the length of allowing a suppliant to change the character of his claim against the Crown, either by adding to it or withdrawing part of it, or by adding parties as co-defendants with the Crown. "The Crown has granted a fiat to a particular petition, and it is obviously not within the subject's competence to amend it into something else without the Sovereign's leave:" Robertson's Civil Proceedings by and against the Crown, p. 390; Halsbury's Laws of England, vol. 10, p. 33.

In the case of *Smylie* v. *The Queen* (1900), 27 A.R. (Ont.) 172, the Court of Appeal appears to have allowed an amendment to a petition of right: see per Osler, J.A., at p. 181; but the character of the amendment is not indicated, nor does there seem to have been any argument upon the point or any opposition by the Crown. As the Court was at the same time dismissing the suppliant's petition, the amendment can hardly have been of much consequence. The decision cannot be regarded as an authoritative ruling against the will of the Crown.

Mr. Arnoldi has referred me, since the argument, to a recent decision of the Chief Justice of the Common Pleas in *Crombie* v. *The King* (1922), 69 D.L.R. 548, 51 O.L.R. 512, in which it is held that the Crown (in the right of the Provincial Government) is bound by the Rules as to the production of documents. But there is a great difference between holding that the Crown is bound, as to the issues which it has allowed to be submitted to the Court for adjudication, by all the Rules of procedure of that Court, and holding that the mere fact that the Crown has allowed certain issues to be submitted to the Court entitles the suppliant to compel the Crown to have those issues presented in a form differing from that to which the Crown assented. The fiat "Let right be done" must surely mean "Let right be done between me (the Sovereign) and my subject upon the claim which my subject has here set up against me and in the form

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here set up according to the practice of the Court in which the proceedings are brought." But this cannot possibly carry into it the right, at the instance of the subject, to submit some other claim against the Crown, whether it is enlarged or modified, for adjudication. In *Crombie* v. *The King* reference is made to the statutory effect of the Rules, but in that case the Crown was a party in the right of the Provincial Government.

The amendments here are of three kinds. First, the claim against the Crown for damages is abandoned. Mr. Arnoldi contends that the plaintiffs by the counterclaim are entitled to do this by way of amendment. It is obvious, of course, that at the trial a suppliant might abandon part of his claim against the Crown without affecting his right to proceed with the trial of the rest of his claim; but Mr. Gordon says that, if the counterclaim against the Crown had been limited at the outset to a prayer merely for a declaratory judgment as to the validity of the patent, no fiat would have been granted, because a patent may be declared invalid without joining the Crown. I agree with Mr. Gordon's view that an amendment that has the effect of abandoning one of the claims against the Crown may so change the character of the issues as to require the fiat of the Crown before the amendment can be allowed.

Then there is the addition of a prayer for judgment "for the issue of a writ of scire facias." When it is remembered that a writ of scire facias is not a writ by way of execution or in aid of a judgment, but a writ which, like a writ of summons, is issued at the commencement of an action to set aside or rescind letters patent issued by the Crown, and that the writ is issued at the suit of the Crown (though frequently by a subject with the approval of the Attorney-General, but always in the name of the Sovereign as plaintiff), one is puzzled to know in what way the Supreme Court of Ontario can pronounce a judgment for the issue of a writ of scire facias to rescind or set aside the patent in question here. But, however, that may be, there is here a fresh demand set up against the Crown, which the Crown has not submitted to the Court for determination.

And the third matter of importance is the attempt to add another party as defendant to the counterclaim. The Crown has permitted a claim to be set up against it jointly as a co-defendant with the original plaintiff. But the Crown, while willing to be connected as a party defendant with one person, may reasonably object to being so connected with some other person, even though that other person is one of the Crown's own servants or officers. One can suggest many grounds which might move the Crown and its advisers to refuse a fiat because

of the joinder of some other person as a co-defendant. And I think the Crown is entitled to say, whether or not, under such circumstances, the fiat already granted shall stand or be withdrawn.

On all three grounds, I am, therefore, of the opinion that the order of the Master in Chambers amending the counterclaim is erroneous and must be set aside, and that the defendants must either proceed to trial on the counterclaim as originally delivered or else procure His Excellency's fiat upon the counterclaim in the form in which the defendants propose to bring it to trial.

My ruling on the first question really disposes of the second so far as the Master's order is concerned, but it is perhaps as well that I should deal with it. The contention of the defendants (plaintiffs by counterclaim) that an official of the Crown can be sued in his official capacity is to me an extremely novel one. I know of no authority for it, except in cases where it is expressly authorised by some statute. Those cases in which the Attorney-General can sometimes be made a party defendant when a declaratory judgment is sought furnish, so far as I am aware, the only exception to the rule. Mr. Arnoldi relies on certain cases as supporting his argument, but I find on examination that they really fall into three categories. The defendant was either a corporation, or was sued in his official capacity by virtue of some statute authorising such action, or was really sued personally for something done in his official capacity.

The case which Mr. Arnoldi pressed upon me as settling the question, *Graham & Sons* v. *Works and Public Buildings Commissioners* (1901), 70 L.J. (K.B.) 860, has no application in my judgment, because the Commissioners were in fact a corporation and were sued as such. It is true that as a corporation they constituted a department of the Government, but they were being sued in their corporate as distinct from their official capacity, just as an individual officer of the Crown might be sued in his personal capacity for some act or omission in the course of his official duties. Had the Commissioners not been a corporation, but performing their official duties as a collection of individuals, I cannot think that they could have been sued otherwise than in their individual names and in their personal capacity.

In *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178, an action brought against the Postmaster-General in his official capacity, it was pointed out, at p. 186, that the Postmaster-Gen-

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eral in England is by legislation a corporation, and that an action lies against him in his corporate capacity.

In *Dixon* v. *Farrer, Secretary of the Board of Trade* (1886), 18 Q.B.D. 43, an action was brought against the defendant in his official capacity, but this was done under sec. 10 of the Merchant Shipping Act of 1876, which provides that an action may be brought against the Secretary of the Board of Trade "by his official title as if he were a corporation sole."

Cases like *Gidley* v. *Lord Palmerston* (1822), 3 Brod. & Bing. 275, and *Raleigh* v. *Goschen*, [1898] 1 Ch. 73, are examples of actions brought against persons occupying official positions for something done or omitted in connection with their office, but the defendant in each case is sued in his personal and not in his official capacity. Mr. Arnoldi argues that the Crown and its revenues can indirectly be reached through a judgment against one of the Crown's servants in his official capacity. But without statutory authority I cannot agree with this proposition. It is not suggested that there is any statute which authorises any such action as this against the Commissioner of Patents. Whatever liability he may have incurred to those who are now claiming damages against him because of some alleged breach of duty on his part in the exercise of his official duties, assuming that any such breach of duty can legally give rise to such a claim, must necessarily be a personal and not an official liability. If any further authority were needed on the broad principle, it is furnished by the judgment of the Judicial Committee in *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619. The recent case of *Bombay and Persian Steam Navigation Co.* v. *Maclay*, [1920] 3 K.B. 402, is directly in point.

So that, apart from the other grounds upon which the order of the Master in Chambers has been set aside, I am of the opinion that the addition of Mr. O'Halloran as a party defendant to the counterclaim in his official capacity as Commissioner of Patents and the amendments claiming against him in that capacity, as distinct from his personal capacity (whatever that distinction may be intended to mean), are unwarranted by the practice of the Court.

The order of the Master in Chambers in question will therefore be reversed, with costs both of the original motion and of this appeal, payable by the plaintiffs by counterclaim to the Crown and to the defendant by counterclaim O'Halloran in any event.

Judgment accordingly.

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CHAPMAN v. ROSE-SNIDER FUR. Co.

ROSE v. ROSE-SNIDER FUR Co.

Ontario Supreme Court, Middleton, J. February 9, 1922.

RECEIVERS (§IA—5)—EX PARTE APPOINTMENT—NOTICE—UNDERTAKING.

An *ex parte* appointment of a receiver, without notice, cannot be properly made, unless it be shewn that the delay necessary to give notice will entail serious mischief. The order of appointment must contain an undertaking as to damages.

MOTION by the plaintiff in the first action for an order continuing a receiver and in the second action for an order for the appointment of a receiver. Dismissed.

H. S. White, K.C., and *H. G. Smith*, for the plaintiff Rose.

R. G. McClelland, for the plaintiff Chapman.

A. Cohen, for the defendant Morris Rose.

John J. Glass, for the estate of Joseph Snider.

MIDDLETON, J.: — This partnership ended by the death of Joseph Snider on December 24, 1921. Some of the surviving partners have been endeavouring to get the affairs into shape for a final accounting and dissolution. In the *Rose* case the plaintiff began his action on February 2, 1922, asking for dissolution and the appointment of a receiver. On February 3, Chapman began his action by the issue of a writ of summons in which he asked for dissolution and the appointment of a receiver; a motion was made before my brother Orde, and an *ex parte* order made appointing H. N. Goodman receiver, without security, the appointment to be good until to-day, and until any motion to continue the appointment should be disposed of. This order contains no undertaking as to damages.

Under this order Goodman has taken possession and evicted the surviving partners. A motion is now made in the *Rose* case to appoint Clarkson receiver and in the *Chapman* case to continue the appointment of Goodman. The appointment of Mr. Goodman in the way indicated is attacked by the plaintiff in the *Rose* case, and by certain of the defendants, as being entirely improper and indefensible.

Rule 213 requires that any application in an action shall be made by motion, of which notice shall be given to all parties affected by the order sought. This rule is peremptory and renders a notice of motion necessary, save in the case provided for by Rule 216: *Joss* v. *Fairgrieve* (1914), 32 O.L.R. 117.

Rule 216 provides that, if the Court is satisfied that the delay necessary to give notice of motion may entail serious mischief, the Court may make an interim order *ex parte*. I have no doubt that this Rule is wide enough to permit the making of an

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order for a receiver *ex parte*, but the preliminary conditions must be satisfied. It must be shewn that the delay necessary to give notice of motion will or may entail serious mischief.

The affidavit upon which this order was obtained made no such suggestion. Chapman merely swears that he is a member of the firm; that the partnership terminated on the death of Snider on December 24; that he has interviewed the other members of the partnership, who have neglected and refused to pay him his share of the profits; that the defendants are in control; that his share is 15 per cent. of the profits for the year 1921 (he had no capital invested); that Rose is in possession and refuses to give him information; that the assets outside of cash in bank amount to $3,000; that he desires a receiver appointed; and that Goodman is an authorised trustee under the Bankruptcy Act and bonded for $15,000 under that Act.

Apart from the peremptory requirements of our Rule as to notice, which goes far beyond anything found in the English Act, the impropriety of the *ex parte* appointment of a receiver, save in cases of most extreme urgency, is emphasised by two decisions of the Court of Appeal in England.

In *Lucas* v. *Harris* (1886), 18 Q.B.D. 127, Lindley, L.J., says (p. 134): "*Ex parte* applications for a receiver ought not to be granted . . . except in cases of emergency, and it is desirable that this rule should always be borne in mind, and not lightly departed from."

In the later case, *Tilling Limited* v. *Blythe*, [1899] 1 Q.B. 557, A. L. Smith, L.J., after referring to what was said by Lord Justice Lindley, adds (p. 558): "The meaning of that decision is that orders for a receiver should not be made without due notice, so that the defendant may have an opportunity of being present to shew cause why the order should not be made."

I have discussed the matter with my learned brother, and he agrees with me that his order was made *per incuriam*, and should not be continued.

Upon the discussion of the case, although there may be some issues of fact, it was admitted by all counsel that no good purpose would be served by merely making an interim order upon the present application; and, therefore, I direct that these orders be turned into motions for judgment, and that in the *Rose* action a judgment shall be pronounced for the winding-up of the partnership and referring the case to the Master in Ordinary to take all necessary accounts and proceedings for the final adjustment of the rights of all parties and the winding-up of the firm. Morris Chapman should be added as a party

defendant in the *Rose* action, so that he may have a *locus standi* to assert his rights. In that action I now make an order appointing Clarkson the receiver for the purposes of the liquidation—he is to give security, unless it is dispensed with, within three days. The costs of all parties in the *Rose* action are to be in the cause, and the Master is to deal with the costs of the action.

In the *Chapman* action the motion will likewise be turned into a motion for judgment, and, inasmuch as the order ought not to be continued, the motion to continue it will be dismissed with costs to be paid by the plaintiff to the defendants. These costs, when taxed, to be carried into the accounting in the other action, and payment not to be enforced by execution. There will be no other costs of the *Chapman* action. Chapman will be entitled to be treated as though a party to the *Rose* action and to be allowed his costs of attending upon the motion in that action as though he had been a party prior to the hearing of the motion and attended thereon.

All further proceedings in the *Chapman* action will be stayed, as the further prosecution is unnecessary in view of the judgment in the *Rose* action.

Any *ex parte* order appointing a receiver, operating in effect as an injunction, should contain an undertaking as to damages.

Motion dismissed.

TREPANIER v. CITY OF MONTREAL.

Quebec Court of King's Bench, Appeal Side, Pelletier, Greenshields, Allard, Tellier and Howard, JJ. December 29, 1920.

MUNICIPAL CORPORATIONS (§IIC—105)—EARLY CLOSING LAWS—STATUTORY POWER TO FIX HOURS FOR CLOSING OF STORES AND TO IMPOSE PENALTIES FOR KEEPING OPEN AT LATER HOURS—DISCRIMINATION BETWEEN CLASSES OF TRADE—EXCEPTIONAL PRIVILEGE GRANTED TO DRUG STORES TO SELL TOILET ACCSSSORIES AT LATER HOUR THAN IN OTHER STORES—57 VICT. QUE. (1894) CH. 50.

The fact that some degree of discrimination as between different class of trade is created under an early closing by-law enacted by a city municipality under its general statutory powers to direct early closing of stores within the municipality is not a ground for quashing the by-law.

APPEAL from the Superior Court.

The appellants are merchants dealing in tobacco, fruit, soft drinks, toilet articles and similar small wares. They complain of a by-law No. 695 of the City of Montreal, ordering shops to be closed at an early hour. Their action is based on allegations of *ultra vires*, injustice, suppression of a legitimate business, public interest and discrimination.

The respondent pleads that a similar by-law has already been

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held to be legal by the Supreme Court of Canada, that the present by-law is *intra vires;* that its observance involves no hardship; that it was enacted in the interests of trade and public order; that it is fair and meets the requirements of existing conditions; and that the petitioners have not the interest required in order to contest it.

The Superior Court Coderre, J., dismissed the petition. The present appeal from that judgment was dismissed.

Garceau and Garceau, for appellants, Trepanier *et alia*.

Jarry, Damphousse, Butler and St. Pierre, for the City of Montreal, respondent.

PELLETIER, J., dissented from the judgment of the majority of the Court.

GREENSHIELDS, J.:—The plaintiffs assert that the by-law is *ultra vires* and allege in support that it is general in its terms and is given application to all stores or shops within the city limits, a condition which is not authorised by the statute and further allege: 1. That the statute refers to one or more categories; 2. It is discriminatory as between classes of merchants; 3. It is oppressive, particularly to the plaintiffs, and to persons in their class or category.

Seeing the admission of the parties as to the authorising statute, 1894, ch. 50 the by-law could not be said to be *ultra vires*. The defendants possessed legislative authority to enact a by-law concerning the early closing of the shops or stores within its limits. If in the enactment of the by-law no illegality amounting to discrimination or oppressiveness is committed, then the by-law must stand as being *intra vires* of the defendant's legislative authority.

The by-law proceeds to provide, that (with certain exception in the by-law stated) all stores in the city of Montreal shall be closed at 7 o'clock in the evening on Monday, Tuesday, Wednesday and Thursday of each week; at nine o'clock in the evening on Friday, and at 11 o'clock in the evening on Saturday, and shall remain closed until 5 o'clock in the morning the following day. Then follows the statement that on certain days, mentioned in the by-law, stores may remain open until 11 o'clock. Those days are recognized as holidays, and are several in number. Then follows the provision that all merchant tailors, milliners and women dealing in novelties and needlework, may keep their shops open until nine o'clock in the evening on Monday, provided that the services of no employee be retained between seven o'clock and nine o'clock. Having so enacted the by-law proceeds

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to define what the word "store" shall be held to mean, and after giving the definition, the by-law continues: "But shall not apply:—

"(a) To establishments where only tobacco or articles generally required in connection with the use of tobacco, are sold. It covers also the sale of newspapers, gazettes, periodicals, illustrated papers, flowers, fruit, pastry, confectionery, ice cream, or aerated waters:

(b) To drug stores, as regards the sale of drugs, medicaments, medicines, remedies, pharmaceutical articles and products, surgical instruments and apparatus, and accessories thereof, hygienic, sanitary or toilet articles or apparatus or accessories thereof generally sold in drug stores; non-alcoholic liquors, soda water, candy, and generally all articles the sale of which is allowed by par. (a) of the section."

The most serious attack made upon the by-law was founded upon that part of the provision wherein the druggist or chemist was permitted to sell "hygienic, sanitary or toilet articles, or apparatus or accessories the eof, generally sold in drug stores."

I fancy it is conceded that it would be impracticable, if not impossible, in a by-law of this kind, to mention in detail and with exactitude, what things, and what things only, a druggist might sell. The wisdom of allowing drug stores to remain open in the evening is readily conceded, and no fault is found with that provision. The enactors of the by-law, apparently, realized that there might be things hygienic and sanitary in their nature which could not and would not properly come within the category of articles described as drugs or surgical instruments. The framers of the by-law, therefore, proceeded to allow a druggist to sell toilet articles of a hygienic or sanitary nature within the prohibited orders. Just what any Court or tribunal, upon a prosecution against a druggist for the violation of the by-law, would hold to be sanitary or hygienic toilet articles, I am unable to say, nor am I greatly disturbed upon that ground. I am ready to say, however, that because a restrictive by-law may perhaps be difficult in its execution, carrying out or enforcement, or indeed, if in some cases or in many cases the enforcement of the by-law is neglected by the proper authorities, that is not in law a ground to declare invalid the enactment.

What the by-law intended is that the druggist may sell only those articles described as toilet articles, which could be reasonably considered as of a like or somewhat similar class to remedial medicines which the druggist is clearly entitled to sell. I venture the statement that there never was, and never will be, a

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by-law of this nature enacted by any municipality which will not in its enforcement create some degree of discrimination. I am equally sure that all by-laws of this kind must to some extent oppress.

Once the authority of the city is conceded to control trade within its limits, a power to oppress or to enact oppressive legislation follows.

Any dealer in any class of goods wants to sell his goods till twelve o'clock at night, and who is told that he may not sell after seven o'clock, will hastily exclaim: Oppression!

The oppression hinted at and suggested by the testimony of the witnesses heard in the present case, is not the oppression contemplated by the law.

I express no opinion as to the necessity or wisdom of such legislation, but the power to legislate being conceded, I can find no valid reason to undo what the wisdom of the law-makers of the city of Montreal saw fit to do. I would dismiss the appeal.

ALLARD, J.:—By-law No. 328 ordered shops to be closed at seven o'clock in the evening on Wednesday and Friday of each week, with the exception of the days mentioned in secs. 2 and 3. Section 4 of this by-law defined the word "shop" as follows:—"Any establishment or place where goods are exhibited or offered for sale at retail only; "and sub-secs. a, b, c and d gave a list of establishments to which the word "shop" should not apply and which consequently were not required to close. These were (*a*) tobacconists, (*b*) places where newspapers were sold; (*c*) inns and restaurants where spirituous liquors were sold; (*d*) fruit and confectionery shops.

The first by-law was attacked in our Courts. The Superior Court, our Court of Appeal and the Supreme Court were called upon to determine its validity, and the Supreme Court finally decided, in *City of Montreal* v. *Beauvais* (1909), 42 Can. S.C.R. 211, reversing (1908), 17 Que. K.B. 420, that the by-law was legal and *intra vires*.

If by-law No. 695 merely repeats the provisions of the former by-law, or has not modified it in any substantial particular, we are evidently bound by this decision of the Supreme Court.

The by-law attacked (695) in sec. 2 fixes the hour and the days for closing shops, and in a, b, c, and d of sec. 2 indicates the days in the year when shops shall not be obliged to close. The old by-law 328, secs. 1, 2 and 3 contained the same dispositions, except that the new by-law adds Mondays and Thursdays to the list of days when shops must be closed.

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Basing my decision on the judgment of the Supreme Court in *Re Beauvais, supra*, I am obliged to conclude that the respondent had the power to legislate as it did in the sub-sections which I have examined.

But, say the appellants, if the respondent has the right to order shops to be closed, it cannot discriminate as it does in sec. 4 and sub-secs. a and b.

Let us first see what change this sec. 4 and its sub-secs. a and b have made in the old by-law, and we shall then see if there has been any discrimination against the appellants. We have already indicated what commercial establishments were not affected by by-law 328 and were not obliged to close at the hours fixed for the closing of shops. Section 8 of by-law 328 also permitted pharmacists to sell medicines and surgical instruments and appliances in prohibited hours. By-law 695, sec. 3, allowed merchant tailors, modistes, ladies' tailors and dealers in needlework, to keep their establishments open from 7 o'clock to 9 o'clock on Monday evenings, provided they did not detain their employees during these two hours. Section 4 of this by-law 695 declares that the word "shop" does not apply; (a) to establishments where only tobacco, pipes, cigars and other articles of the same nature; newspapers, magazines, etc.; flowers, fruits, pastry, confectionery, ice-cream or aerated waters are sold: (b) to pharmacies for the sale of drugs, medicaments, medicines, remedies, pharmaceutical appliances and products, surgical appliances and instruments and their accessories; hygienic, sanitary or toilet articles and appliances and their accessories, generally sold by chemists; soft drinks, sodas, candies and generally all the things permitted to be sold by para. a. of this article; and finally by sec. 8 it is provided that if a shop carries on two different businesses, one allowed and the other prohibited, the parts of such shop devoted to each of these businesses must be separated.

So the only changes made in art. 328 are the following:—

Permission is given to retail merchants, modistes, etc. to keep their shops open on Monday from 7 to 9 o'clock in the evening; to pharmacists to sell, besides what they were authorised to do by by-law 328, hygienic, sanitary or toilet articles and their accessories, such as are generally sold in chemists' shops, soft drinks, sodas, candies and those things provided for by the said section 3 quoted above.

As the Supreme Court has pronounced on all the provisions of the old by-law which are incorporated in the new by-law

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No. 695, except the above mentioned changes, we must decide that these dispositions are legal and that the various clauses containing them are also legal and *intra vires*.

Is there discrimination and injustice affecting the appellants by reason of the amendments which I have just referred to as having been made to the old by-law No. 328?

The doctrine regarding discrimination appears to me to be clearly expressed in Tiedeman (on Municipal Corporations, p. 269, sec. 162).

According to this doctrine it seems to me that the clause referring to the right of chemists to keep their shops open for selling those articles provided for in sub-sec. b. of sec. 4 is the only one which can provoke any discussion.

The permission granted to retail merchants and others by sec. 3 does not constitute a discrimination against the appellants, nor does it cause them any prejudice. Sub-section a. of sec. 4 re-enacting the former provisions of the old by-law 328, was declared legal and valid by the *Beauvais* judgment. Section 8 of the by-law which is attacked is neither discriminative nor oppressive. It is general in its application. It affects all merchants in the same category. It merely sanctions the prohibition to sell in certain hours certain goods of which the sale is forbidden; it was conceived and enacted for the purpose of allowing merchants who had in their shops goods which it was forbidden to sell and others of which the sale was permitted to sell these latter articles.

The changes made in sub-sec. b. of sec. 4, which are virtually the only ones seriously questioned by the appellants, remain to be considered.

The by-law, they say, gives chemists an unfair preference (discrimination) over us, by permitting them to sell articles which we deal in but cannot sell. Section 8 of the old by-law allowed chemists to keep their shops open during the prohibited hours and to sell medicines and surgical instruments or appliances. The new by-law, sec. 4, sub-sec. b. also allows them to sell hygienic, sanitary or toilet articles or appliances and their accessories, such as are generally sold by chemists, as well as all other articles the sale of which is authorised by the sub-section, namely: tobacco, newspapers, fruit, confectionery, etc., As regards the last mentioned articles chemists are given no greater preference than the dealers mentioned in sub-sec. a. of said sec. 4.

By the first by-law No. 328, all owners of establishments

selling the articles mentioned in this sub-sec. a. were not obliged to close their shops during the hours fixed for closing. It is really only the sale of toilet articles and their accessories which constitutes, as the appellants say, an undue preference against them in favour of chemists.

The evidence shews that most of the appellants did not sell these articles (examination of the proof on this point).

The appellants' evidence shews that only three of them, Daigneault, Chas. Fortier and Edmond Gougeon, sell soap and toothbrushes in addition to the tobacco, cigars, cigarettes and other articles which are sold in the shops of the other appellants.

Does that constitute discrimination and oppression? I do not think so.

The general or special character of the by-law, as Tiedeman says, must be determined by the facts of each case and not by any fixed rule. It seems to me that the whole record shews that the by-law was evidently inspired by considerations of public interest and was voted and passed in the most perfect good faith.

The appellants do not really suffer any prejudice from what they call an undue preference shewn to chemists. Therefore, I do not consider that the present by-law is discriminative.

The Supreme Court in this *Beauvais* case, *supra*, decided, as indeed it has been decided on many occasions, that a by-law passed and enacted in good faith must be oppressive, unjust and unreasonable before it can be set aside. In my opinion the present by-law is just and reasonable and is not either oppressive or discriminative. For these reasons I would dismiss the appeal and confirm the Superior Court judgment with costs.

TELLIER, J. dissented.

Appeal dismissed.

REX v. HARRI.

Ontario Supreme Court, Riddell, J. February 10, 1922.

JURY (§IIC—60)—RIGHT TO QUESTION JUROR.

A juror may be challenged peremptorily or for cause, but he cannot otherwise be questioned. The practice of questioning jurors, in vogue in the United States, is not followed in Ontario.

TRIAL (§ID—15)—ADDRESS OF COUNSEL.

Counsel rising to open in a criminal case should begin by first addressing the Court, and not turn to the jury at once, the trial being before Court and jury.

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REX v. HARRI.

Riddell, J.

WITNESS (§IIA—30)—TESTIFYING AS OF "MURDER."

A witness testifying in a murder trial cannot use the word "murder" in his testimony; it is for the jury to decide whether there was a murder.

TRIAL of an indictment for murder at Toronto. During the calling of the jury, counsel for the prisoner said he would like to question a juryman.

Gordon Waldron, K.C., for the Crown.

John J. Glass, for the prisoner.

RIDDELL, J.:—No, you cannot question him, you can challenge for cause, and the matter will then be tried, but you cannot question a juryman. We have no such system as obtains in some of the American courts. I think I had better give a formal ruling on the point so that it may be of record.

Counsel for the prisoner desiring to question a juryman before he was sworn, I rule that that is not permissible in our practice. This was decided, so far as I know, only once in this Province—in 1833—by Robinson, C.J. of the Court of King's Bench of Upper Canada, upon the trial (at Brockville for murder in a duel) of John Wilson, who was afterwards a Judge of the Court of Common Pleas (35 Canadian Law Times, September, 1915, pp. 726 *et seq.*) We have never introduced into this Province the practice which seems to be common in the United States; we have followed the English practice: *Rex* v. *Peter Cook* (1906), 13 State. Tr. 311, 334; *Rex* v. *Edmonds* (1821), 4 B. & Ald. 471, 492.

According to our practice, there are two kinds of individual challenge; the peremptory challenge and the challenge for cause. The peremptory challenge can be exercised at the proper time to an extent mentioned in the Criminal Code. In a challenge for cause, the cause must be stated (Code, secs. 935, 936), and there is a regular way of trial of the cause, to determine whether the juryman is or is not to serve.

I make that ruling now so that it may be borne in mind. Very many, particularly of the younger barristers, seem to imagine that we have introduced what is to me an exceedingly objectionable practice. I may say that I have seen the questioning of a juryman only once in our Courts; that was at the assizes at Ottawa before the late Mr. Justice Robertson, upon the trial of a woman for cruelty to her children, in which I was of counsel for the Crown, and Mr. Fripp was counsel for the prisoner. I did not, on behalf of the Crown, object to it being done, although I stated that it was not regular. In that particular instance it was allowed; but I think the practice should not be permitted to spread.

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Waldron, K.C., for the Crown:—There is another question of practice. I have long observed that counsel in rising to open a criminal case sometimes turns to the jury at once.

RIDDELL, J.:—That is improper. A criminal trial is before "the Court and jury sworn," not before the jury alone. I had better make a formal ruling so that it may be of record. A criminal trial, being before the Court and jury sworn (as expressed in the oath of the jurymen), the proper course for counsel in making any address is to begin by addressing the Court. The Court and the gentlemen of the jury are both addressed in every address by counsel—Crown counsel or counsel for the defence.

During the course of the trial a witness spoke of "the day of the murder."

RIDDELL, J.:—You have no right to talk about a murder until the jury have decided there was a murder. You may say "the day of the death," "the day of the tragedy," "the day of the event," "the day of the circumstance," or the like; no one but the prisoner or his counsel may call it a murder.

REX v. SPELLMAN.

New Brunswick Supreme Court, Appeal Division, Sir J. D. Hazen, C.J., White and Grimmer, JJ. November 18, 1921.

HOMICIDE (§II—18)—DRUNKENNESS—INTENT—FATAL BLOW STRUCK FOR AN UNLAWFUL OBJECT—MANSLAUGHTER—TRIAL JUDGE EXPRESSING PERSONAL VIEW OF EVIDENCE—EFFECT OF EVIDENCE LEFT ENTIRELY TO THE JURY—CR. CODE SECS. 252, 262.

It is not reversible error on a trial for murder for the trial judge, in his charge to the jury, to express his personal view that the evidence proves culpable homicide if he also clearly left it to the jury to decide whether or not there was any culpability at all and, if there were, whether the verdict should be for murder or manslaughter. Verdict for manslaughter sustained.

CROWN case reserved by Barry, J. following a verdict of manslaughter. Conviction affirmed.

D. Mullin, K.C., for defendant.

W. B. Wallace, K.C., for Crown, contra.

The judgment of the Court was delivered by

HAZEN, C.J.:—At the St. John Circuit Court on September 27 last, Barry, J. presiding, Edward O'Brien and Thomas J. Spellman were jointly indicted for the murder of Albert Norris. The accused were tried separately. Edward O'Brien was first tried and acquitted by the jury. Spellman was then tried and found by a jury to be "not guilty of murder but guilty of manslaughter."

After the verdict had been rendered counsel for Spellman

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applied to the Court to reserve certain questions of law arising during the trial. This application for a reserved case was granted and sentence on Spellman was postponed until after the question should have been determined. The questions reserved for the opinion of this Court were:—

1. O'Brien having been called to testify for the prosecution and objection having been taken that he was not a competent witness on the ground that he had been indicted with the accused, should he have been sworn?

2. O'Brien having been jointly indicted with the accused for the same offence, and having stated that he did not wish to testify, was he a compellable witness and was his evidence properly received?

3. Was there error on the part of the trial Judge when in charging the jury he said, "Still if the homicide were culpable, and I cannot see how under the evidence you can find otherwise, the prisoner will be guilty of manslaughter and not murder, though such an act in a sober man would prove an intention to do grievous bodily harm."

The first two questions reserved by the Judge were abandoned by the prisoner's counsel on the argument before this Court, and the only question which we now have to consider is the third regarding alleged error on the part of the trial Judge in charging the jury.

The portion of the Judge's charge above set out as objected to is an isolated extract, and in order to arrive at the conclusion as to whether or not there was error the whole charge must be carefully considered.

One of the defences set up was that the accused was so much under the influence of strong drink at the time the crime was committed that he was incapable of forming an intention to commit the act, and in this connection the Judge said this:—

"We come down to the defence, here first I will refer to the defence of drunkenness. I have taken the occasion to examine somewhat carefully the authorities on this question so as to be able to give you what I think is correct law upon the subject. It is almost trivial for me to observe that a man is not wholly excused from crime by reason of his drunkenness. If that were so you might as well shut up the criminal courts because drink is the occasion of a large proportion of the crime that is committed. But although you cannot take drunkenness as an excuse for crime, yet, where the crime is such that the intention of the party committing it is one of its constituent elements, which is the case in murder, you may look at the fact that the

man was in drink in considering whether he formed the intention necessary to constitute crime. If a sober man strikes another with a billet of wood and thereby kills him the inference is that he intended to strike with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of his drunkenness upon his intention, to shew a malicious intention being necessary to constitute the crime of murder."

And further on he says:—

"But you will bear in mind that although a man by reason of drunkenness be exonerated from a criminal intent and declared to be not guilty of murder inasmuch as to constitute manslaughter it is not necessary to shew a guilty intention, drunkenness will never excuse him from the culpable homicide of manslaughter. I say to you therefore, gentlemen, that if you find Spellman was so drunk as to prevent him from forming a wrongful intention, and that is the defence set up here, and that on that account you cannot say he is guilty of murder, still if the homicide be culpable and I cannot see how under the evidence you can find otherwise, the prisoner would be guilty of manslaughter and not murder though such an act in a sober man would prove an intention to do grievous bodily harm."

It will be seen that the objection made on behalf of the prisoner is to the latter part of the last sentence, and I presume relates to the statement "I cannot see how under the evidence you can find otherwise."

Previous to this the trial Judge had said to the jury:—

"All the Crown is required to prove and these several matters resolve themselves into questions which you will have to answer, is when the prisoner struck the fatal blow, assuming for the moment that he did strike it, but whether he did or not is a question for you to determine, did he strike the blow for an unlawful object and did he know or ought he to know that that blow would be likely to cause death. If he did that is murder, and it makes no difference though he may have desired that the object that he had in view, the unlawful object he was pursuing, should be effected without hurting anyone. To warrant you in convicting the prisoner under this sub-section it is essential that three facts should be established to your satisfaction. Was the blow that killed Norris dealt him by the prisoner? In striking the deceased was the prisoner in pursuit of some unlawful object? And did he know or should he as a reasonable man have known, should a reasonable man in the

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circumstances of the case have known that the blow which he delivered was such an act as to be likely to cause death?"

One of the witnesses at the trial was O'Brien, who had been jointly indicted with the accused, tried separately and acquitted by a jury, and the Judge informed the jury that they must regard O'Brien's evidence as that of an accomplice, and they must acquit the prisoner unless the testimony of O'Brien was corroborated not only as to the circumstances of the offence, but also as to the participation in it of the accused. He stated it might be that they would be able to find a verdict in the case without the evidence of O'Brien altogether but if they had to resort to the evidence of O'Brien in order to satisfy themselves of the guilt of the accused, then he directed them that O'Brien was an accomplice, that his evidence must be confirmed not only as to the circumstances of the crime but also as to the identity of the prisoner.

It will be seen that this was distinctly in favor of the prisoner, and without expressing an opinion on the subject, as it is not necessary to decide the point in the present case, I think that very great doubt might arise as to the correctness of describing O'Brien as an accomplice, in view of the fact that he had been tried and acquitted of the offence.

The Judge further pointed out to the jury that in case there was any reasonable doubt as to the guilt of the prisoner they were bound in law to give the prisoner the benefit of it, and that the Crown had not only to prove the facts necessary to convict the prisoner of the charge, but it had to prove his guilt without any reasonable doubt, for every man is presumed to be innocent until he is proved guilty.

At the conclusion he stated that if he was guilty the offence was either murder or manslaughter, but whether murder or manslaughter was for the jury to say. He stated that the jury might under the indictment acquit the prisoner of murder and find him guilty of manslaughter, or find him not guilty of murder, or might acquit him, and that any one of these verdicts would be a good verdict, stating that there was no doubt in the world that the jury should be able to arrive at some conclusion. He said—"What that conclusion is going to be gentlemen is for you and not for me. You have to take the law as I interpret it, but as for the questions of fact let me tell you in conclusion that you are the supreme judges of them. I want you to withdraw from your minds any impression that I may have given you as to the facts, and deal with them untrammelled in any way by anything I have said."

In conclusion he asked the counsel for the defendant if there was anything upon which he desired that he should further direct the jury, to which Mr. Mullin replied asking that there should be a direction along the recent decision in the *Clark* case, [*Clark* v. *The King* (1921), 59 D.L.R. 121, 35 Can. Cr. Cas. 261] viz., that if the jury have a reasonable doubt as to the defence of drunkenness, that is as to the prisoner's mind being so obscured by drunkenness as to render him incapable of forming any intent, then in dealing with the charge of murder they should give the prisoner the benefit of such a doubt and find him not guilty of the charge; to which the Court replied that he would not charge as requested by Mr. Mullin, but would leave the case to the jury in the way he had put it, and would take the responsibility.

Throughout the case the principal effort of the counsel for the defence while contesting the prisoner's guilt on any charge seems to have been directed to having culpable homicide reduced from murder to manslaughter, on the ground of the prisoner's inability to form any intention to commit a wrongful act because of his condition caused by drinking quantities of lemon extract, having no doubt in his mind the decision of the House of Lords in the case of *R.* v. *Beard*, [1920] A.C. 479, 14 Cr. App. R. 159, 89 L.J. (K.B.) 437, where it was decided that where a specific intent is an essential element in a criminal offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should, except where insanity is pleaded be taken into consideration with the other facts proved in order to determine whether he had in fact formed the intent necessary to constitute a particular crime.

The jury evidently found that the prisoner was not in a condition to form the intent necessary to constitute the crime of murder and therefore reduced the offence to manslaughter. I fail to see any reason why this verdict should be interfered with. There is nothing in the Judge's charge in my opinion to justify the conclusion that he was in error in saying what he did. The jury was informed, as appears from the portions of his charge which I have quoted, that it was essential in convicting the prisoner that it should be established to their satisfaction that the blow which killed Norris was dealt him by the prisoner, and that in striking him the prisoner was in pursuit of some unlawful object. They were further told that he should be given the advantage of every reasonable doubt, and all this had reference as much to the crime of manslaughter as to that of murder, and I was not impressed by the argument

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of the counsel for the defence to the effect that those portions of the Judge's charge would be regarded by the jury as having relation to the murder charge and not to the lesser offence.

In my opinion, therefore, the appeal should be dismissed.

Conviction affirmed.

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*GEORGE v. CANADIAN NORTHERN R. Co.

Ontario Supreme Court, Mowat, J. February 14, 1922.

CARRIERS (§IIIC—385)—LIABILITY FOR THEFT — LIQUOR — NOTICE OF ARRIVAL—WAREHOUSEMAN—CARE.

The liability of the railway company for the theft from a shipment of liquor at its warehouse after arrival at destination, but before written notice of arrival had been given to the consignee, is that of a common carrier and not of a warehouseman. Failure on the part of the company to take extra precautions to guard a shipment of that nature is negligence for which it would also be liable as a warehouseman.

DAMAGES (§IIID—125)—CARRIER—LOSS OF GOODS—LIQUOR.

The measure of damages, in an action against a carrier for the loss from a shipment of liquor, is the replacement value of the goods at the time of trial, plus the proportionate duties paid thereon, but subject to the right of refund thereof.

AN action for damages for the loss of 76 cases of Scotch whiskey, consigned to the plaintiff at Fort Frances, and said to have been stolen from the defendant company's warehouse there.

F. R. Morris, K.C., for plaintiff.

F. H. Keefer, K.C., for defendant company.

MOWAT, J.:—The plaintiff, living at Fort Frances, purchased in Great Britain, on June 7, 1921, 100 cases of Scotch whiskey, and prepaid the freight. The vendors shipped by C.P.O. steamer Megantic, and the shipping company reshipped from Montreal wharf to Fort Frances by the defendant company's line. The goods being bonded goods, a "pink manifest" in triplicate was issued, but the bill of lading was not put in at the trial. The consignment reached Fort Frances at 8.35 a.m. on June 27, and was under special guard on the freight-train up to the time of its arrival, and also until 11 a.m. after removal from the freight-car. The reason for this guard was that whisky had become of unusual value on account of the passing of the amendment to the Canada Temperance Act, by 10 Geo. V. ch. 8, prohibiting importation into the Province, and the proclamation of the day and hour fateful to all users of liquor was July 18, 1921, at midnight. That class of the community had become nervously apprehensive of the prospect of being

*Affirmed as to all but damages by the Appellate Division of the Supreme Court, November 13, 1922, 23 O.W.N. 245, a full report of which will appear later.

without the stimulating beverages to which they were accustomed, and had become eager to stock their "private dwelling houses in which they reside" before the hour had struck.

Rossington, special service officer of the railway company (i.e., a detective) stationed at Fort Frances, says he telephoned to the plaintiff after the arrival of the consignment informing him that it had arrived intact and in good order. He kept special watch over the cases on the platform opposite the Sufferance Warehouse until it was handed over to the Customs officers, who had the keys of that warehosue, at 11 a.m., and in the noon-hour again telephoned the plaintiff as to what had been done with the cases and asked him when he could clear them from the Customs. The plaintiff in reply said that he could take the goods as soon as cleared; but, as there was a circus company performing in town, asked if it were necessary for him to take extra precaution in guarding the goods. Rossington, he says, told him not to mind about that, for he, Rossington, would look after it, as he had done in the case of other consignments. This conversation is not denied by Rossington, although there is a discrepancy between the two persons as to whether there were two telephone conversations or but the one at the noon-hour.

The railway company freight officials gave the plaintiff notice of the arrival by mailing the regulation postcard, dated and postmarked June 28, the day after.

In the morning of June 28, that Customs lading waiter, J. W. Prout, discovered that the sufferance warehouse had been opened, by the hasp being unscrewed and taken off, and that 76 cases out of the 100 had been stolen. No trace of these was found except that a case containing 11 empty straw wrapping and one full bottle in its wrapping was discovered a few hundred yards along the road from the station.

The point for decision in the case is whether the consignee or the railway company shall bear the loss of the 76 cases, and to assist this purpose it must be determined whether the railway company, at the time of the theft, was a common carrier or a warehouseman. I find that it was a carrier.

"Where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination, and given the consignee notice of arrival, and allowed the consignee a reasonable time in which to remove the goods. A reasonable time, however, must always be allowed for the removal. What that time is

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must depend on the circumstances of each case": Halsbury's Laws of England, vol. 4, p. 12 (Carriers).

The decisions in Ontario bear out this statement of the law. The plaintiff had not time or opportunity to take over the goods.

The standard bill of lading for railways formulated by the Board of Railway Commissioners for Canada provides thus (sec. 6): "Goods not removed by the party entitled to receive them within 48 hours, or in the case of bonded goods within 72 hours, after written notice has been sent or given, may be kept in a car, station, or warehouse of the carrier subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only," which means that before the expiry of those periods the railway company is to remain carrier unless circumstances intervene to change its character and responsibility. Here there was no written notice until the postcard of the 28th June, which contains some irony, because as a matter of fact the 76 cases had then been stolen. If there is strength in the contention that the oral telephone notice from the defendant company's detective on the day of arrival put the duty upon the plaintiff of at once removing the goods, a cogent answer is that the company must have known by experience that the goods could not be cleared at Fort Frances until they had been gauged, which would take the time consumed in sending a bottle to Port Arthur Customs House and its return from there; the amount of Customs duty depending on the liquor being above or below "the strength of proof."

If the company's character as common carrier existed at the time of the theft, the question of negligence is not germane to the inquiry as to whether it is said to be held liable for the loss or not, because a common carrier "is in the nature of an insurer, and if he carries without any qualification of his liability, he becomes an insurer against all but fire, tempest, and the King's enemies, and he insures against thieves, and the frauds of his own servants:" *Brind* v. *Dale* (1837), 8 C. & P. 207, per Lord Abinger, at p. 211.

The railway company takes the position that it was a warehouseman. In a document called in railway language "Expense bill No. 1," it charged the plaintiff $7.20 as storage on 100 cases from the 27th June to the 18th July, although upon this same expense bill it is noted and admitted that 76 cases had been stolen from the warehouse. As warehouseman for hire, upon the railway company is the onus of accounting for goods which it cannot return to its owner: *Pratt* v. *Waddington* (1911),

23 O.L.R. 178; *Carlisle* v. *Grand Trunk R. Co.* (1912), 1 D.L.R. 130 at pp. 135, 136, 25 O.L.R. 372, at p. 379; by shewing circumstances which negative negligence on its part. I find that it has not satisfied this condition. The degree of care required by a warehouseman is that which a careful and vigilant man would exercise in the custody of his own goods of similar character: Wyatt Paine on Bailments (1901), p. 93.

In the statement of defence itself it is pleaded that the plaintiff well knew that the said shipment was about to arrive at Fort Frances, and that acts of theft were common in the case of goods of such class, and that the plaintiff should have for his own protection taken extra precautions to see that the same were guarded and looked after. If he had done so, his guard would have been an intruder. But, if extra guarding was incumbent upon the plaintiff, a citizen having few such transactions, the more would it be incumbent on the company—well aware of the many thefts—to take special precautions to prevent the stealing of whisky, which in many communities—and probably in Fort Frances—was scarcely realised to be a crime by those who were not wealthy enough to lay in large stocks for the dry years to follow; yet, although the consignment was specially guarded on the train which brought it, and although a special guard was put on the 24 cases which remained after the theft, on the night of the 27th June this precious freight was left in a bonded warehouse, where the locking arrangements were quite flimsy and inadequate, as is proved by the fact that the screws holding the hasp were removed in a few minutes, and the sliding door thus opened. If the hasp had been attached to a substantial staple driven in and clinched on the other side of the floor, or had the hasp been fastened by bolts and nutted on the inside, there would have been something to say to negative negligence. Under sec. 18 of the regulations of the Customs Department, 1155B, all railway companies shall provide secure and commodious "Sufferance Houses" in connection with their stations for landing, storing, delivering, and forwarding bonded goods, and all such premises are to be made secure to the satisfaction of the collector or proper officer of Customs. But the railway company remains warehouseman; it is the railway company that collects the customs duties and pays them over to the Department; it was the railway company that made the warehouse charges in the present instance, and its warehouse is not a warehouse merely for the purposes of the Customs Department, but a warehouse as between the warehouseman and the bailor, and that must be the test of security and safe custody.

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It follows that as warehouseman (if it were such) the railway company would also be liable.

The facts in this case make it different from *Brown* v. *Dominion Express Co.* (1921), 67 D.L.R. 325, 51 O.L.R. 359 where the whisky stolen was "at owner's risk."

The plaintiff claims damages on the basis of what he had to pay for 76 cases at $40 per case to replace what was stolen. There is authority for making, as in conversion, the standard of damages the value of the goods at the time of a trial, and as in cases of breach of contract to supply: Halsbury's Laws of England, vol. 10, p. 344 (Damages). He is entitled therefore to recover $3,040 on that count.

As regards duty paid the Department of Customs, the ruling of the Commissioner of Customs was that the duty on 100 cases was $1,922.12; the Commissioner's ruling was founded on regulation No. 1343B, sec. 14 (g): "If a deficiency be found in the quantity of goods remaining in warehouse when compared with the quantities originally warehoused . . . . then in such case the duty on the quantity found deficient shall be paid to the Collector of Customs before the ex-warehousing of such remaining goods" (Order in Council, 22nd May, 1900).

The proportion of the duty imputable to 76 cases is $1,460.81. The plaintiff is entitled to add this sum as part of his damages. But he put in a claim for a refund of this amount, and the railway company is to be placed in his shoes as regards this claim. If it has been refunded, it is not to be added to the damages; if it has not been refunded, the railway company is entitled to an assignment of it.

The plaintiff will have his costs of action.

Judgment for plaintiff.

Re HARRISON.

Ontario Supreme Court, Orde, J. February 16, 1922.

BANKRUPTCY (§II—20)—PRIORITY OF CLAIMS—LIEN FOR TAXES—MORTGAGE.

The lien of a municipal corporation for arrears of taxes under the Assessment Act, R.S.O. 1914, ch. 195, sec. 109, is enforceable as against the goods of a bankrupt in the hands of the trustee in bankruptcy, by virtue of sec. 51 (6) of the Bankruptcy Act, and ranks prior to the claim of a first mortgagee.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

HENRY F. HARRISON, the insolvent, who carried on a hotel business at Oakville, made an assignment to an authorised trustee under the Bankruptcy Act on August 16, 1921. A day or two later the municipal corporation of the Town of Oakville seized certain goods and chattels of the insolvent, at Oakville,

for arrears of taxes against the lands of the insolvent, amounting to $1,482.22; but, pursuant to an order of the Registrar in Bankruptcy, these goods were returned to the possession of the trustee, without prejudice to any claim of the corporation of the town to be paid out of the proceeds of the sale of the goods by the trustee.

William S. Davis held a first mortgage on the lands of the insolvent, upon which there was alleged to be due for principle and interest a sum exceeding $25,000, and was taking steps to realise under his power of sale.

The arrears of taxes being of course a lien upon the lands ranking ahead of his mortgage, and to this extent impairing his security, Davis applied for an order declaring that the town corporation was entitled to levy upon the goods of the insolvent in the hands of the trustee and to be paid out of the proceeds, and directing the trustee to sell the goods and pay the arrears of taxes.

J. M. Ferguson, K.C., for the applicant.

H. H. Donald, for the trustee.

J. M. Godfrey, K.C., for the town corporation.

ORDE, J. (after stating the facts as above):—Under sec. 109, (x) subsec. 1, of the Assessment Act, R.S.O. 1914, ch. 195, the municipality has a lien (para. 1) upon the goods of the owner or tenant of the lands in respect of which the taxes are payable, wherever found within the county in which the municipality lies, and likewise (para. 4) upon goods upon the lands where title is claimed by purchase, gift, transfer, or assignment from the person taxed.

The trustee contends that these words are not sufficient to cover the case of a transfer of title operating by virtue of a receiving order or an authorised assignment. With this view I cannot agree. If the goods are still on the land which is charged with the payment of the taxes, then they are subject to seizure even in the hands of the trustee, because his title is derived by a transfer or assignment (whether statutory or voluntary is immaterial) from the owner, within the meaning of para. 4 of sub-sec. 1 of sec. 109 of the Assessment Act, and consequently are within the protection afforded to claims for taxes by sub-sec. 6* of sec. 51 of the Bankruptcy Act.

*(6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect to such a property created by any such laws.

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There is no conflict between this view and that already expressed in *Re F. E. West Co.* (1921), 62 D.L.R. 207, 50 O.L.R. 631, as to business taxes. See (1921), 68 D.L.R. 772, 50 O.L.R. at p. 644. There I held that sub-sec. 11 (added in 1917, 7 Geo. V. ch. 45, sec. 10) of sec. 109 of the Assessment Act was not wide enough to cover the case of assignment or receiving orders under the Bankruptcy Act so as to give to the purely personal claim for business taxes any privilege under sub-sec. 6 of sec. 51 of the Bankruptcy Act. But in the case of taxes charged upon the lands, the wording of sub-sec. 1 of sec. 109 is quite different, and is, in my judgment, sufficiently wide to preserve the privilege even after the bankruptcy.

Though the municipality was represented upon the motion, it is not asking for the order. The application is by the mortgagee. This, in my judgment, is immaterial. It is simply a case for marshalling. The municipality has two funds or securities to which it can resort for payment of the taxes, and the mortgagee has but one. Under these circumstances, he is entitled, as against the insolvent estate, if the municipality exacts the taxes from the lands, to the benefit of the other security. The town corporation's right to assert its claim was preserved by the Registrar's order, and that must enure for the benefit of the mortgagee as well.

There will, therefore, be an order directing the trustee to sell sufficient of the goods to pay the taxes, costs of seizure, and such other costs as are payable to the municipality, and to pay the same.

The costs of the mortgagee and of the town corporation and of the trustee upon this motion will be paid out of the insolvent estate.

Judgment accordingly.

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Quebec Court of King's Bench, Appeal side, Lamothe, C.J., Lavergne, Pelletier, Martin and Greenshields, JJ. June 28, 1920.

DISORDERLY HOUSE—CHARGE OF KEEPING DISMISSED—POLICE REGISTER OF BAWDY HOUSES—IMPROPER LISTING OF ACCUSED AS HAVING BEEN CONVICTED WHEN IN FACT DISCHARGED—NOTICE FROM CITY POLICE DEPARTMENT TO PROPERTY OWNER UNDER CR. CODE SEC. 228 A — LIABILITY OF CITY MUNICIPALITY IN DAMAGES.

A city municipality may properly be held liable in damages by reason of its improperly listing through its police office in a special Police record of disorderly houses the name of the plaintiff as having been convicted of keeping when in fact she had been acquitted on the charge and for improperly sending a notice

of conviction to the property owner under sec. 228 A of the Criminal Code; but the police officer who laid the charge of keeping against the plaintiff and who took no part in the execution of the warrant of arrest or in the erroneous listing and the notice to the property owner, is not liable if he acted without malice and without reasonable and probable cause.

APPEAL by defendants from the judgment of the Superior Court in an action by Dame Mongeon against the City of Montreal and one Archambault, its Superintendent of Police. The judgment against Archambault was set aside and the judgment against the city maintained.

Laurendeau, Archambault, Damphouse, Jarry, Butler and *St. Pierre*, for the City of Montreal and Archambault defendants, appellants.

A. Papineau Mathieu, for the plaintiff, (Mongeon), respondent.

LAMOTHE, C.J.:—I am of opinion that the judgment rendered against Archambault should be reversed and the action dismissed as regards him. I am, however, of opinion that the judgment should be confirmed in its dispositif as regards the city appellant.

Archambault laid a complaint against the plaintiff accusing her of keeping a disorderly house. The Recorder's Court dismissed this complaint, each party paying his own costs. The plaintiff, relying on this acquittal, alleges that Archambault informed on her in malice and without cause. The defendant, Archambault, pleaded that he was a peace officer (constable) and that he acted with reasonable and probable cause. He invokes art. 88 C.C.P. [foot note (a)] and argues that the action brought against him should fail through want of preliminary notice. The complaint against the plaintiff could be laid by any citizen. Constables do not enjoy greater rights in this respect than other persons. It was not in his quality of peace officer that Archambault made the complaint; he made it at the request of the City of Montreal, and as an employee of that municipality. This circumstance produces two consequences: 1.

(*a*) NOTICE OF ACTION AGAINST PUBLIC OFFICER IN QUEBEC.

Article 88, Quebec Code of Civil Procedure, enacts as follows: "No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him unless notice of such action has been given him at least one month before the issue of the writ of summons. Such notice must be in writing; it must state the grounds of the action and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile."

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That Archambault is not entitled to the notice required by art. 88 C.C.P.; 2. That the City of Montreal is responsible for the act of its employee.

But the action against Archambault must fail for another reason, namely: because there was reasonable and probable cause for laying such information, although there was not a sufficient case for conviction. Reports had been made in writing containing statements which by their nature constituted a justification for the information. These reports bore every appearance of truth and good faith. Any citizen on reading them would have been justified in doing what Archambault did. This constitutes sufficient ground for dismissing an action in damages. The fact that Archambault was present when the plaintiff was arrested in execution of a warrant issued by a Court of competent jurisdiction, does not increase the gravity of his legal position.

As regards the City of Montreal, it was equally justified in having the complaint brought against the defendant, considering the information that was furnished to Inspector Bélanger. The confirmation of the judgment against the city should not be based upon the fact of the arrest, but upon other facts in the case. The Police Department keeps in a register a list of disorderly houses. (*b*) The plaintiff's house was entered on this list, without any subsequent entry to indicate that the charge was dismissed. This is a serious circumstance involving damages. There is another fact equally serious: the Chief of Police wrote to the Montreal Trust Company, who represented the owners of the house occupied by the plaintiff, saying that the

(*b*) LIABILITY of OWNER of PROPERTY used as DISORDERLY HOUSE in PROVINCE of QUEBEC.

By Canada Statutes 1913, ch. 13, sec. 228 A of the Criminal Code, was enacted as follows:—

228 A. Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house shall be liable upon summary conviction to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment.

(2.) If the landlord, lessor or agent of premises in respect of which any person has been convicted as the keeper of a common bawdy-house fails, after such conviction has been brought to his notice, to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and subsequently any such offence is again committed on the said premises, such landlord, lessor or agent shall be deemed to be a keeper of a common bawdy-house unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

latter had been accused of keeping a disorderly house, and had been found guilty of the charge. This is contrary to the truth; it induced the owner to take very disagreeable measures. Correspondence took place with the Chief of Police who finally abandoned the stand he had taken. He says there was error. That error caused damages for which the municipality is responsible. The city's pretension that the Chief of Police took this action, not as its employee, but as a peace officer acting under the Criminal Code, cannot be seriously entertained. The Criminal Code does enable constables to send such notices, and the present notice is governed by the ordinary rules regarding offences and quasi-offences.

Confirmation of the judgment against the City of Montreal alone for $500, involves a somewhat special adjudication as to costs. The plaintiff-respondent's action against the defendant-appellant Archambault being dismissed, the plaintiff is condemned to pay the costs of the contestation made by the said Archambault in the Superior Court, the separate contestation. The City of Montreal is condemned to pay the costs of an action for $500 in the Superior Court, including all the costs of hearing. As the appeal fails as regards the defendant Archambault and succeeds as regards the City of Montreal, each party must pay its own costs since the two defendants joined in a single inscription in appeal.

PELLETIER, J., dissented.

MARTIN, J.:—In the view that I take of this cause, it is

In the Province of Quebec there are additional regulatory provisions of the class commonly called "Red Light Abatement law," passed by the provincial legislature in 1920 under the title "An Act respecting the owners of houses used as disorderly houses."

It is to be noted, however, that this provincial legislation was passed after the decision appealed from in *Montreal* v. *Mongeon*, reported above.

By Statutes of Quebec 1920, Chap. 81, the following provisions are made:—

It shall be illegal for any person who owns or occupies any house or building of any nature whatsoever, to use or to allow any person to use the same as a disorderly house. A certified copy of any judgment convicting any person of an offence under sec. 228, 228a, 229 or 229a of the Criminal Code shall be *prima facie* proof of such use of the house in respect of which such conviction was had. (Sec. 2).

"Disorderly House" shall mean a house used for any of the purposes which constitute a disorderly house within the meaning of Part V of the Criminal Code. (Sec. 1 (b)).

Any person knowing or having reason to believe that any building or part of a building is being made use of as a disorderly house, may send to the registered owner, or to the lessor, or to the agent of the registered owner, or to the lessor of such building, a notice, accom-

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unnecessary to decide the much debated question as to what extent and in what cases the city of Montreal is responsible for the acts of its police officers in laying an information under the provisions of the Criminal Code or in causing the arrest of offenders of the provisions of that Code. The extent of such responsibility must depend upon the circumstances of each case. Generally speaking, a police officer is not the agent of the municipal corporation which appoints him to the position and if a constable, for instance, arrests a person in the act of committing a crime, he does not do so as an employee or *préposé* of the city. Of course, the responsibility of the city attaches where the latter has authorised or adopted the acts of its constables.

It is unnecessary to repeat the views expressed by Carroll, J. speaking for this Court in the case of *Fafard* v. *City of Quebec* (1917), 35 D.L.R. 661, 26 Que. K.B. 139, where he points out the distinction to be made on the question of responsibility of the municipal corporation.

In the present case, it was urged that the city had authorised and adopted the acts of its police officers in forming what was generally styled the "Morality Squad" to suppress immorality in the city. In this case, I prefer not to express a firm view on this point and it is unnecessary to do so.

On the question of want of reasonable and probable cause, I am of opinion that what occurred in respondent's house on the occasion of the visits of constables Labelle and Chabot, created grounds of reasonable and probable cause for the belief that 225 Bleury Street was a disorderly house.

Holding as I do that Archambault had reasonable and probable cause for doing what he did, we cannot say he was acting in bad faith and he was entitled to notice of the action under

panied by a certified copy of any conviction as aforesaid, if any there be, by registered mail to the last known address of the said owner, lessor, agent or lessee, as the case may be. (Sec. 3).

Ten days after the mailing of such notice, if such building or any part thereof still continues to be used as a disorderly house, any person may apply for and obtain an injunction directed to the owner, lessor, lessee or occupant of such building, or to all such persons, restraining them, their heirs, assignees or successors from using or permitting the use of such building or any other building for the purposes above mentioned. (Sec. 4).

If the judge finds that the use of such building as a disorderly house continues, he shall by his final judgment, in addition to all other orders he is by law empowered to make, order the closing of the said building against its use for any purpose whatsoever for a period of not more than one year from the date of judgment, which said order shall be registered at the registry office of the registration

art. 88 C.C.P., and the jurisprudence of this Court. As to appellant Archambault, I would maintain the present appeal and dismiss the action against him without costs.

As to the other appellant, the city of Montreal, even if responsible for the acts of Archambault, there existed in my opinion reasonable and probable cause for the acts of Archambault and the city could not be condemned on this ground. Nevertheless, in my opinion, the judgment of the Superior Court, in so far as the city of Montreal is condemned, should be confirmed on the ground that the Superintendent of Police, not acting as a constable or peace officer under the provisions of the criminal law but acting as an employee of the city, notified the owners of the house occupied by respondent that she had been convicted of keeping a common bawdy house, whereas in truth and in fact she had been acquitted of such charge. The action of the Superintendent of Police in causing respondent's name to be inscribed in the register or book of record kept of persons convicted of keeping a disorderly house, after her acquittal, and the carelessness and recklessness of this official in sending to the proprietor of the house a notice that she had been convicted when she had been acquitted, constitutes a faute, an act *dommageable*, sufficient to engage the responsibility of the city. The amount of the condemnation is not contested.

I would confirm the judgment of the Superior Court in so far as the city of Montreal is concerned, with costs in both Courts.

GREENSHIELDS, J. (after stating the facts):—Archambault neither knew the plaintiff's name nor the plaintiff, and had no personal knowledge whatever of the character of the house or its inmates. In the information or complaint, he states that he

division in question within ten days thereof with a notice stating that it affects the immoveable property concerned. The judgment shall affect the property only from the date of its registration, and shall have no effect whatever against any persons acquiring rights in or upon such property prior to such registration. (Sec. 7).

In 1921, sec. 7 was amended by adding at the end of the 2nd paragraph: "Nevertheless the notice given under sec. 3 shall have effect as against any person acquiring such property before the registration of the judgment, if the Court be of opinion that such acquirer is using the building in question, or any part thereof, as a disorderly house." 1921 Que., ch. 98, in effect March 19, 1921.

The Provincial Act contains other provisions for suspension of the judgment on certain conditions, the giving of a cash bond, etc. and for the protection of the property during the period for which the building is closed (Secs. 8 and 9); and for the avoidance of the lease (Sec. 10).

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has just reason to suspect and to believe, and that he does suspect and believe upon information received, that the person described in his complaint was the keeper of a common bawdy house. Upon this complaint the warrant issued. Archambault took no part in the execution of this warrant, and no complaint is made against him on that score, and if the condemnation against Archambault stands, it must be based solely upon the fact that he, under instructions and upon such information as he had, signed the complaint.

A serious if not violent attack is made upon the testimony of the two constables who were delegated by their chief to make the case. They are known by name as S. Labelle and F. Chabot.

I am not called upon to decide, whether or not the plaintiff was guilty of the offence charged. The recorder said she was not guilty. For some reason he did not award her the costs of her defence. In like manner, I am not called upon to decide whether Labelle and Chabot told the truth, either in their report or in their testimony. What I am called upon to decide is, whether or not Archambault, being in possession of the information he had, and having received it from the source he did, whether he acted as a reasonable man should or would under like circumstances.

It is the duty of a policeman, as it is the duty of every individual, to denounce crime. If the policeman or the individual does it in good faith and with grounds that can be considered by a reasonable man sufficient, then the policeman and the individual is immune from attack. Reasonable and probable cause even destroys express malice. The lack or want of reasonable and probable cause, presumes malice. A man may be actuated by feelings or hatred (which means more than malice), but if another gives him reasonable and probable cause to institute proceedings before the Criminal Court an action in damages will not lie even though there be an acquittal. I have no hesitation whatever in freeing the defendant Archambault from the judgment, and that on the ground (if for none other) that he acted with reasonable and probable cause.

There is another ground upon which I think the defendant, Archambault, is bound to escape. I am of opinion that he was a public officer, or, in any event, a person fulfilling a public function or duty; that he acted in good faith, and that he was entitled to the notice called for by art. 88 C.C.P. I should maintain Archambault's appeal and dismiss the action against

him.

As to the appeal of the city. I am of opinion that under the circumstances disclosed by the proof, that Belanger, Labelle, Chabot, Campeau and Archambault were *préposés* of the city, and I believe that the city defendant is responsible for their acts.

Having come to the conclusion that Archambault is free from blame, I might come to a similar conclusion with respect to the city were it not for an incident that occured after all that is charged against Archambault and the others except Campeau, had ended.

The plaintiff was acquitted on February 8, 1918. It would seem that as part of the system of keeping records in the City Hall they have a book containing what I might call a "black list." As soon as any person is arrested for keeping a common bawdy house, his or her name, as the case may be, is entered in this book. It is justified on the ground that it is advisable to have a record of these persons. That may or may not be right and wise. It is not advisable that the employees of the city should come to the conclusion that the mere entry of a person's name in this book makes him black or convicts him of an offence. Six days after the plaintiff was acquitted, and for no reason whatever, and with no excuse or explanation given, the Superintendent of Police wrote the following letter to the Montreal Trust Co., a well known and influential company in this city:—

"I hereby beg to notify you that Lucie Mongeau occupant of the house bearing civic No. 225 Bleury Street, of which you are owner, has been arrested and convicted on the 11th of February, of keeping a common bawdy house. Therefore, I wish to draw attention to Art. 228a, sec. 2 of the Criminal Code, which reads as follows. (Then follows the section of the Code.)"

This letter was received by the Montreal Trust Co., and it promptly proceeded to make investigation. On February 25 it wrote, through one of its employees, Lucas, to the Superintendent of the Police; told the Superintendent that the property was owned by H. N. Chauvin and the writer, although nominally it stood in the name of the Montreal Trust Co., and that the letter had been handed over by the Montreal Trust Co. to the writer and Chauvin. Chauvin and Lucas had employed the A. F. Gault Trust Co. to administer this property as their agents, and they handed the letter over to the Gault Co., thus

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giving it further publicity. The Superintendent got the report that the plaintiff had occupied the premises for several years, and the Gault Trust Company believed her to be absolutely honorable and respectable in every way. Then Mr. Lucas adds:—

"We are most anxious to get to the bottom of this matter and would ask you, therefore, to kindly let us know by return mail whether Mr. Mathieu is correct in his statement that Mrs. Privey, (the plaintiff) was acquitted or not. If Mrs. Privey was actually convicted, she cannot leave our property too quickly, but if she was acquitted your charge cannot be too quickly withdrawn."

The following day the charge was withdrawn. The error was admitted; regret was expressed by Campeau that the error had occurred. His regret did not remedy the damage.

As I have stated, there is no excuse or justification pleaded or offered for this error, and I should confirm the judgment against the city defendant on this ground only. It may be that I would not have assessed the damages at the amount fixed by the trial Judge, but I am not prepared to interfere with the assessment, and would dismiss the appeal and confirm the judgment.

Formal judgment was entered as follows:—

Judgment:—"As to the appellant Archambault:

Considering that the defendant appellant Archambault had reasonable and probable cause for laying the complaint mentioned in the declaration against plaintiff-respondent, especially in view of the reports made by two special agents of the Police department.

Considering that it has not been proved that the said defendant-appellant Archambault acted, in the circumstances, with malice and without reasonable cause; As to the appellant, the City of Montreal:—

Considering that the other defendant-appellant, the City of Montreal, acting through its Chief of Police, gave notice in writing to the owner of the house occupied by the plaintiff-respondent, that the said plaintiff had been accused and found guilty of keeping a disorderly house when the complaint laid against her had been dismissed by the Recorder's Court, which notice should have been withdrawn by reason of error;

Considering that the name of the plaintiff-respondent, with mention of the street and number of her house, was inscribed in a special register kept by the Department of Police as a record of disorderly houses in Montreal, and that this entry was not cancelled;

Ont.

S.C.

Considering that the plaintiff-respondent sustained damages as a result of the two facts hereinabove mentioned; Considering that there is error in the judgment of the Court of first instance, which condemned the defendant-appellant Archambault, but that there is no error in the *dispositif* of the said judgment, which condemned the City of Montreal appellant;

Maintains the appeal as to the defendant-appellant Archambault and quashes and annuls the judgment insofar as it affects him; confirms, for the reasons hereinbefore set forth, the *dispositif* of the judgment rendered by the said Superior Court, as to the city of Montreal, the other defendant, maintaining the action for the sum of $500; the plaintiff-respondent is condemned to pay the costs of the separate contestation of the defendant Archambault in the Superior Court without costs of hearing; the City of Montreal is condemned to pay the costs of the action against it in the Superior Court including all the costs of hearing. In appeal, each party shall pay his own costs.

Judgment against police officer reversed; judgment against city maintained.

Re MANCHESTER STORES Ltd.

Ontario Supreme Court, Orde, J. February 16, 1922.

COMPANIES (§VF—255)—LIABILITY ON SUBSCRIPTIONS—CONDITIONS PRECEDENT—NOTICE OF ALLOTMENT.

The purchase of goods from a subscriber for shares, or the employment of him, agreed to by the corporation when obtaining the subscription, form no conditions precedent to the liability of the subscriber, as contributory, for the unpaid amount upon the subscription. The receipt of notice of a shareholder's meeting by a subscriber has the effect of notice of the allotment of the shares under his subscription.

[See Annotation 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

MOTION by the trustee of the bankrupt estate of the above named company for judgment against certain persons named as contributories for the amounts unpaid upon their subscriptions for shares.

R. S. Cassels, K.C., for the trustee.

H. S. White, K.C., for R. M. Fraser, J. H. Fraser, and May A. Fraser, and for C. M. Taylor.

A. G. Cook, in person.

ORDE, J.:—The insolvent company made an authorised assignment under the Bankruptcy Act. The company was incorporated by letter patent under the Ontario Companies Act, on January 5, 1921, with an authorised capital of $200,000.

Ont.

S.C.

RE MANCHESTER STORES, LTD.

Orde, J.

The trustee alleges that certain persons are liable as contributories in respect of their subscriptions for shares in the company, and now moves, after due demand made, for judgment under the provisions of sec. 36 of the Bankruptcy Act and Bankruptcy Rules 122 *et seq.* Upon the hearing of the motion certain evidence was given *viva voce*. I deal with the cases *seriatim*.

The Frasers' Case.

The three Frasers are members of a partnership known as the Fraser Hardware Company of Galt. They subscribed for 10 shares of $100 each, and allege that there was an agreement with the insolvent company whereby this stock was to be paid for by the purchase of goods of the Fraser Hardware Company. Goods were, in fact, purchased to the extent of $417.53, and credit given, but the bankruptcy intervened before any more purchases were made.

Mr. White relied upon *Re Canadian McVicker Engine Co.* (1909), 13 O.W.R. 916, and contended that the purchase of the goods was a condition precedent to the subscription. But I cannot see the present agreement in that light. There was no condition precedent here at all. There was merely an agreement that the company would purchase hardware supplies from the Frasers, and, as Mr. J. A. Fraser put it, they were "to allow the first $1,000 of goods taken to be applied on the stock." The application in this way of the moneys owing for goods purchased was merely a method of paying the subscription.

It was suggested, though not very seriously, that there had been no allotment of the stock and no notice of allotment. Mr. Fraser attended a meeting of shareholders and acted as a shareholder, and must be deemed to have waived the necessity for an allotment, and it is too late now to repudiate. There will therefore be judgment against R. M. Fraser, J. A. Fraser, and Mary A. Fraser, trading as the Fraser Hardware Company for $648.06 and the proportionate costs of this application.

Taylor's Case.

Campbell M. Taylor subscribed for 10 cumulative preferred shares of $100 each, paying $250 in cash. He subsequently paid a further $250. He was employed by the company at no stated salary, but says he was to receive a small salary at first and then a larger one to enable him to pay for his shares. Some time after his second payment, he had some disagreement with the manager and was discharged. He thereupon attempted to cancel his subscription. He now asserts that his subscription was conditional upon his employment. This defence cannot

stand. The arrangement is in substance the same as that in the Frasers' case. The two agreements are collateral. Taylor may have a claim for damages for wrongful dismissal, but he cannot escape his liability as a contributory.

There will be judgment against him for $500 and the proportionate costs of this application.

Cook's Case.

A. G. Cook subscribed for two shares. He swears that he never received any notice of allotment, and there is no evidence that any shares were ever allotted to him or notice of allotment given. He admits that he received notice of three meetings of shareholders, but says he never attended any meeting or did any thing to admit his liability as a shareholder, and no evidence is given to the contrary. He says he always intended to pay an allotment, but he never repudiated or withdrew his subscription.

The question whether or not there has been such action on the part of the company as to constitute an allotment, or on the part of the shareholder as to waive the necessity for formal allotment and notice, is largely one of fact. It has been held by the Court of Appeal in Manitoba that the receipt of notice of a meeting of shareholders by a subscriber is notice of acceptance of his subscription: *Traders Trust Co.* v. *Goodman* (1917), 37 D.L.R. 31, 28 Man. L.R. 156: and Anglin, J. in *Alberta Rolling Mills Co.* v. *Christie* (1919), 45 D.L.R. 545 at p. 559, 58 Can. S.C.R. 208, appears to approve of this principle. Mr. Cook received three notices and took no steps to repudiate or withdraw his subscription. I think he must be held to have accepted the notices as sufficient intimation that his subscription had been accepted and that he had become a shareholder, and that he cannot now escape his liability as such.

There will, therefore, be judgment against Cook for $200, and the proportionate costs of this application.

Motion granted.

Re THOMAS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 10, 1922.

BANKRUPTCY (§I—6)—DATE OF PROCEEDINGS—AMENDED PETITION—PREFERENCES.

Where, because of the insufficiency of status of the petitioning creditors, in a proceeding under the Bankruptcy Act, an amended petition is filed, the proceeding does not relate back to the time of the filing of the original petition, but commences with the date of the presentation of the amended petition; and it is from such date that the three-months' period, for determining preferences under sec. 31 of the Act, is computed.

Ont.

App. Div.

BANKRUPTCY (§II—15)—FRAUDULENT PREFERENCES—PAYMENTS—RELATIVE.

Where a bankrupt, within the three-months' period, has made payments to his brother, in money and goods, in larger sums than paid to other creditors, they will be deemed fraudulent preferences under sec. 31 of the Bankruptcy Act, despite the latter's affidavit that he did not suspect the debtor's insolvency.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL by John F. Thomas from the judgment of Orde, J. on a motion by the trustee in bankruptcy of the estate of Ralph Thomas, under Bankruptcy Rule 120, for an order setting aside as fraudulent and void certain payments of money and transfers of goods made by the debtor, Ralph Thomas, to his brother the appellant.

The judgment appealed from was as follows:—

The evidence was submitted in the form of affidavits.

The petition for a receiving order was made by certain wholesale dealers in Montreal, and was presented on February 25, 1921. The status of the petitioning creditors was questioned, and the motion was enlarged to permit the petitioners to amend by adding or substituting other creditors: *Re Thomas* (1921), 60 D.L.R. 616, 50 O.L.R. 324. Subsequently the motion was renewed, some of the discounted bills having been taken up by the petitioners, a bank, as the holder of certain other bills, having been added as a petitioner, and the petition having been amended on April 22, 1921; and a receiving order was made on June 4, 1921: *Re Thomas* (1921), 60 D.L.R. 613, 50 O.L.R. 324, 328. I mention these proceedings because the date when the petition was amended is material on this motion.

When the petition was presented, the petitioners had no status; they were not then creditors of the alleged bankrupt having discounted with certain banks the negotiable instruments theretofore held by them. Counsel for the trustee argues that the subsequent amendments whereby this defect was cured related back to the date of presentation of the original petition in its original form, and he cites certain English cases upon what is there termed the "relation back of the trustee's title." This relation back operates, by virtue of sec. 37 of the English Act of 1914, to carry the bankruptcy back to the act of bankruptcy, or, if more than one, the first act of bankruptcy, within a period of three months committed by the bankrupt. This has in England a very important bearing upon all transactions with the bankrupt subsequent to the first act of bankruptcy. But these provisions of the English Act have not been re-enacted here. Their place is filled, to some extent at any rate, by those provisions of our Act dealing with fraudulent preferences, etc.

I am unable to see in what way the English authorities upon the relation back of the trustee's title affect the question as to when the bankruptcy petition must be deemed to have been presented, within the meaning of sec. 31 of our Bankruptcy Act. I am of the opinion that where the defect in the petition was fundamental, as it was in this case, the date of presentation must be held to be the date when the petition was so amended as to constitute a sufficient foundation for the making of the receiving order. That date was April 22, 1921.

John F. Thomas is a brother of the bankrupt, and was carrying on business as a dry goods merchant at Timmins, where the bankrupt also carried on a similar business. Prior to December 1, 1920, John F. Thomas had made advances of money and goods to the bankrupt to the extent of $2,278.89. On the 8th December, 1920, the bankrupt paid him $600, and on the 18th February, 1921, delivered him goods to the value of $300. This was followed by further payments of money and on further delivery of goods until a final payment on April 13, 1921, made up an amount of $2,279.19, a few cents in excess of the amount due Thomas. Four of the later payments of money were to take up promissory notes given by the bankrupt to his brother, the earliest of them having been given on January 29, 1921. All these payments and deliveries of goods are attacked by the trustee on the ground that they were made within three months prior to the presentation of the petition and are in consequence *primâ facie* preferential and void under sec. 31.

Holding, as I do, that the petition must be deemed to have been presented at the date of its amendment on April 22, 1921, the earliest payment of $600 made on December 8, 1920 is excluded from the category of *primâ facie* preferential transactions, but the remaining transactions, being subsequent to January 22, 1921, all come within it. The burden is therefore upon the creditor to establish the validity of the transactions. This he attempts to do by swearing that he needed the money and had pressed for payment, and that he did not know or suspect that his brother had committed any act of bankruptcy or that bankruptcy proceedings had been commenced against him, and that the transactions were all in good faith and in their ordinary course of dealing as business men in the town of Timmins.

The act of bankruptcy upon which the receiving order was made was the giving of a chattel mortgage on January 27, 1921, to another creditor, which I held to be preferential (60 D.L.R. 613, 50 O.L.R. 324, 328). It is rather significent that two of the promissory notes, each for $350, given by the bankrupt to

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his brother, were given on January 29, 1921. It is also significant that after that date the bankrupt, though still purchasing goods quite heavily, paid to his creditors only $2,598.37, of which $1,679.19 was to his brother.

The burden of establishing that the transactions subsequent to January 22, 1921, were made without knowledge of the insolvent condition of the debtor is cast upon the creditor by sec. 31. I do not consider that a bald statement in an affidavit that he was not aware of any act of bankruptcy is sufficient. It is not altogether satisfactory to have to deal with questions of fact in a summary way upon affidavits, but the transfer of goods in satisfaction of a debt is always open to suspicion, and I think requires much more explicit evidence to support it than in the case of an alleged preferential payment of money. It is noteworthy here that the first transaction after January 22, 1921, apart from the giving of the promissory notes, was that of February 18, 1921, when goods to the value of $300 are transferred by the bankrupt. Without explanation that transaction is convincing that the creditor must then have become aware of the debtor's insolvent condition and this knowledge would taint all the later transactions.

The payment of $600 on December 8, 1920, having been made more than three months prior to the presentation of the petition, does not fall within sec. 31* at all. If it is subject to attack by the trustee, it must be because of some other statutory provision. The burden of establishing that the payment is subject to be set aside is upon the trustee, and he has failed to shew any ground upon which I can give him any such relief.

The trustee is therefore entitled to a judgment against John F. Thomas, declaring that the payments and deliveries of goods to him subsequent to January 22, 1921, were fraudulent and void and must be set aside, and for the payment by John F.

* 31. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same, if made, incurred, taken, paid or suffered with such view as aforesaid, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorised assignment, or if it has such effect as aforesaid be presumed *primâ facie* to have been made with a view of giving such a creditor a preference over the other creditors, whether it was made voluntarily or under pressure, and if held to have been with such a view, be deemed fraudulent and void as aforesaid.

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Thomas to the trustee of $1,679.19 in respect thereof, together with the costs of this motion.

H. H. Davis, for the appellant.

D. G. M. Galbraith, for the trustee, respondent.

The Court, by consent of the parties, discharged the judgment appealed against and remitted the case to the Judge in Bankruptcy for trial upon oral evidence; costs of the appeal to be costs in the proceeding.

Oral evidence was taken before FISHER, J.; and (May 29, 1922) he pronounced judgment in favour of the trustee, against John F. Thomas, for $1,679.19, with costs of this and the summary trial before ORDE, J. (see 22 O.W.N. 397).

BRISCOE v. MOLSONS BANK.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Masten, Rose and Orde, JJ. October 10, 1922.

BANKRUPTCY (§IV—38)—PREFERENCES—PAYMENTS TO BANK—VICTORY BONDS—GOOD FAITH—PRESENT CONSIDERATION.

Payments received by a bank from a debtor whom it knew to be in insolvent circumstances are not payments "in good faith" within the meaning of sec. 31 of the Bankruptcy Act, and are recoverable as fraudulent preferences by the trustee in bankruptcy, excepting those founded on an actual present consideration. Payment with Victory bonds will be treated as "payment" in cash, although the proceeds thereof were not realised until after the assignment in bankruptcy.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL by defendants and third parties from the judgment of Meredith, C.J.C.P. in an issue arising out of bankruptcy proceedings. Affirmed.

The judgment appealed from is as follows:—

"The question involved in this issue is: whether certain payments, or any of them, made by the bankrupt to the defendants in the issue, are "fraudulent and void as against the trustee" in bankruptcy of the bankrupt's estate.

Section 31 of the Bankruptcy Act provides, among other things, that every payment made by any insolvent person in favour of any creditor with a view to giving such creditor a preference over other creditors, or which has the effect of giving such creditor a preference over the other creditors, shall, if the person paying the same make an authorised assignment within three months after the date of paying, if made with such view as aforesaid, be deemed fraudulent and void as against the trustee. The enactment then goes on to provide for the case of payment, etc., which has the effect of giving such a preference, creating a *primâ facie* presumption only that such payment,

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etc., was made, etc., with a view to giving the creditor a preference over other creditors.

All that seems plain enough, but Parliament did not deem it sufficient and added another section—32—in which, subject to some provisions of the Act not applicable to this case, it is provided that nothing in the Act shall invalidate any payment by the bankrupt to any of his creditors provided that certain conditions are complied with, one of which is: that the payment "is in good faith" and takes place before the date of the receiving order or authorised assignment; and the other is: that the person (other than the debtor) to whom the payment is made has not at the time of the payment notice of any available act of bankruptcy committed by the bankrupt or assignor.

This somewhat roundabout way of expression does not at all dim the meaning of the enactment in its effect upon this case: there are just two questions involved in it, either of which, being answered in the plaintiff's favour, concludes the case against the defendants upon the main point involved in it.

The questions are: (1) Were the payments in question payments made in good faith before the date of the assignment to the plaintiff? and (2) Had the defendants, at the times of payment, notice of any available act of bankruptcy committed by the bankrupt?

As I deem that the second question must be answered in favour of the defendants, I shall consider it first.

At the time of all these transactions, an available act of bankruptcy was: "an act of bankruptcy available for a bankruptcy petition at the date of the presentation of a petition on which a receiving order is made:" sec. 2 (*h*) of the Act. How can that be applicable to this case, which is one of an authorised assignment only? The amendment to the Act in this respect was made after all these transactions: The Bankruptcy Act Amendment Act, 1921, 11 & 12 Geo. V. ch. 17, sec. 3.

The act of bankruptcy alleged relates to a writ of execution in a sheriff's hands; I do not consider whether or not an act of bankruptcy has been proved in respect of it, because that is unnecessary: as I am unable to find that the defendants had notice of it. It is strange that they did not, if in very truth they had not; but I am unable, in view of the positive denial of their manager in the witness-box, to find that they had, whichever way the onus of proof may lie.

But, on the whole evidence, I cannot but find in favour of the plaintiff on the first question.

However it might seem under sec. 31 alone, it is tolerably

plain—though not nearly as plain as it might and should have been made—that both parties must be implicated in the want of good faith which invalidates a transaction.

It is not needful either to consider what "good faith" is, because the facts of this case prove the want of it, whatever reasonable, definite meaning may be given to the words "good faith."

The payments in question with two exceptions were by the bankrupt, when in a hopeless state of insolvency, for the one purpose of preferring his creditors, the defendants, so that his guarantors to them might be relieved from their obligations, under their guaranties held by the defendants, as much as possible; and the defendants, when the moneys were paid to them, knew that.

The bankrupt was so insolvent that the trustee's estimation is that his estate shall pay only about 10 cents in the dollar; for about a writ of execution lay in the sheriff's hands against him in full force and virtue, binding all his property; and all the payments in question were made within a few days of his voluntary assignment in bankruptcy; indeed it is contended and is literally a fact that some were paid after it.

The defendants' manager knew that judgment had been entered up against his debtor in the sum of over $4,000 at the suit of a competing bank; he learned then that his customer had gone to and was dealing with the other bank without having informed him and without his knowledge; he knew that that judgment had been reported by the mercantile agencies; and that thereby the debtor's credit should be ruined, and that his creditors should come down upon him "like a thousand of bricks;" and he had had a conversation with the debtor's bookkeeper, who had gone to see him with a view to "all getting together to pull Hanning out of the hole," and he knew that she, on finding how much the indebtedness to the bank was, had given up the effort "to pull Hanning out of the hole," as hopeless. On that occasion they discussed the Standard Bank affair, and the defendants' manager seemed to know all about it. He was of course complaisant, knowing that the defendants were fully secured and that all payments really should enure to the debtor's relative, connection, and friend, who were his guarantors to the defendants.

Therefore, generally, the plaintiff succeeds; but there are some minor points yet to be considered; some actual present consideration was given for some parts of the payments in question; the plaintiff cannot recover the whole payments, the

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value so given must be deducted: sec. 32 (1) (*d*). This affects two items.

For the plaintiff it was contended: that the four payments credited to the bankrupt in the defendants' books on and after the date of the assignment should go to the plaintiff under any circumstances, not having been made before the date of the assignment: sec. 32 (1) (*i*).

These amounts were the proceeds of sales by the defendants of Victory bonds given to them by the bankrupt before the date of the assignment, the proceeds of which were not received and credited until after that date. But I find that the bonds were intended to be treated as cash, and the fact that they had to be sold before the exact amount of the payment could be known and credited did not, under or for the purposes of the Act, prevent the transaction being then and now treated as a "payment" at the time when the bonds were delivered as and for that purpose. It, however, is further evidence of the intention to feather the nest of the guarantors with all kinds of material that could be made available for that purpose.

The parties can, no doubt, readily calculate and agree upon the amount that the plaintiff should recover from the defendants, and should do so; but, if they will not, the local registrar should ascertain and state it in the presence of or after notice to the parties; and in that case the matter is to be mentioned to me again, otherwise it need not.

The guarantors of the defendants are parties to the issue and joined with the defendants in resisting the plaintiff's claim and so are bound by this judgment; but no other judgment or order affecting them can rightly be made here; it is nothing like a case for indemnity or contribution; the defendants can recover against them only on their guaranties, and any such action is quite foreign to these bankruptcy proceedings.

The defendants must pay the plaintiffs' costs."

J. C. Elliott, K.C., for the defendants, appellants.

O. L. Lewis, K.C., for the third parties, appellants.

A. G. Slaght, K.C. and *Hanna*, for the plaintiff, respondents.

MULOCK, C.J.EX.:—This appeal must fail, because the learned trial Judge found that there was a lack of good faith on the part of the bank. It was successfully contended at the trial by the trustee in bankruptcy that there was a fraudulent preference, and that the bank knew that the payment to it was illegal, because it had notice. There is sufficient evidence to support the view taken by the learned Judge at the trial. As it is unnecessary to do so in deciding the appeals, I refuse to inter-

pret the meaning of sec. 32 of the Bankruptcy Act.

MASTEN, J.:—I agree, but desire to add that, in my opinion, sec. 31 of the Bankruptcy Act is independent of sec. 32, and must be construed separately.

ROSE, J.:—I agree. This case falls under sec. 31, not under sec. 32. The trial Judge was not bound to find, on the evidence, that the intent to defraud was disproved.

ORDE, J.:—I agree. This case comes under sec. 31, and the burden was on the defendants to rebut the presumption mention in that section; and that, upon the evidence, the defendants had not done.

Appeals dismissed.

Re CECILIAN Co. Ltd.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Kelly, Masten and Rose, JJ. June 12, 1922.

BANKRUPTCY (§II—20)—PRIORITY OF CLAIMS—TAXES—"ASSIGNEE FOR CREDITORS."

The claim of a municipal corporation for business taxes, not reduced to lien, is in the nature of a personal obligation and has no priority under the Bankruptcy Act over the claims of general creditors. The priority of such claim as against an "assignee for the benefit of creditors," by virtue of the Assessment Act (R.S.O. 1914, c. 195, s. 109, ss. 11), does not apply to proceedings under the Bankruptcy Act.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL by the City Corporation from the judgment of ORDE, J. on a motion by the Corporation of the City of Toronto by way of appeal from the disallowance by the trustee of the bankrupt estate of the above named company, of the claim of the city corporation to be allowed priority over other creditors of the debtor-company, in respect of business taxes.

The judgment appealed from is as follows:—"The company made an assignment under the Bankruptcy Act on the 15th August, 1921. At that time there was due by it to the Corporation of the City of Toronto for business taxes for the year 1921, based upon the 1920 assessment, the sum of $1,111,09, and the city corporation claims under the levy of 1922, based on the 1921 assessment, the further sum for business taxes of $1,511.09. The city corporation claims to be entitled, by virtue of subsec. 6 of sec. 51, to priority over the other creditors for these taxes.

The main question here was disposed of by me in *Re F. E. West & Co.* (1921), 62 D.L.R. 207, 50 O.L.R. 631. In that case the city corporation appealed to the Appellate Division from my judgment; but I understand that, upon it appearing that the amount of the estate there was not sufficient to satisfy the prior claims of the Crown in full, leaving nothing for the city, even if

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its contention was correct, the Appellate Division declined to deal with what, under the circumstances, was merely an academic question. (See 68 D.L.R. 772, 50 O.L.R. at p. 644.) The city corporation, quite properly, desires to test the soundness of my decision, and the present case will readily serve that purpose. I understand that in several other estates the same question has arisen, and it is desirable that the point should be carried to a higher Court.

It was suggested on the hearing of the motion in the present case that the argument on the city's claim in the *West* case had not been sufficiently adequate, having been overshadowed by what was then considered the more important question as to the Crown's prerogative, and that if the matter were fully argued before me I might consider that my previous decision was erroneous. The question was therefore reargued before me as fully as the parties desired, but very little more, if anything, was urged than in the *West* case.

My interpretation of the application of subsec. 6 of sec. 51 is sufficiently disclosed in the *West* case. That Parliament intended to preserve to the Crown and to municipalities those priorities in the payment of taxes which were already given to them by law or by statute, is clear. The simple question here is, whether the existing provincial legislation governing the collection by municipalities of business taxes, which are a purely personal obligation upon the part of the ratepayer, and are not charged upon his lands or his goods, is wide enough to come within the scope of subsec. 6 of sec. 51 of the Bankruptcy Act.

There is nothing in sec. 109 of the Assessment Act, R.S.O. 1914, ch. 195, as it stood prior to 1917, which, in my judgment, had that effect. But the city corporation contends that subsec. 11 of sec. 109, as added by 7 Geo. V. ch. 45, sec. 10, is sufficient. Had that added subsection used language wide enough to cover the case of proceedings in bankruptcy under a federal Bankruptcy Act, I think it would then have come within the language and spirit of subsec. 6 of sec. 51, as being a "law . . . . of the Province . . . . in which the debtor resides," and that the priority so given would not be dependent upon any charge or lien, but would have its effect by virtue of the combined operation of subsec. 6 of sec. 51 and of the provincial legislation.

I am still unable to bring my mind to the conclusion that the expression "any assignee for the benefit of creditors" in subsec. 11 of sec. 109 means, or was intended to mean, anything else than an assignee for the benefits of creditors, as that expression was understood in 1917 when the afendment was passed, that is, an assignee for the benefit of creditors under the Ontario

Assignments and Preferences Act. It is true that under the Bankruptcy Act, when an authorised assignment is made, the authorised assignee is an assignee for the benefit of creditors, but he is so by virtue of an Act having for one of its objects the ultimate discharge of the bankrupt, and with powers and duties and subject to obligations in many respects wholly differing from those of an assignee under the Ontario Act. In fact, while there are many points of resemblance between the two cases, there are as many points of difference, and it is simply because of the use in the two Acts of the same phrase to describe entirely different things that the difficulty arises here.

If the city's contention is admitted, what is to be done in the case of a receiving order, where the trustee acquires his title against the will of the bankrupt? Is he to be deemed an "assignee for the benefit of creditors" within the meaning of subsec. 11 of sec. 109? It is impossible so to extend the meaning of the words in subsec. 11 without straining them unduly; but, if this is not done, then there would be this anomaly, that under an assignment the municipality would have a privileged claim, whereas under a receiving order there would be no such privilege, though in all other respects, so far as I am aware, there is no distinction, in their effect upon the distribution of an insolvent estate, between a receiving order and a voluntary assignment.

The case, in my judgment, is simply one which has not been anticipated by the existing legislation. The omission ought to be corrected by an appropriate amendment to the Assessment Act.

For these reasons, I can see no ground for altering the views expressed in the *West* case, and I must therefore hold that the city has no claim to priority.

Some question was raised as to the liability of the insolvent estate for business taxes for 1922, the assignment having been made on August 15th, 1921. The city relies on subsec. 3 of sec. 95 of the Assessment Act, as passed in 1917 by 7 Geo. V. ch. 45, sec. 9, to support its claim. This amendment seems wide enough to make the company liable to be assessed even after the bankruptcy, if the assessment roll had been revised prior thereto. This question was not argued as fully as perhaps it deserved.

Strictly speaking, the claim must be regarded, I think, as a contingent one, within the meaning of subsec. 3 of sec. 44 of the Bankruptcy Act, and consequently requiring valuation under Bankruptcy Rule 119. The valuation may, however, be dispensed with if the rate for 1922 is fixed before the distribution;

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otherwise the provisions of Rule 119 must be followed. My order can be so framed as to cover this.

The costs of this motion ought to be paid by the city."

C. M. Colquhoun, for the appellants.

C. B. Henderson, for the trustee in bankruptcy, respondent.

MULOCK, C.J. EX.:—This is an appeal by the Corporation of the City of Toronto from an order of Orde, J., declaring that the corporation is not entitled to any priority in respect of its claim for business assessment taxes owing by the company. There is no dispute as to the facts, which are as follows:—

The company was carrying on business in the city of Toronto, and on August 15, 1921, made an assignment under the Bankruptcy Act. At that time it owed the corporation for business taxes arising from its assessment in 1920 the sum of $1,111.09, which amount was then overdue, but for which no levy had been made; the company was also then liable to the corporation in a further sum for business tax assessment in 1921; and for these two sums the corporation filed a claim in bankruptcy against the estate, claiming to be entitled to payment thereof prior to payment of unsecured debts. The authorised trustee disallowed the claim for priority, and from such disallowance the corporation appealed to Orde, J., who dismissed the appeal, and this appeal is from his order.

Subsection 4 of sec. 51 of the Bankruptcy Act declares that, "subject to the provisions of this Act, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*." What provision to the contrary is there in this Act? It was contended that, under subsec. 6 of sec. 51, claims for taxes are not of the class of debts which are paid *pari passu*, but are entitled to priority payment. That subsection is as follows: "Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws."

I am of opinion that this subsection does not determine where claims for taxes are to rank on the assets of the estate, but that it merely provides that they are not to be prejudicially affected by the assignment in bankruptcy, and that they may be realised in accordance with any law of the Dominion or Province, etc. It was suggested that when on an assignment the estate of the debtor passed to the authorised trustee there remained no assets which would be exigible under the warrant of the corporation's

collector for taxes, and that therefore if the subsection preserved any right to the creditor it would be a barren one. But is this so?

Subsection 2 of sec. 109 of the Assessment Act declares that "in case of taxes which are not a lien on land remaining unpaid . . . the collector . . . may . . . levy the same with costs by distress . . . (4) upon goods and chattels which at the time of making of the assessment were the property and on the premises of the person taxed in respect of business assessment and at the time for collection of taxes are still on the same premises, notwithstanding that such goods are no longer the property of the person taxed."

Under the combined effect of subsec. 6 of sec. 51 of the Bankruptcy Act and of subsec. 2 of sec. 109 of the Assessment Act, the corporation is entitled, notwithstanding the assignment in bankruptcy, to distrain for business taxes just as it could have done had there been no assignment; in other words, subsec. 6 does not interfere with the collection of such taxes or prejudice the corporation's lien on the particular goods and chattels exigible under the collector's warrant, nor does it enlarge the corporation's rights by giving it a priority on the general fund of the estate. As regards such fund the corporation remains an unsecured creditor and must rank *pari passu* with other creditors.

Thus construed, full effect may be given to subsec. 4 and subsec. 6 of sec. 51, neither qualifying the other.

It was contended that sec. 11 of the Bankruptcy Act (as enacted by sec. 6 of the amending Act of 1921, 10 & 11 Geo. V. ch. 34) prevents a municipal corporation levying a distress for taxes, and reliance was placed upon the words in this section that the assignment takes "precedence over . . . . (*b*) all other attachments, executions or other process against property," etc.; but the section does not declare such attachments, executions, or other process to be void, nor that a municipal corporation may not exercise the right of distress given to it by subsec. 2 of sec. 109 of the Assessment Act, and which right has been preserved by subsec. 6 of sec. 51 of the Bankruptcy Act; to have so declared would have been in conflict with subsec. 6. That subsection was, I think, clearly intended to preserve to municipal corporations their liens, in respect of taxes and their right to collect the same in accordance with the provisions of any Dominion or provincial laws; and it is fair to assume that sec. 11 was not intended to neutralise the effect of subsec. 6.

For these reasons, I am of the opinion that the appeal fails and should be dismissed with costs.

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Kelly, J.

KELLY, J.:—The contest here is whether the city is entitled to receive in priority certain taxes on business assessment of the Cecilian Company Ltd., which made assignment under the Bankruptcy Act, on August 15, 1921.

Orde, J. on an application to him, decided against the city's claim to priority, and the appeal is from that decision.

The question has arisen from a consideration: (1) of the provisions of the Assessment Act, R.S.O. 1914, ch. 195, and particularly subsec. 11 of sec. 109, which was added by 7 Geo. V. ch. 45, sec. 10; and (2) of sec. 51 of the Bankruptcy Act, particularly subsec. 6.

Subsec. 11 of sec. 109 says: "Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment, or has been seized by the sheriff or by a bailiff of any Court, or is claimed by or in possession of any assignee for the benefit of creditors or liquidator, it shall be sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator, notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator shall pay the amount of the same to the collector in preference and priority to any other, and all other fees, charges, liens or claims whatsoever."

It is admitted that at the time of the assignment no seizure or attachment had been made for these taxes. I agree with Orde, J.'s conclusion that the expression "any assignee for the benefit of creditors," in the above subsec. 11, does not mean and was not intended to mean anything else than an assignee for the benefit of creditors, as that expression was understood in 1917 when the amendment was passed; that, is, an assignee for the benefit of creditors under the Ontario Assignments and Preferences Act.

Assuming that interpretation to be correct, notice by the tax collector to the assignee in bankruptcy of the amount due for taxes is not effective to authorise payment to the tax collector as a preferential claim.

Then as to sec. 51 of the Bankruptcy Act, which deals specially with priority of claims in the distribution of the property of the bankrupt or authorised assignor. In its earlier subsections it states in the order of their priority certain preference payments, and declares, by subsec. 4, that: "Subject to the provisions of this Act, all debts proved in bankruptcy or under an assignment shall be paid *pari passu;*" and by subsec. 5 it provides for the disposal of any remaining surplus. [The Judge then set out subsec. 6, as above.]

The question is not an easy one or altogether free from doubt. I have had the advantage of considering the judgments of the

other members of this Court, and, in my opinion, sufficient reasons are set forth by his Lordship the Chief Justice and my brother Masten for declaring against the preference contended for by the appellant without ignoring the meaning and effect which may be given to subsec. 6, when read with other statutory provisions relating to the collection of taxes and to liens and charges intended to secure payment thereof. I adopt their conclusion because I think that, by the process of reasoning they have followed, these various subsections of sec. 51 can be harmonised one with the other and with other statutory provisions relating to the subject without bringing about that interference to which subsec. 6 refers, or cutting down the effect of any part of the whole section; and because, if full effect were given in the appellant's contention, it is easily conceivable that cases might, and probably would, arise where the preferences declared by subsec. 1, or some of them, would fail; a result which, it is fair to assume, was not intended by the legislators who framed the Act.

MASTEN, J.:—The facts and the statutes relevant to the disposition of this appeal are set out in the judgment now in appeal and in the reasons of my Lord the Chief Justice and of my brother Rose, both of which I have had an opportunity of perusing.

Section 51 of the Bankruptcy Act is intituled "Priority of Claims," and proceeds in subsec. 1 to designate three classes of claims which are to be entitled to priority in the distribution of the estate, but taxes, rates and assessments are not included in these three preferential classes. Subsection 4 provides that, "Subject to the provisions *of this Act*, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*." [The Judge then set out subsec. 6, as above.]

If it was intended by sec. 51 to create a priority in favour of taxes, it would seem that taxes would have been specifically mentioned in subsec. 1 along with the three other preferential classes, and its order of priority in relation to the other three classes would be specified. Not only so, but the question arises —assuming that subsec. 6 gives taxes a preference—is it superior or inferior to the fees and expenses of the trustee mentioned in subsec. 1 (firstly), to the costs mentioned in subsec. 1 (secondly), and to wages spoken of in subsec. 1 (thirdly). These considerations lead me to the conclusion entertained by my Lord the Chief Justice that sec. 51 does not "interfere" in one way or the other with the collection of taxes, but leaves the right of the municipality in the same situation as if that section had not been passed; it neither prejudices nor aids the collection of

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taxes; it simply does not "interfere."

If this is the correct interpretation of sec. 51, it becomes necessary to inquire, in the next place, what are the rights of the municipal corporation apart from sec. 51? Has the corporation, in the circumstances here existing and apart from sec. 51, a preferential right?

For the reasons assigned by Orde, J., and by my brother Rose, I agree with the judgment appealed from, that subsec. 11 of sec. 109 of the Assessment Act, added by sec. 10 of the Assessment Amendment Act, 1917 (Ontario), has no application where the estate of an insolvent is in administration under an authorised assignment. The Assessment Act, R.S.O. 1914, ch. 195, makes the taxes due upon any land a lien on the land (sec. 94); and makes all taxes a debt recoverable by action (sec. 95); but the only special or superior right accorded to a municipal corporation in respect of taxes which are not a lien on land is found in sec. 109, subsec. 2, which gives to the municipal corporation a right of distress against the goods of the debtor. But by sec. 11 of the Bankruptcy Act, that right of distress is superseded when an authorised assignment is made. That section is (in part) as follows: "Every receiving order and every authorised assignment made in pursuance of this Act shall take precedence over . . . . (*b*) all other attachments, executions or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor . . . and except also the rights of a secured creditor under section 6 of this Act." (These last words are added by the amending Act of 1921, 11 & 12 Geo. V. ch. 17, sec. 10.) Counsel for the appellant admits that, no distress having been levied prior to the execution of an authorised assignment, the appellant has no lien or charge on any property of the insolvent.

My conclusions are:—

First, that, quite apart from the special provision of subsec. 4 of sec. 51 of the Bankruptcy Act, the authorised assignee is bound to distribute the estate in his hands ratably among ordinary creditors, subject only to such priorities as are specifically given by the Act to certain classes of claims.

Second, that, by sec. 11 and in the manner indicated above, the appellant is deprived of the only means by which it can secure a priority for taxes that are not a lien on land.

Third, that subsec. 6 of sec. 51 of the Bankruptcy Act does not operate to nullify the effect of sec. 11, and the result is that in respect of the taxes here in question the municipal corporation is an ordinary creditor of the estate without any special lien or priority.

I ought to add that, on the interpretation which I am suggesting, subsec. 6 is not nugatory, but has full effect in respect to taxes which are a lien on land, and probably in respect of taxes payable to the Crown.

For these reasons, I am of opinion that this appeal should be dismissed with costs.

ROSE, J. (dissenting):—I share Orde, J.'s view upon what he treats as the only question in the case (and what seems to have been the only question discussed before him), viz., the question whether the combined effect of subsec. 11 of sec. 109 of the Assessment Act, R.S.O. 1914, ch. 105, as added by 7 Geo. V. ch. 45, sec. 10, and subsec. 6 of sec. 51 of the Bankruptcy Act, 9 & 10 Geo. V. ch. 36 (Dom.) is to give to the municipality the preference claimed. I think, as he does, that the "assignee for the benefit of creditors" referred to in the Ontario statute is such an assignee for the benefit of creditors as was known to the law at the time when the Ontario statute was passed, and not an authorised trustee under the Bankruptcy Act, and, therefore, that there is no statutory warrant for the adoption in bankruptcy of the procedure which would be followed in the case of an assignment for the benefit of creditors under the Ontario Act. Whether the result contended for would have followed if the Ontario statute had expressly been made applicable to an authorised trustee under the Bankruptcy Act—as Orde, J., appears to think it would—it is unnecessary to consider.

I agree also with the opinion expressed by Orde, J., in *Re F. E. West & Co.* 62 D.L.R. 207, 50 O.L.R. 631, that after the property has become vested in the authorised trustee under the Bankruptcy Act the municipality cannot distrain for taxes. Moreover, sec. 11 of the Bankruptcy Act, as amended by 10 & 11 Geo. V. ch. 34, sec. 6, gives to every receiving order and to every authorised assignment made in pursuance of the Act precedence over attachments, executions, or other process against property, even if they were in force at the time of the receiving order or assignment, unless they have been completely executed by payment to the execution or other creditor.

Subsection 6 of sec. 51 of the Bankruptcy Act has, however, in my opinion, the effect of producing, in a way not discussed by Orde, J. the result for which the appellants' corporation contends. Section 51 settles the order in which the various claims against the estate shall be paid by the authorised trustee. The trustee is to pay first, his own fees and expenses; secondly, the costs of the execution creditor, etc., provided for by sec. 11; and, thirdly, certain wages, etc; subject to the provisions of the

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Act he is to pay *pari passu* all debts proved if there is a surplus he is to apply it in payment of interest. Now taxes payable by or imposed upon the debtor are debts; and, if there was nothing in sec. 51 but what has been mentioned, such taxes, if proved, would have to be paid *pari passu* with the other debts proved. But subsec. 6 enacts that nothing in sec. 51 (i.e., *inter alia*, no direction to the authorised trustee to pay debts *pari passu* shall interfere with the collection of any taxes payable by the debtor under any law of the province wherein the debtor resides that is to say that no direction for the payment of debts *pari passu* shall interfere with the collection of such taxes. The tax upon the business assessment which is in issue in this case is a tax imposed upon the debtor by the law of the Province in which he resides: there is, apparently, a deficiency of assets for the payment in full of all the debts, including such tax; any distribution of the assets *pari passu* amongst the creditors, including the municipality, must therefore interfere to some extent with the collection of the tax; and, if effect is to be given to the enactment that nothing in sec. 51 shall interfere, the authorised trustee must, as it seems to me, pay the tax in full before he proceeds to pay *pari passu* the other debts proved. The direction in subsec. 4 of sec. 51 for the payment of debts *pari passu* is not in terms absolute. It is expressly made subject to the provisions of the Act. One of such provisions is the provision in subsec. 6 that nothing in sec. 51 shall interfere with the collection of such taxes as are here in question. Parliament can hardly be supposed to have imagined that there was anything in subsecs. 1 to 5, inclusive, of sec. 51 which could interfere with the collection of such taxes *pari passu* with the other debts. Subsection 6, therefore, is not to be read as meaning merely that nothing in sec. 51 shall interfere with such collection *pari passu*; it must mean something other than that, and the only meaning that can be given to it is its literal meaning, viz., that nothing in sec. 51 shall interfere at all with the collection of such taxes, i.e., that such taxes may be collected notwithstanding the enactment that debts shall be paid *pari passu*. To read the two subsections together in the way I suggest is to give full effect to each. In no other way that has been suggested can both be made effective.

For these reasons, I would allow the appeal and would substitute for the declaration contained in para. 2 of the order appealed from a declaration that the city is entitled to the priority claimed. Upon the argument of the appeal nothing was said as to the question, shortly discussed by Orde, J. as to whether the estate is liable in respect of the taxes for 1922.

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or only in respect of those for 1921, and I assume that there is no objection to para. 3 of the order, which prescribes the method of ascertaining the amount of the 1922 taxes.

The appellant should have costs here and below.

Appeal dismissed.

Re CANADIAN WESTERN STEEL CORPORATION LIMITED.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 23, 1922.

BANKRUPTCY (§I—6)—PROCEEDINGS AS TO CORPORATIONS—WINDING-UP ACT—LEAVE OF COURT.

Where an insolvent corporation has made an assignment under the Bankruptcy Act, the Registrar in bankruptcy has no power, on an *ex parte* application, without leave of Court, to direct the proceedings to be continued under the Winding-up Act.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

COMPANIES (§VID—335)—WINDING-UP—BANKRUPTCY—RIGHTS OF SECURED CREDITORS—ACTION ON MORTGAGE.

Bondholders of an insolvent corporation have the right to proceed upon the mortgage for the enforcement of their securities, independently of the winding-up or bankruptcy proceedings, and leave of Court to do so will be granted as a matter of course.

APPEAL (§IA—1)—FROM ORDER OF REFEREE IN BANKRUPTCY.

The order of a Referee in bankruptcy, refusing a secured creditor leave to proceed upon his security, is appealable.

[See Annotation 63 D.L.R. 1.]

APPEAL by the liquidator and trustee in bankruptcy from an order of Orde, J. Affirmed.

The judgment appealed from is as follows:—

ORDE, J.:—The Canadian Western Steel Co. Ltd. on March 11, 1921, made an assignment to a trustee under the provisions of the Bankruptcy Act, but subsequently, by virtue of sec. 66 (2) and Bankruptcy Rule 13, an order was made that all further proceedings in the winding-up be continued under the provisions of the Dominion Winding-up Act R.S.C. 1906, ch. 144. There are outstanding and unpaid $169,000 of the bonds of a company known as Canadian Western Steel Company Limited (not the corporation now being wound up), forming part of an authorised issue of $500,000, which are secured by a mortgage trust deed to the Northern Trust Co. as trustee, as a fixed specific first charge upon certain freehold and leasehold lands of the company situate in the Province of Alberta, and upon all other present and future realty of the company, including its buildings, plant, equipment, machinery, and fixtures, as also by way of floating charge upon its undertaking, goodwill, chattels, book-debts, etc. Hargrave is the holder of $33,000 of the bonds in question.

The steel company sold its assets to the Canadian Western

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Steel Corporation Limited (the corporation now being wound up), subject to the bonds, which the purchasing corporation covenanted to assume and pay.

There are arrears of interest upon the bonds, and by the terms of the bonds and the mortgage trust deed the payment of the principal was accelerated and became due in consequence of the bankruptcy.

Hargrave and the trustee for the bondholders, desiring to proceed in Alberta for the realisation of their security, applied to the Official Referee to whom the winding-up order delegated the winding-up, for leave. The Official Referee, as appears by his certificate of November 24, 1921, has refused such leave, on the ground that all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, etc., may, under sec. 133 of the Winding-up Act, be obtained by an order of the Court on summary petition and not by any action. From that ruling Hargrave and the trustee now appeal.

The arguments which were advanced by counsel for the liquidator were all based upon decisions rendered under the Winding-up Act, and before the coming into operation of the Bankruptcy Act. While the effect of the order made under Rule 13 of the Bankruptcy Act that the proceedings are to continue under the Winding-up Act is to bring into play all, or substantially all, of the provisions of the Winding-up Act, it must not be forgotten that, when the authorised assignment under the Bankruptcy Act was made, the bondholders and the trustee under the mortgage trust deed were entitled in some measure to proceed to realise their security without leave: sec. 6, subsec. 1, and sec. 10 of the Bankruptcy Act. The fact that the Bankruptcy Act expressly preserves to a secured creditor his ordinary remedies for the realisation of his security may be taken as indicating the mind of Parliament on this point, and as resolving in favour of the secured creditor any doubt, if there is any doubt under the authorities, as to whether leave ought to be granted to a secured creditor under sec. 22 of the Winding-up Act, or whether he should be restricted to the remedies afforded him by sec. 133 of that Act. I refer to this aspect of the matter because of the strenuous argument of Mr. Robertson that the modern tendency of the Court is to refuse leave and to restrict the creditor in such cases to the provisions of sec. 133.

The principle is well settled that a secured creditor may proceed to realise his security independently of any bankruptcy or winding-up proceedings, and is not confined to the medium of the winding-up of the insolvent estate, in all cases where the security is of such a nature as to enable the creditor to realise

without resort to the Court for the purpose, and that where the security is in the form of a mortgage, though leave to bring an action may in some cases be necessary, such leave is granted almost as a matter of course: *Re Brampton Gas Co.* (1902), 4 O.L.R. 509, at p. 518.

Counsel for the liquidator, however, contends that the more modern practice is "not to exclude from the winding-up workshop" cases in which formerly leave to proceed independently would have been granted—see per Meredith, C.J.C.P., in *Re J. McCarthy & Sons Co., of Prescott Ltd.* (1916), 32 D.L.R. 441, at. p. 447, 38 O.L.R. 3, at p. 11. But in that case the creditor was not seeking to enforce a security, but was a simple contract creditor who desired to bring an action to establish a claim for a mere money demand. And the judgment itself distinguished the case from those involving the rights of mortgagees. Nor am I able to find anything in the cases of *Stewart* v. *LePage* (1916), 29 D.L.R. 607, 53 Can. S.C.R. 337, or *Carson* v. *Montreal Trust Co.* (1915), 23 D.L.R. 690, 49 N.S.R. 50, to justify the suggestion that the Court has departed from the principle that leave ought to be granted almost as of course to a mortgagee seeking to foreclose or otherwise realise upon his security. The Nova Scotia case did not involve the rights of a mortgagee at all. And in *Stewart* v. *LePage*, *supra*, which merely decided that where the winding-up under the Dominion Act has commenced in one Province, proceedings must not be commenced in another Province without leave from the Court in the winding-up proceedings, there is the clear intimation that if the creditor is asserting a claim to the ownership of certain assets (and the security of a mortgagee is the same in principle) leave ought to be granted: Anglin, J., at p. 349.

In the present case the lands covered by the mortgage trust deed are situate in Alberta, and Hargrave, the bondholder who is applying with the trustee, resides in Alberta. The right to exercise all the ordinary remedies open to the bondholders and to the trustee ought not, in my judgment, to be lightly interfered with. If the purchaser of the bonds of a company secured by a mortgage upon assets in one Province is to risk having his remedies cut down by reason of the winding-up of the company in some remote Province, the value of such securities may be very seriously impaired.

While the question of granting leave under sec. 22 is to some extent a matter of discretion, the Official Referee has, in my judgment, proceeded upon a wrong principle. He deals with the question as if it were a matter of jurisdiction, and, holding

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that, by virtue of sec. 133, he has jurisdiction under the winding-up order to deal with the subject-matter of the bond-holders' claims, he declines to grant leave. No one questions the jurisdiction of this Court to deal with the matter. That is not the point. The question is, whether or not, according to the established principles applicable to the rights of mortgagees and debenture-holders, leave to proceed by an action ought to be granted. I am clearly of opinion that such leave ought to be given.

The decision or ruling of the Official Referee will therefore be set aside, and an order will issue giving leave to the applicants to bring such action in the Province of Alberta for the enforcement of their securities as they may be advised.

The liquidator will pay the costs of this appeal to the applicants out of the assets of the estate in his hands.

The liquidator moved for an order granting leave to appeal from the order of Orde, J., and extending the time for appealing.

The motion was heard before FERGUSON, J.A., in Chambers, and is as follows:—

The Can. Western Steel Corp'n is in liquidation. The Northern Trust Co. and one John C. Hargrave, a bondholder under a bond mortgage held by the trust company, applied to the Referee for leave to commence action to enforce the mortgage.

The referee refused leave, being of opinion that the rights of the parties could best be dealt with in the winding-up proceedings—see secs. 22 and 133 of the Winding-up Act.

On appeal, Orde, J., granted leave, being of opinion that the practice required such leave to be granted almost as a matter of course.

The applicants served notice of appeal; but, on applying to set the case down, found that sec. 101 of the Winding-up Act requires that leave to appeal be obtained. Hence this application.

Mr. Robertson contended that the discretionary order of the Referee was not appealable, or that, if appealable, it should not be interfered with unless it appeared that the Referee had proceeded upon a wrong principle—and that the authorities relied upon by Mr. Justice Orde did not establish that the Referee had proceeded on an erroneous idea of the practice.

He relied on *Re Brampton Gas Co.*, 4 O.L.R. 509; *Re J. McCarthy & Sons Co. of Prescott Ltd*, 32 D.L.R. 441, 38 O.L.R. 3; and secs. 22 and 133 of the Winding-up Act.

Mr. Cassels contended that *Re Raven Lake Portland Cement*

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Co. (1911), 24 O.L.R. 286, and cases collected in Masten's Company Law, 2nd ed., p. 823, demonstrated that the practice as stated by Orde, J., was well-established.

I have read the opinions and authorities cited, and think the point raised is doubtful, and that leave to appeal should be allowed; the time for setting down being extended to March 13.

Costs of the application should be costs in the appeal.

R. S. Robertson, K.C., for appellant.

R. C. H. Cassels, K.C., for respondents.

MEREDITH, C.J.O.:—This is an appeal, by the liquidator and trustee in bankruptcy of the Canadian Western Steel Corporation Limited, from an order of Orde, J., dated February 15, 1922, giving leave to the respondents, a bondholder and a mortgagee of the property of the company, as trustee for the bondholders, to proceed on the mortgage notwithstanding the proceedings which have been assumed to be taken under the Winding-up Act.

The company made an assignment under the Bankruptcy Act to the appellant, and a petition for the winding-up of the company under the Winding-up Act was filed, but no further proceedings were taken upon it.

On April 2, 1921, the Registrar in Bankruptcy on the *ex parte* application of the appellant, made an order directing that all further proceedings in the winding-up of the company be continued under the Winding-up Act, appointing the appellant provisional liquidator of the company, and referring it to J. A. C. Cameron, Official Referee, to appoint a permanent liquidator and "to take all the necessary proceedings for and in connection with the winding-up of the said company . . ."

It is further provided by the order that "all such powers as are conferred upon the Court by the said Winding-up Acts as may be necessary for the said winding-up of the said company be and the same are hereby delegated to the said J. A. C. Cameron."

And the referee is proceeding under the reference thus made to him.

The rights of a mortgagee under the Bankruptcy Act differ from those which he has under the Winding-up Act. Under the former he may proceed regardless of the bankruptcy, while under the latter Act he cannot proceed unless by leave of the Court, and one of the questions to be determined is, which of these Acts governs.

By sec. 2 (*o*) of the Bankruptcy Act, 9 & 10 Geo. V. ch. 36, the definition of the word "debtor" includes a corporation carrying on business in Canada, but there follows the provision

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to that effect, the following: "and where the debtor is a corporation, as defined by this section, the Winding-up Act, ch. 144 of R.S.C., 1906, shall not extend or apply to it, notwithstanding anything in this Act contained, but all proceedings instituted under that Act before this Act comes into force may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made."

The effect of this legislation was to repeal the Winding-up Act except as to proceedings pending under it when the Bankruptcy Act came into force.

By (1920), 10 & 11 Geo. V, ch. 34, sec. 2, the provision I have quoted was repealed and re-enacted to read as follows: "and where the debtor is a corporation, as defined by this section, the Winding-up Act, ch. 144 of R.S.C. 1906, shall not, *except by leave of the Court*, extend or apply to it notwithstanding anything in that Act contained, but all proceedings instituted under that Act before this Act comes into force *or afterwards, by leave of the Court*, may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made."

I have, for convenience, italicised the words that were introduced by the amendment.

In order to understand the effect of this change, it is necessary to refer to other sections of the Bankruptcy Act.

By sec. 2 (*l*) "Court" or "the Court" is defined as "the Court which is invested with original jurisdiction in bankruptcy under this Act."

By Rule 4 provision is made that "all matters and applications shall be heard and determined in Chambers unless the Court or a Judge shall in the particular matter or application otherwise direct."

By sec. 65 (2) of the original Act, the Registrar is, subject to General Rules limiting them, to have among other powers the power "to hear and determine any unopposed or *ex parte* application" (para. *g*).

By sec. 66 (2) it is provided that "such rules" (i.e., general rules) "shall not extend the jurisdiction of the Court, save and except that, for the purpose of enabling the provisions of Rules having application to corporations, but for such purpose only, the Winding-up Act, ch. 144 of R.S.C., shall be deemed part of this Act."

In this Province the Court of original jurisdiction is the Supreme Court of Ontario, and it is constituted a Court of bankruptcy (sec. 63 (1)).

By sec. 63 (2) it is provided that, "subject to the provisions

of this Act and to General Rules, the Judge of the Court exercising jurisdiction in bankruptcy or in authorised assignment proceedings may exercise in Chambers the whole or any part of his jurisdiction."

Rule 13 provides that "where any proceedings in bankruptcy have been commenced against a corporation or where a corporation has made an authorised assignment, the Court may, on the application of the trustee or of any creditor or shareholder, grant leave that all further proceedings in the winding-up of the corporation or liquidation of its assets be continued under the Winding-up Act and amendments thereto, and may make such order for the transfer of proceedings or to effectuate such leave as to the Court shall deem best."

It is clear, I think, that the effect of the provisions of sec. 2 which I have quoted is not to empower the Court to dispense with taking proceedings under the Winding-up Act, or to authorize the Court in a bankruptcy proceeding to pronounce an order for the winding-up of the company, the appointment of a liquidator, or the delegation to an officer of the Supreme Court of the powers of the Court. What was done in this case, as I have said, was for the Registrar, on an *ex parte* application, to make an order embracing all these matters. That neither he nor the Court acting in the bankruptcy proceedings had, in my opinion, jurisdiction to do. It is clear, I think, that all that is authorised by para. (*o*) of sec. 2 is, where proceedings have been instituted under the Winding-up Act, the continuance of them, if the leave of the Court is obtained; and, where proceedings have not been so begun, to authorise proceedings to be taken under the Winding-up Act, if the leave is obtained. The enactment does not appear to me to contemplate taking proceedings under the Bankruptcy Act and then continuing them, if the leave is obtained, under the Winding-up Act. All that is done, where proceedings have not been begun under the Winding-up Act before the Bankruptcy Act came into force, is to give persons entitled to take proceedings for the winding-up of a company the option, if leave is obtained, to proceed under the Winding-up Act. Where proceedings under the Winding-up Act were begun before the Bankruptcy Act came into force, it is made permissible to go on under the Winding-up Act, and in other cases, as I have said, the option is given to proceed under it, in other words, to take such steps as are necessary to obtain a winding-up order and to proceed with the winding-up under it.

What sec. 2 (*o*), as amended, provides, is that the Winding-up Act is not, except by leave of the Court, to extend or apply to proceedings instituted under it "before the Bankruptcy Act

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came into force," or afterwards, that is, instituted under the Winding-up Act after the Bankruptcy Act came into force.

The result of the conclusion to which I have come is that the Registrar had no jurisdiction to make the order which he made and that it is therefore nugatory.

Rule 13 is, I think, *ultra vires*. It assumes that bankruptcy proceedings may go on under the Winding-up Act, although no proceedings have been instituted under it. What the Act authorises is the continuance of proceedings instituted under the Winding-up Act before or after the coming into force of the Bankruptcy Act, if the leave of the Court is obtained.

I doubt whether the leave which the Act provides for can be granted on an *ex parte* application. The result of the giving of the leave may alter the rights of creditors and mortgagees, as well as others, for the provisions of the two Acts differ as to these rights, as do also the provisions as to preferences.

It would indeed be an extraordinary result if, by the act of the Registrar, on an *ex parte* application, these rights can be changed, and equally so if the Registrar of the Bankruptcy Court can make an order for the winding-up, the appointment of a liquidator, and the delegation of the powers of the Court to a Referee, which in a winding-up proceeding can be made only by the Court, i.e., the Supreme Court of Ontario.

There are, in my opinion, some provisions of the Bankruptcy Act which require amendment, and some that are probably *ultra vires* of the Dominion Parliament.

No good reasons exist, I think, for making the rights to which I have referred of one sort if proceedings are taken under the Winding-up Act, and of another sort if they are taken under the Bankruptcy Act.

The effect of the Bankruptcy Act is to create Dominion Courts (sec. 63), and Parliament has assumed to make certain Provisional Courts Courts of Bankruptcy and to cast upon the Provinces the burden of maintaining these Dominion Courts at the expense of the Provinces, for it is the officers of the Provincial Courts, who are appointed and paid by the Provinces, upon whom, under the provisions of the Act, the obligation rests of performing duties under the Bankruptcy Act.

How can the imposition upon the Provinces of the burden of carrying on the work that is to be done under the Bankruptcy Act be justified?

It would, no doubt, have been competent for Parliament to have enacted a bankruptcy law and to have left the administration of it to the Provincial Courts, as is done in the case of

the criminal law, but it is a very different thing to create a Bankruptcy Court and to cast upon the Provinces the duty of providing for the carrying on of the work of that Court by its Courts and at the expense of the Provinces.

Then the Act provides for the Minister of Justice assigning a Judge or Judges of the Provincial Courts for the exercise under his or their direction of the powers and jurisdiction in bankruptcy and otherwise conferred by the Act. Is this not an interference with what is by the British North America Act sec. 92 (14), within the exclusive legislative authority of the Provinces,—the administration of Justice in the Provinces?

I have not overlooked the case of *Valin* v. *Langlois* (1879), 5 App. Cas. 115. In that case the question was as to the authority of Parliament to commit to the Provincial Courts jurisdiction with regard to election petitions. It is to be observed that what was dealt with was an application for leave to appeal to Her Majesty in Council from a judgment of the Supreme Court of Canada, and that in stating the opinion of the Judicial Committee Lord Selborne, p. 117, said that the Lords of the Committee very much doubted whether, "if there had been an appeal and counsel present on both sides, the grounds on which the appeal would have been supported, or might have been supported, could have been better presented to their Lordships than they have been upon the present occasion by Mr. Benjamin."

I mention this because it is probable that the Committee would not feel bound to follow the conclusion announced by Lord Selborne if in a subsequent case, after full argument, a different conclusion seemed preferable.

Reliance was placed by Lord Selborne on the fact that by sec. 41 of the B.N.A. Act it is provided that the old mode of determining election petitions shall continue until the Parliament of Canada shall otherwise provide.

With great respect, I am unable to find in sec. 41 anything which warrants the conclusion that authority is conferred on the Parliament of Canada to impose on Provincial Courts and Judges the duties which the Election Courts and its officers are to perform, if, as Lord Selborne thought, the Election Court were a Dominion Court. I do not question the right of Parliament to enact an election law and to leave the administration of it to Provincial Courts and Judges, but what I do question is its authority to create a Dominion Court and to man it with the Provincial Courts and Judges. As well might Parliament impose upon them the duties which are to be performed by the Exchequer Court of Canada.

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For the reasons I have given, I would dismiss the appeal with costs, and in the order dismissing it I would embody a declaration that the order of the Registrar in Bankruptcy was made without jurisdiction and is of no effect.

MACLAREN and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—Appeal by G. T. Clarkson, as liquidator of the Canadian Western Steel Corporation, from an order of Orde, J., allowing a bondholder of that company and the Northern Trust Company, the mortgagees in trust for the bondholders, to take proceedings in the Province of Alberta to enforce and realise their security.

The order is intended to be made under the Winding-up Act, R.S.C. 1906, ch. 144.

Before 1919, the Winding-up Act was in effect a bankruptcy Act as regarded insolvent companies, though applying to companies not insolvent; and, after a winding-up order, no action or proceeding against the company could be begun or proceeded with except by leave of the Court: secs. 22, 23.

The Bankruptcy Act was passed in 1919, and in sec. 2 (*o*) declared that where the debtor was a corporation the Winding-up Act should not extend or apply to it, but proceedings instituted before the Bankruptcy Act might be continued under the Winding-up Act. In 1920, by 10 & 11 Geo. V. ch. 34, sec. 2, (*o*) was amended so as to provide that the Winding-up Act should not extend or apply to corporations except by leave of the Court, but all proceedings instituted under that Act before the Bankruptcy Act, or instituted afterwards by such leave, might be continued. The effect of this, as I read it, is that, if proceedings have been instituted (by leave if after 1920) under the Winding-up Act before bankruptcy proceedings, they may be continued under the Winding-up Act, but not that after the company has been put in bankruptcy resort may be had, either with or without leave, to the Winding-up Act or any of its provisions, whether intermittently or otherwise. In fact after the bankruptcy there is nothing upon which winding-up proceedings can take effect — the assets being vested in the trustee in bankruptcy. As the Winding-up Act was intended to apply also to companies not insolvent, it is manifest that it was proper that it should still be available; but the Bankruptcy Act did not restrain resort to it where the company is in fact bankrupt, though it may be questioned whether it was intended that leave should be given in case of a bankrupt company. That question, however, is not material here. The order appealed from was, I think, unnecessary, but gave no right not existing, and the appeal should be dismissed.

I agree with my Lord the Chief Justice as to the order of the Registrar not being such as could be made by that officer.

FERGUSON, J.A.:—Appeal by the liquidator from an order of Orde, J., granting the mortgagees leave to commence an action in the Courts of Alberta to realise upon their security.

By sec. 63 of the Bankruptcy Act, jurisdiction in bankruptcy is conferred upon the Supreme Court of Ontario.

Section 64 directs (subsec. 3) that, except as otherwise provided, all the powers and jurisdiction of the Court in bankruptcy shall be exercised by a Judge named by the Minister of Justice, and (subsec. 4) that the registrars, clerks, and officers in bankruptcy shall be appointed by the Chief Justice of the Supreme Court of Ontario.

Section 65 defines the powers of registrars in bankruptcy as (2 (*f*)), "To make any order . . . which by any rule in that behalf is prescribed as proper to be made . . . "in Chambers," and among other things gives them power (*g*) to hear and determine any unopposed or *ex parte* application."

On March 11, 1921, the Canadian Western Steel Corporation Limited, having its head office in the city of Owen Sound, assigned to G. T. Clarkson, of Toronto, all its property for distribution among its creditors in pursuance of the said Bankruptcy Act.

On the same day, William Kennedy & Sons Limited, creditors of the Canadian Western Steel Corporation, filed in the Central Office at Toronto, a petition to wind-up under the Winding-up Act R.S.C. 1906, ch. 144.

There is no record of this petition having been presented to the Court or of a winding-up order having been made by a Judge of the Supreme Court; but, on an *ex parte* application of Mr. Clarkson, the trustee in bankruptcy, George S. Holmested, Esquire, K.C., a Registrar in Bankruptcy, purporting to act under sec. 65 of the Bankruptcy Act and Rule 13, made the following order:—

"In the Supreme Court of Ontario.

In Bankruptcy.

George S. Holmested, Esq., K.C., Registrar in Bankruptcy.

In Chambers. Saturday the 2nd day of April, A.D. 1921.

In the matter of the authorised assignment of Canadian Western Steel Corporation Limited, debtor.

Upon the application of counsel for Geoffrey Teignmouth Clarkson, authorised trustee, upon reading the assignment for the general benefit of creditors made to the applicant under the Bankruptcy Act by the company above named, dated the 11th

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day of March, 1921, and the affidavit of the applicant, filed, and upon hearing what was alleged by counsel for the applicant:—

1. It is ordered that all further proceedings in the winding-up of Canadian Western Steel Corp'n Limited be continued under the Winding-up Act, being chapter 144 of the Revised Statutes of Canada and amending Acts.

2. It is further ordered that Geoffrey Teignmouth Clarkson, the authorised trustee under the Bankruptcy Act, be and he is hereby appointed provincial liquidator of the estate and effects of the above named company, upon giving security to the satisfaction of J. A. C. Cameron, Esquire, for the due performance of his duties.

3. It is further ordered that it be referred to the said J. A. C. Cameron to appoint a permanent liquidator or liquidators to the estate and effects of the said company above named and to take all necessary proceedings for and in connection with the winding-up of the said company and to fix the security to be given by the said liquidator upon his appointment and the remuneration to be paid to the said liquidator.

4. And it is further ordered that, in pursuance and by virtue of the Bankruptcy Act and the Winding-up Act, being chapter 144 of the Revised Statutes of Canada, and amending Acts, all such powers as are conferred upon the Court by the said Winding-up Act and amending Act as may be necessary for the said winding-up of the said company be and the same are hereby delegated to the said J. A. C. Cameron.

5. And it is further ordered that the costs of the applicant of this application and order be taxed and paid by the said permanent liquidator out of the assets of the said company which shall come into his hands."

The order made by Mr. Holmested was taken to Mr. Cameron, therein named, and was by him and all parties interested treated as being an adjudication that the corporation should be wound up under the Winding-up Act, rather than under the Bankruptcy Act, and that the rights of all parties should be defined, fixed, and dealt with as is provided by the Winding-up Act, rather than by the Bankruptcy Act.

In November, 1921, John Campbell Hargrave, a bondholder of the Canadian Western Steel Corporation, under a mortgage-deed dated May 1, 1916, made between the Canadian Western Steel Company Limited and the Northern Trust Company as trustee for the bond-holders, and the Northern Trust Co. as such mortgagee, applied to J. A. C. Cameron, named in the order of Registrar Holmested, for leave to commence, in the Courts of Alberta, proceedings to enforce payment of their

bond-mortgage.

The Referee was of opinion that the leave applied for should not be granted, but that the applicants could and should enforce their rights in manner provided for by sec. 133 of the Winding-up Act, and refused the leave applied for.

The applicants appealed: on the appeal Orde, J., reversed the order of the Referee, and granted the leave applied for. This is an appeal by the liquidator from the order of Orde, J.

The appellant contends that under the Winding-up Act, no proceedings against the liquidator of the company can be instituted without leave of the Court; that the learned Referee was right in his opinion that he had, under sec. 133 of the Winding-up Act and the order of Registrar Holmested, power and jurisdiction to determine the rights of the applicants, and could do so more expeditiously and with less expense than if leave to proceed in the Courts of Alberta were granted; that, the Referee having exercised his discretion in respect of the application for leave, Orde, J., should not have interfered; counsel also argued that Orde, J., in making his order was of opinion that the authorities established that the applicant was entitled as of right to the leave asked, and the Judge proceeded on an erroneous view of the authorities.

Counsel for the respondents relied on the reasons of Orde, J., for his order, and also contended that the rights of the parties were governed by the Bankruptcy Act rather than by the Winding-up Act, and pointed out that by sec. 6 of the Bankruptcy Act the right of a secured creditor to realise on his security is expressly preserved.

On these arguments and contentions it has become necessary to determine whether or not the proceedings for the liquidation and adjustment of the rights of the creditors and the insolvent corporation are to be determined by reference to the provisions of the Bankruptcy Act, or by reference to the provisions of the Winding-up Act, R.S.C. 1906, ch. 144; for, if they are to be determined and regulated by the Bankruptcy Act, the applicant mortgagees' rights to enforce their security appear to be absolute; while, if they are to be determined and regulated by the provisions of the Winding-up Act, it would appear that the mortgagees must proceed to enforce their claim in manner provided for by sec. 133 of the Winding-up Act unless the Court having jurisdiction under the Winding-up Act otherwise permits; that brings us to the consideration of the meaning and effect of several sections of the Bankruptcy Act.

For the appellant liquidator it was contended that sec. 2 (*o*)

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and secs. 63, 65, and 66 of the Bankruptcy Act and Rules 4 and 13 passed pursuant to the Bankruptcy Act, read together, empower the Registrar in bankruptcy, on an *ex parte* application by the trustee in bankruptcy, to make an order for winding-up under the Winding-up Act, and to delegate to an officer named by him the power of the Court in winding-up matters, and to direct him to wind up the company, and in doing so to exercise all the powers conferred on the Supreme Court by the Winding-up Act; and that such order has the effect of making applicable to the liquidation of this corporation, all the provisions of the Winding-up Act, to the exclusion of the provisions of the Bankruptcy Act. In support of these contentions the liquidator submitted that:—

By the Act, sec. 63 (2), a Judge may exercise the whole or any part of his jurisdiction in *Chambers*.

By sec. 65 (2), the Registrar is empowered "to make any order *or exercise any jurisdiction* which by any rule in that behalf is prescribed as proper to be made or exercised in *Chambers*."

By Rule 4, *all matters and applications* are to be heard and determined *in Chambers* unless the Court or a Judge shall in the particular matter or application otherwise direct.

Therefore the Registrar, except those matters expressly exempted from his jurisdiction by sec. 65, has power to adjudicate upon all matters in bankruptcy.

By sec. 2 (*o*), as amended by (1920) 10 & 11 Geo. V. ch. 34, sec. 2, the Winding-up Act is not (subject to certain exceptions) to apply to companies (see sec. 2 (*k*)), except by leave of the Court, i.e., in its bankruptcy period.

The Registrar, under the sections above referred to, has power to grant that leave. Where that leave is granted, then the Bankruptcy proceedings shall be *continued* under the Winding-up Act as if the provisions of (1920), 10 & 11 Geo. V. ch. 34, sec. 2, had not been made; which seems to mean, "as if there had been no statutory prohibition of the application of the Winding-up Act."

In other words, having obtained leave "to continue the proceedings" under the Winding-up Act, the proceedings thereafter ceased to be in bankruptcy and are carried on under the ordinary jurisdiction of the Court. But where the word "continued" is used that seems to negative the idea that proceedings *de novo* must be commenced under the Winding-up Act. If that were so, then a petition would have to be filed and served and a case made for winding-up. This can hardly have been in-

tended. The only way the proceedings can be "*continued*" is by in some way making the procedure of the Winding-up Act applicable to the case in hand; but, in order to make that procedure applicable, some order is obviously necessary, so that the order "to continue" may be effective.

Orde, J., was of the opinion that the power to order proceedings to "be continued" under the Winding-up Act necessarily involved the power to make any order necessary under the Winding-up Act to make that Act operative in the proceedings, such as the appointment of a liquidator, and the delegation of the powers of the Court to the Referee.

The Winding-up Act and the Bankruptcy Act being both legislative Acts of the Dominion Parliament, it was competent to that Parliament to say how these Acts are to be administered, and for the purpose of bankruptcy proceedings, to incorporate the Winding-up Act as a part of the Bankruptcy Act, or at all events make it part of the Bankruptcy procedure so far as it should see fit; and this it seems to have done by, in effect, enacting that the Winding-up Act is only to be operative as regards certain companies so far as the Court in its bankruptcy jurisdiction shall determine. It could hardly have been intended that the forum which is to determine whether the Winding-up Act is to be applicable should be competent only to make an ineffective order, dependent on another jurisdiction to determine whether or not it should have any operation at all. It is therefore submitted that the giving of power to the bankruptcy jurisdiction to determine whether or not the Winding-up Act should be applicable to a bankruptcy necessarily and implicitly involves the power also to make an order effectively to carry out its decision.

It may be remembered that, assuming that the Registrar in bankruptcy has the jurisdiction above suggested, he is very much in the position of the Master in Ordinary or Assistant Master when exercising jurisdiction under the Mechanics and Wage-Earners Lien Act; and, while their jurisdiction so to do may perhaps be open to question on constitutional grounds, the jurisdiction of the Registrar in bankruptcy, being derived from the Dominion Legislature, seems free from any such objection.

I am of opinion that these contentions are not in accordance with the true intent and meaning of the Legislature as expressed in the sections referred to, and cannot be supported.

On my reading of these sections and rules, a corporation to which the Bankruptcy Act is applicable must be wound up under, and the rights of the corporation and its creditors, dir-

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ectors and officers, must be ascertained and fixed by reference to, the provisions of the Bankruptcy Act, unless the Judge exercising jurisdiction in bankruptcy grants leave to continue proceedings already commenced under the Winding-up Act, or grants leave to institute and continue proceedings under the Winding-up Act.

It seems to follow that, in a case where proceedings under the Winding-up Act have not been commenced prior to an assignment in bankruptcy, or prior to proceedings in bankruptcy, and it is desirable that the liquidation be under the Winding-up Act rather than under the Bankruptcy Act, it is necessary: (a) to obtain leave from those having jurisdiction in bankruptcy to institute and continue proceedings under the Winding-up Act; (*b*) to institute proceedings under the Winding-up Act in the Court having jurisdiction under that Act, and in manner provided by that Act, and in those proceedings to obtain a winding-up order, and any delegation of powers the Court may deem wise to grant, and any orders and directions the Supreme Court may see fit to give to its own officials.

I am of opinion that the Bankruptcy Act does not empower the Judge in Bankruptcy, or the Registrar in Bankruptcy as such, to make orders under the Winding-up Act; or empower them as officers in Bankruptcy to interfere with, order, direct, or control officers of the Supreme Court of Ontario, but merely contemplates authorising them to interfere with, direct, control, order, or empower officers in the Bankruptcy Court, appointed to office in manner provided by the Act, and that it was not by the Act intended that the Judge in Bankruptcy or the Registrar in Bankruptcy should have authority to delegate to officers or any other persons powers conferred on the Supreme Court of Ontario by some Act other than the Bankruptcy Act, and under which the Supreme Court may delegate its powers or some of its powers to its own officials.

The Bankruptcy Act (sec. 64) makes it plain that (except in special circumstances not here material) the jurisdiction and powers granted by that Act must be exercised, not by any Judge of the Supreme Court nor by any official of the Supreme Court, but by the Judge named by the Minister of Justice, and by officials in Bankruptcy named by the Chief Justice of Ontario. Mr. Cameron has not been appointed an officer or official in Bankruptcy, and it is worthy of note that the reference to him is not to him as an officer of any Court.

While *Valin* v. *Langlois*, 5 App Cas. 115, is an authority for the proposition that the Parliament of Canada has power to commit to the Provincial Courts jurisdiction to administer laws

of the Dominion in matters reserved to the exclusive jurisdiction of the Dominion, and to require them to do so, and, while there is much in the reasons for judgment to support the contention that the Dominion Parliament may require the Provincial Court and its officials to exercise the jurisdiction conferred, I doubt that it has yet been determined that the Dominion in such matters may legislate as to matters of procedure or may clothe some one who may or may not be an officer of the Provincial Court, such as the Registrar in Bankruptcy, with power and authority to order, direct, and control officers of the Provincial Court, or, by delegation of the Provincial Court's jurisdiction, to clothe him or them with powers conferred upon the Court itself.

If it were intended that such power should be exercised, it should, it seems to me, be made very plain and not left in doubt and if left in doubt should not be inferred, for such outside interference and control must lead to trouble in the Courts and confusion and delay in the administration of justice.

I am also of opinion that the power to grant leave to proceed under the Winding-up Act, rather than under the Bankruptcy Act, is one that may in its use seriously and materially alter and affect the rights and remedies of all concerned in the liquidation of a corporation, and is one that should be exercised by the Court rather than the Registrar, and on notice to parties to be or who may be affected, and is one that should not be exercised *ex parte*.

I am, for these reasons, of opinion that the order of the Registrar of April 2 was made without authority, and has no legal validity, and that therefore the rights of the respondents to enforce their security, as preserved by sec. 6 of the Bankruptcy Act, have not been taken away but stand unimpaired.

I would dismiss the appeal, leaving the trustee in bankruptcy or the creditors, Wm. Kennedy & Sons, who have filed a petition to wind up, if so advised, to apply for leave to institute or continue proceedings, and if leave is granted to apply for a winding-up order.

I would not award costs to either party here or below.

I am of opinion that it would facilitate the administration of the Act if the administration thereof was left to the Court generally, and so that the Court might direct, order, or empower its officials generally, rather than that the jurisdiction of the Court should be exercised only by a Judge named by some power outside the Court, and only by officials appointed for that purpose and paid differently and in a way not contemplat-

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ed by the Province when they were employed and when their duties were defined. For these reasons I suggest that subsec. 3 of sec. 64 be amended to read about as follows:—

"Except as otherwise provided by this Act, all the powers and jurisdiction in bankruptcy and otherwise conferred by this Act may be exercised by any one of the Judges of the Court upon which such powers are conferred; that the judgment, decision, or order of a Judge shall be deemed the judgment, decision, or order of the Court; and references in the Act to the Court shall, where necessary, apply to the Judge so exercising the powers and jurisdiction of the Court, without thereby abrogating, restricting, or limiting the rights, powers, and duty of any and every Judge of the Court to exercise jurisdiction in bankruptcy; and the Minister of Justice shall from time to time assign to one Judge named by him the duty and obligation of devoting himself and so much of his time as may be necessary to performing the work of the Court in bankruptcy matters."

And that subsec. 4 of sec. 64 be amended by providing that the fees of this Act made payable to a Registrar, or other officer in bankruptcy, shall, where such Registrar or officer is an officer of a Provincial Court, be paid to the Province in which the work is performed, by the purchase of law-stamps of the Province and the cancellation thereof by the officer of the Provincial Court.

Appeal dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

KESLERING v. KESLERING AND ATT'Y GEN'L FOR SASKATCHEWAN.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 15, 1922.

DIVORCE AND SEPARATION (§IV—40)—*Petition by husband—Wife guilty of adultery—Husband by neglect and cruelty conducing to offence—Refusal of Court to grant—Discretion of Court.*]—Appeal by petitioner from the judgment of the Court of Appeal for Saskatchewan (1921), 61 D.L.R. 44, 14 S.L.R. 367, in an action for divorce. Affirmed. [See Annotation 62 D.L.R. 1.]

The judgment of the Court was delivered orally as follows:—

"It has not been established to the satisfaction of the majority of the Court that the judgment against which this appeal is brought is not a discretionary judgment either within sec. 38 of the Supreme Court Act, R.S.C. 1906 ch. 139, as it now stands or within sec. 45 of this Act as it stood prior to July 1, 1920, (Can. Stats. ch. 32) and following the decision in *St. Lawrence Ins. Underwriters* v. *Fewster* (1922), 69 D.L.R. 351, 63 Can. S.C.R. 342, delivered by this Court a few days ago, this appeal must stand dismissed without costs."

C. E. Gregory, K.C., for appellant.

J. C. Martin, for the Attorney-General for Saskatchewan, respondent.

SHEPPARD v. SHEPPARD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. March 27, 1922.

APPEAL (§IIA—40)—*Right of appeal to Divisional Court—Judicature Act, sec. 25—Order of Judge in Court dismissing motion to set aside statement of claim—Interlocutory order.*]—Appeal by the defendants from the order of Latchford, J. (1922), 69 D.L.R. 570, in the Weekly Court, dismissing the defendants' motion to set aside the statement of claim, upon the ground that the action was not maintainable.

H. S. White, K.C., for appellants.

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J. M. McEvoy, K.C., for respondent.

The Court quashed the appeal, holding that the order appealed from was interlocutory (Judicature Act, sec. 25); costs as of a motion to quash to the respondent in any event of the action.

Appeal quashed.

HARRIS v. GARSON.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Sutherland, Kelly, Masten and Rose, JJ. January 24, 1922.

JUDGMENT (§IVB—230)—*Motion to set aside—Rule 523—Grounds arising after judgment—Action brought upon judgment in another Province and tried by jury with different result—Law of New Brunswick—Ontario action defended but defendants not appearing at trial.*]—Appeal by the defendants from the order of Meredith, C.J.C.P. (1921), 64 D.L.R. 659, 51 O.L.R. 37.

William Proudfoot, K.C., for appellants.

W. R. Meredith, for respondent.

The Court dismissed the appeal with costs.

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CHRISTENSEN v. ANDREWS AND HAMILTON.

Manitoba King's Bench, Mathers, C.J.K.B. June 27, 1921.

SOLICITORS (§IIC—20)—*Solicitor garnishee—Client's money on hand — Client indebted for solicitor's costs and charges — Right to retain money and apply in payment of debt.*]—Application to compel a garnishee to pay money into Court.

A. Griffin, for Christensen; *W. Thornburn*, for the garnishee.

MATHERS, C.J.K.B.:—This in an application on behalf of the plaintiff to compel the garnishee to pay into Court a sum of money alleged to be in his hands belonging to the defendant. The garnishee, a solicitor who has been acting for the defendant in various matters, admits that at the time the garnishing order was served he had in his hands a sum of money belonging to the defendant. He says that at that time the defendant was indebted to him in a larger amount for solicitor's costs and charges, which he claims to be entitled to set off against the money so received.

The solicitor's right to retain these moneys and apply them in payment of his costs does not depend upon whether he had

a solicitor's lien, as the plaintiff argued, but whether or not he had as against the garnishing creditor a right to set off costs and charges due to him by the defendant. In my opinion, he had that right. In that respect, a solicitor has the ordinary rights of one creditor as against another: 25 Hals. 493, 503; Annual Practice Rules, 1921, p. 785.

The motion will, therefore, be dismissed, unless the garnishing creditor desires to question the propriety of the solicitor's bill of costs. If he does he may have the bill taxed, and an order will go for that purpose. In that event, should the bill as taxed be less than the amount of money in the garnishee's hands, the difference must be paid into Court, and the garnishee must also pay the costs of this motion. If the garnishing creditor elects to have the bill taxed, he must do so, and notify the garnishee within 5 days, otherwise the motion will stand dismissed.

Judgment accordingly.

TETZ v. TETZ.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. July 3, 1922.

SEDUCTION (§I—3)—*Liability—Conduct of girl as affecting.*] —Appeal by plaintiff from the trial judgment in an action for seduction. Reversed.

J. K. Paul, for Olga Tetz, appellant.

A. M. Sinclair, K.C., for F. G. Tetz, appellant.

J. J. O'Connor, for respondent.

The judgment of the Court was delivered by

BECK, J.A.:—The action was for seduction. The trial Judge dismissed the action at the conclusion of the plaintiff's case. His reasons for judgment are reported to us. The action is brought both by the girl alleged to have been seduced and by her father. The seduction is alleged to have taken place on October 19, 1919. The evidence proves this allegation; but the reason why the Judge, nevertheless, dismissed the action seems to be that the girl had so acted in regard to the defendant during several months previous to the date mentioned and on the occasion of the seduction as to shew that she was not seduced or enticed into the act. I think the evidence falls much short of that; and that the Judge has strained the expressions of opinion given by this Court in *Gibson* v. *Rabey* (1916), 9 Alta. L.R. 409, much beyond what was intended. In that case, I said that, in my opinion, it would be a *defence* to an action for seduction if it were shewn (1) that the woman was the tempter, or (2) even if she deliberately *consented* from lasciv-

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iousness or even from the strength of mere natural passion, *provided* her *consent* had not been brought about by the enticement of the defendant. To this, I added that, in my opinion, in the absence of evidence of loose behaviour on the part of the woman, the presumption is that there was enticement on the part of the man and that the burden of shewing that the plaintiff could not succeed on the ground that she was at least equally morally guilty is on the defendant. Stuart, J.A. concurred with me and Scott, C.J. (the Court being composed of three members) was evidently of the same opinion. He expressly refers to the circumstance in that case of an alleged promise of marriage and the fact that the evidence left it in doubt whether the promise was made before the first act of intercourse. He found that the conduct of the woman was not such as to constitute a defence to the action.

In the present case, the girl gave evidence of a promise of marriage at the time of the act of intercourse. The promise was probably made before the act. The circumstance that the defendant was a minor and that consequently the promise was not binding, 16 Hals. *tit* Husband and Wife, p. 273 sec. 494, is of no consequence. It would, undoubtedly, be an inducement. I am, clearly, of opinion that the evidence given on behalf of the defendant disclosed nothing to meet the plaintiffs' *primâ facie* right to recover.

The appeal should, therefore, be allowed with costs to be taxed under column 4 and a new trial directed. As to the costs of the first trial, as it seems that the suggestion, that the plaintiff's action failed, came in the first instance from the Judge, I think that they should abide the event of the new trial.

Appeal allowed.

LOCKWOOD v. CANADIAN WESTERN POWER & FUEL Co.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. October 18, 1922.

PARTIES (§III—120)—*Adding party defendant.*]—Appeal by Town of Redcliffe from an order of McCarthy, J. refusing to add the town as a party to the action.

D. M. Stirton, for appellant.

C. S. Blanchard, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—Since the order was made the plaintiffs have filed a notice of discontinuance so that there is now no action in which the appellant can be added. The appeal is really taken

for the purpose of getting rid of the order for costs, amounting to $74 which was made against the applicant.

It seems to me that the reasons for allowing the applicant to be added in this action are perhaps as strong as in the case of *Canada Land and Ranch Co.* v. *Redcliffe Realty Co.* (1922), 67 D.L.R. 401, where we allowed the appeal and permitted the applicant to be added. As the action has been discontinued the propriety of adding the applicant is a quite academic question and can scarcely now be properly examined.

In the circumstances I think the proper order for this Court now to make, which I think it still has power to make, is to direct the order of McCarthy, J., to be amended by saying that it shall be without costs to either party and that there be no costs of this appeal. There will be an order accordingly.

Judgment accordingly.

REX v. VERBERG.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. October 28, 1922.

INTOXICATING LIQUORS (§IIIA—55)—*Validity of Part IV. of the Canada Temperance Act R.S.C. 1906 ch. 152 as amended 1919 (Can. 2nd sess.) ch. 8.*]—Application to quash a conviction under the Canada Temperance Act. Affirmed.

A. M. Sinclair, K.C., for appellant.

A. A. McGillivray, K.C., and *S. Helman*, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—I do not think it necessary to deal with the preliminary objection because even if there is a right of appeal by way of stated case I do not think the objections on the merits can be sustained. Really the only contentions raised were as to the validity of Part IV. of the Canada Temperance Act, R.S.C. 1906, ch. 152, as amended 1919 (Can. 2nd sess.) ch. 8. In view of the decisions binding on us it seems to me that this cannot now be questioned.

In my opinion, the words "carriage or transportation of intoxicating liquor through such province" as contained in sec. 154, sub-sec. 1 (*c*) of the Act, refer to passage through a Province whether from one Province to another or from one Province through another to a foreign country or from a foreign country through a Province to another part of Canada.

Even if it were open on the case as stated to raise the question of the sufficiency of the evidence, which I doubt very much, I think there was ample evidence to support the conviction.

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The application should be dismissed with costs.

Application dismissed.

CANADA LIFE ASSURANCE Co. v. McHARDY.

Alberta Supreme Court, Walsh, J. November 18, 1922.

LAND TITLES (§III—35)—*Sale of land—Order of Court—Sufficiency of purchase price—Land Titles Act, 1906 (Alta.), ch. 24 and amendments.*]—Appeal from an order for sale by the Master. Affirmed.

G. A. Costigan, for the appeal.

W. G. Egbert, contra.

WALSH, J.:—It is impossible for me to interfere with the Master's order on the ground of the insufficiency of the purchase price. Although the earlier material filed shewed as usual a considerable difference of opinion amongst the valuators, I think that the fixing by the Master of a price exceeding by $5 an acre or $3,200 in all that put upon the property at that very time by two experienced and competent valuators, one of whom was the appointee of the defendant, as the result of a visit to and a personal examination of the land, quite justifies the price at which the Master ordered a sale to the plaintiff.

I am unable to see how the lease made by the plaintiff to Clarke in April last affects the question. The public sale held in May proved abortive though it was not subject to the lease. The fact of this lease being outstanding is not referred to in the report of Mr. Nowers, one of the valuators, and there is absolutely nothing before me to indicate that it affected in the slightest degree the opinion of either of the two valuators above referred to. I am by no means sure that the operation of para. 31 of the lease was restricted to the public sale held in May last. It provides for the determination of the lease upon a sale to any one but the plaintiff "at the judicial sale now ordered or at any adjournment thereof." The order of March 24 was that the land be forthwith sold under the direction and with the approval of a Judge or Master. It may well be that para. 31 of the lease would apply to any sale made pursuant to that order and not simply to the public sale then advertised, so that any purchaser other than the plaintiff, at any sale made in this action, would be entitled to hold the land free from it.

Notwithstanding Mr. Costigan's interesting argument, I remain unconvinced that this sale is not a sale within the meaning of sec. 62 of the Land Titles Act 1906 (Alta.), ch. 24, as

amended 1919 (Alta.), ch. 37, sec. 1, and sec. 6 of 1920 (Alta.), ch. 3. Under the order now under appeal, the land has certainly been sold, the Court being the vendor and the plaintiff the purchaser, just as effectively as though a complete outsider was the purchaser, and so, I think, the event has happened which the Legislature intended, so far as I can judge from its language, to entitle the plaintiff to pursue against the defendant personally its remedy for the deficiency.

The appeal is dismissed with costs.

Appeal dismissed

GILBERT BROS. Ltd. v. KEISER.

Alberta Supreme Court, Simmons, J. July 6, 1922.

BROKERS (§IIB—10)—*Sale of land—Compensation—Sufficiency of services.*]—Action to recover commission on the sale of land. [See Annotation 4 D.L.R. 531.]

A. B. Mackay, for plaintiff.

W. J. Millican, for defendant.

SIMMONS, J.:—On April 28, 1919, the defendant entered into an agreement in writing with the plaintiff to pay the plaintiff a commission of $2 per acre respecting the sale of sec. 9 and the east half of sec. 8, tp. 26, r. 24, west of the 4th. meridian, containing 960 acres more or less, at the net price to the owner of $69 per acre, payable $12 per acre in cash and the balance on crop payment plan with interest at 6% per annum.

The said agreement in writing contained this farther term "I further agree that this is an exclusive listing to you covering the aforesaid land, but in case that I desire to withdraw same I will give you ten days' notice in writing by registered mail, otherwise this listing shall remain in full force and effect."

The plaintiff's officer inspected the said land and took prospective purchasers to view the land. On May 25 one Chester W. Putnam visited the plaintiff's real estate office in Calgary making enquiries for available lands for purchase. The plaintiff's officer submitted the defendant's lands on the terms of the above listing. The plaintiff's officer sent for the defendant to come to the plaintiff's office and meet Putnam. A visit to the said lands was discussed among the three parties, the plaintiff's officer, the defendant and Putnam and it was finally agreed that the defendant should take Putnam out to see the said land, which arrangement was carried out.

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On June 17, 1919, the defendant entered into an agreement with Putnam for the sale of said lands and for the sale of certain chattels used by the defendant in farming the said lands. In the said agreement sec. 9 was sold at $75 per acre and the east half of sec. 8 at $45 per acre. Certain chattels described in the said agreement were sold for $5,403, and a titan 10/20 engine for $1,428. The cash payment provided for in the agreement was $4,350 and the balance was on crop payment plan.

This sale was made within the 60 days provided for in the agreement in writing between the plaintiff and the defendant and was carried out without any notice in writing by registered mail or verbally by the defendant of a withdrawal of the listing and was also entered into without the plaintiff's knowledge or consent. The plaintiff claims a commission of $2 per acre on the said sale on the ground that the plaintiff was the efficient cause of bringing about the said sale by introducing the purchaser and in the alternative the plaintiff claims damages for breach of the contract.

It is quite obvious that the defendant committed a breach of contract in writing entered into with the plaintiff and not only did he fail to give the 10 days' notice in writing but he availed himself of the services of the plaintiff in submitting a new offer to the prospective purchaser who had been introduced by the plaintiff.

The defendant relies on *Como* v. *Herron* (1913), 16 D.L.R. 234, 49 Can. S.C.R. 1. The plaintiff relies on *Howard* v. *George* (1913), 16 D.L.R. 468, 49 Can. S.C.R. 75. I do not think this case is governed by either of the above cited cases. In *Como* v. *Herron*, the plaintiff relied upon a contract to sell the whole of the land, part of which only was sold by the defendant. It is quite clear if the plaintiff in that case had claimed damages for breach of contract or upon a *quantum meruit*, the action could be maintained. In *Howard* v. *George* the agency was held to be a general agency, which brought it within the rule of *Toulmin* v. *Millar* (1887), 12 App. Cas. 746.

I think the contract must be held to be a specific listing at $69 per acre net to the owner and that the case comes within the principles of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*, [1910] A.C. 614. While, in that case, the full commission of 10% was allowed to the agent it was allowed as the measure of damages. Per Lord Atkinson in that case at p. 626:—

"It was quite open to the referee to take as the measure of damages what would have been Burchell's commission at the stipulated rate 10% on the consideration actually received for the sale."

The small cash payment provided for in the sale made by the defendant and the fact that a full line of farm implements was included in the sale suggests that the plaintiff's endeavour to find a purchaser on the basis of the terms provided for in the listing might not have been successful. He, however, was wrongfully deprived of the right which the listing gave him to earn his commission. He made an honest attempt to sell the land and he introduced a prospective purchaser and the defendant availed himself of his efforts by selling to the prospective purchaser, who was introduced by the plaintiff.

The Statute 1906 (Alta.) ch. 27, is quite satisfied by the authority in writing given to the plaintiff by the defendant.

I would assess damages for the defendant's breach of contract at $1,000, together with costs of the action.

Judgment accordingly.

THE GALT HOSPITAL v. LYNN.

Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ.A. October 23, 1922.

CONTRACTS (§IID—153)—*Practising physician—Agreement with union as to care of members employed in mines—Construction—Injury to member not party to agreement—Hospital treatment—Special agreement—Liability of physician.*]—Appeal by defendant from the judgment of a District Court Judge in an action to recover certain charges for hospital expenses in connection with two patients. Reversed.

H. P. O. Savary, K.C., for appellant; *W. S. Ball*, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—This is an appeal by the defendant from the judgment of the Lethbridge District Court awarding the plaintiff for hospital charges the sum of $19.25 in respect of a patient, John Makeranko and the further sum of $519.75 in respect of a patient George Nozi, being at the rate of $1.75 per day for each patient.

Both patients were admitted to the hospital prior to July 15, 1920 and when admitted were members of the Local Union No. 574, United Mine Workers of America District 18 and were employed at the Galt Mines. They were taken to the hospital by or under the instructions of Dr. Galbraith, who was, at the respective dates of their admission, physician to the said Union under an agreement presumably in the terms of the agreement with the defendant presently referred to.

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By agreement in writing between the said Union and the defendant, who is a physician practising at Lethbridge, dated July 15, 1920, the defendant agreed to furnish medical treatment and when necessary hospital accommodation to the Union members and their families for which he was to receive one and seven-tenths per centum of the earnings and bonuses of all the members of the Union employed at the Galt Mines, and it was provided that any contention arising between any Union member and the defendant concerning services under the agreement should be settled between the committee of the Union and the defendant.

The plaintiff was not a party to this agreement.

The defendant told the secretary of the hospital that he was to take over the work of the Union and shortly after July 15 gave him a copy of his agreement, and the secretary received a letter from the Union that on and after a certain date (presumably July 15) the defendant would be responsible for the patients.

I think that a contract with the plaintiff may be fairly implied that from the date of his agreement the defendant would pay for the patients in the hospital who were entitled to hospital accommodation at his expense under the terms of his agreement with the Union.

As to Makeranko, the defendant did pay without dispute from July 28, he objected to pay from July 15 because Dr. Galbraith was still attending the patients and refused to give them up, he (Galbraith) apparently was still claiming the right to attend the Union patients at the expense of the Union, but it does not appear that he was paid anything for his services after July 15 and the defendant was evidently paid on the basis of his providing the hospital accommodation from that date. I do not think that he should be relieved by reason of the interference of Dr. Galbraith, which lessened instead of increasing his work, he should be held responsible for the item of $19.25 for Makeranko.

The situation regarding Nogi is different.

For some unexplained reason, Dr. Galbraith appears to have paid for him up to July 31 and the claim against the defendant is only from August 6. Dr. Galbraith appears to have ceased treating this patient about the last of July and from that time until some date in September not definitely fixed, he had no medical attention. At the latter date, after consultation with representatives of the Union, when it was agreed between them and the defendant that this patient was not entitled to free hospital accommodation, the defendant arranged to take him on

as a private patient and that he (Nogi) should pay his own bills. The secretary of the hospital was notified of this arrangement and given to understand that he should look to the patient personally for hospital charges. This is not disputed by the secretary, his position is shewn by the following extracts from his evidence.

"Q. What did he say about taking him over as a private patient? A. He said that Nogi's friends had approached him to take him over and they would pay him private fees. Q. That he wasn't being taken over under his contract with the Local Union? A. He was in the hospital as a contract patient. Q. But didn't Dr. Lynn tell you that he was not going to take Nogi over as a contract patient? A. He said he would take him over as a private patient but that was nothing to do with me as he was a contract patient as far as I knew. Q. But you were secretary of the hospital? A. Yes. Q. And he notified you to that effect? A. Yes. Q. And at that time he spoke to you about these bank accounts that Nogi had? A. He told me that he understood that Nogi had about $1,000 in the bank. Q. And that the hospital fees would be paid by Nogi himself. A. I think he said to me if I cared to get after that, probably I could get the money from Nogi's private account."

Up to this time, I think the plaintiff was right in treating Nogi as a contract patient for which the Union physician was liable, no notice having been given to the contrary, but, in my opinion, the physician was the sole judge so far as the hospital was concerned of whether or not the patient should remain as a contract patient. There being no time agreed upon between the plaintiff and the defendant during which the patient would remain, the physician could, at any time, terminate his liability to the hospital, and then it was open to the hospital, either to make its arrangement with the patient to continue, or failing that, to exclude him from the hospital. The secretary in his evidence stated: "I stand on the case as being that Nogi was admitted to that hospital as a Union patient and that I could not conscientiously ask the man for money for the hospital when he was entitled to free hospital treatment and as a member of the Union."

I think by this attitude he seeks to usurp the functions of the Local Union and the patient or one of them to whom alone the defendant was responsible under his agreement to provide hospital accomodation, and, moreover, the representatives of the Union, as well as the patient acquiesced in the position that Nogi was not entitled to further free hospital accomodation. I think the defendant should only pay for Nogi up to the time

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he notified the hospital of taking him over as a private patient, which I would put at 30 days at $1.75 per day, amounting to $52.50.

The result is that the appeal should be allowed with costs, the judgment below set aside and judgment entered for the plaintiff for the said sums of $19.25 and $52.50 making a total of $71.75 with costs, as of a small debt action, the defendant to have no costs against the plaintiff other than the costs of the appeal.

Appeal allowed.

REX v. GRANT.

Saskatchewan King's Bench, Mackenzie, J. May 18, 1922.

CERTIORARI (§IA—9)—*Saskatchewan Temperance Act R.S.S. 1920 ch. 194—Breach—Conviction — Application to quash — Right to examine evidence taken before magistrate.*]—Application by accused to quash a conviction under the Saskatchewan Temperance Act. Application dismissed.

T. A. Lynd, for appellant.

D. C. Kyle, for informant.

MACKENZIE, J.:—The applicant seeks an order for *certiorari* quashing his conviction on the grounds that the evidence taken before the magistrate shews that the applicant did not keep liquor for sale within Saskatchewan but took orders for liquor, which was sold at Winnipeg, in Manitoba. To decide applicant's contention, I would have to look at the evidence taken before the magistrate. After a careful perusal of the judgment of the Privy Council in *Rex* v. *Nat Bell Liquors Ltd.*, 65 D.L.R. 1, 37 Can. Cr. Cas. 129, [1922] 2 A.C. 128, I have come to the conclusion that this is something I should not do. See their Lordship's conclusions on this point 65 D.L.R. at p. 30, as follows:—

"Their Lordships are of the opinion . . . that the evidence, thus forming no part of the record, is not available material on which the Superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, and that it is not competent to the Superior Court under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact, which had to be sworn to in order to render a conviction a right exercise of his jurisdiction."

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Section 82 (2) R.S.S. 1920, ch. 194, the Saskatchewan Temperance Act, referred to by the applicant is not essentially different from secs. 62 and 63 of the Alberta Liquor Act, 1916 (Alta.) ch. 4, which was before their Lordships in coming to the decision and so cannot affect it. I therefore dismiss the application with costs.

Application dismissed.

GOOLD SHAPLEY Co. v. MEYER.

Saskatchewan King's Bench, Taylor, J. October 17, 1922.

PLEADING (§IN—110)—*Amendment of.*]—Application by defendant to amend his pleadings, in an action on a lien note.

L. McK. Robinson, for plaintiff.

R. F. Hogarth, for defendant.

TAYLOR, J.:—In this action I have now before me the consideration of the defendant's application to amend his pleadings. It seems to me again a case wherein the parties have come down to trial on pleadings which are not apposite on the facts. The plaintiffs' statement of claim was that the defendant was a farmer, and they sued him upon a lien note for $406.50, the subject-matter of the cause of action, alleging that this note had been given by the defendant to the plaintiffs pursuant to and in performance of a certain contract in Form A under the Farm Implement Act 1917, 2nd sess. (Sask.), ch. 56, for the sale of a 22 h.p. engine; and upon the trial being opened it was shewn that on February 15, 1918, such an agreement had been made on that date.

The plaintiffs amended without objection by altering the allegation that defendant was a farmer to one that the defendant was a feed mill proprietor, and amending the allegation also that the lien note was given pursuant to a contract in Form A, to one that it was given pursuant to and in performance of a contract in Form C.

Now there are certain admitted facts. The defendant is not and has not been a farmer: he is a feed mill proprietor. He did sign a contract which is in form C, a contract for the sale of second-hand implements, purporting to be a contract made under the provisions of the Farm Implement Act, 1917 2nd sess. (Sask.), ch. 56. Whether the Act applies to him or not is another matter. Whether the Act applies to this sale or not, I am not *prepared* to express any opinion. The plaintiffs' cause of action would appear to be pleaded as a cause of action under

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that contract and on a note given for the consideration therein referred to.

Then there is no dispute over the fact that on August 20, 1918, a new arrangement was entered into. There may be some dispute as to the terms of the new arrangement. Under that new arrangement the 22 h.p. engine delivered into the possession of the defendant by the plaintiff company was taken back by the plaintiff company, and he subsequently received a 34 h.p. stationary patent-cooled oil engine.

Certain defences were set up going to the statement of claim as it was pleaded. It was alleged in the statement of claim that this contract in Form C complied with the Act; and this was denied. It was alleged that the defendant cannot read the English language, and that the agreement was not read over or explained to him, and that certain provisions of the Farm Implement Act in reference thereto were not carried out, and it was alleged that this agreement was rescinded and a new agreement made on August 20, 1918, in Form A, but there was no allegation that the subsequent agreement was not carried out or that there had been any failure of consideration thereunder.

The defendant's evidence was that the first note for $400, the note which is sued on in this action, was to be applied as part payment of his liability on the new engine. The question at once arises as to whether there has been a failure of consideration in the continuing transaction. Portions of the evidence that were allowed to go in without objection shew clearly that the controversy between the parties is not limited merely to the first engine, but relates also to the second engine, and I take it that it is clear that all amendments must be allowed that are necessary to determine all matters in controversy between the parties. Now whilst the plaintiff, it seems to me, in his form of pleading has been somewhat at fault and has let the defendant in to a certain extent, yet the defendant should have set up the amendments which he now seeks, at an earlier stage, and any costs occasioned by allowing the amendments should be borne by the defendant. I think the proper order to make is, to allow both parties to amend their pleadings as they may be advised. The costs of and relating to the amendments setting up the new issues in the defence not now raised in the defence and counterclaim should be borne by the defendant, including the costs thrown away in preparation for this trial and the trial so far; and as the plaintiffs are not now ready to go on, the trial of the action should stand adjourned until the next Court. I

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think too, in view of all the circumstances, that the costs in connection with the amendments which I have directed should be borne by the defendant, should be paid not less than 10 days prior to the opening of the next Court, and the postponement and amendments are allowed on condition that the said costs be paid by that date. As the discussion of counsel may have shewn the advisability of drafting the issues in a different way, I will give leave to either party to amend as they may be advised, with the usual right of reply. If no other amendment is served by the defendant within 1 week from this date, the proposed amendment now filed will stand: that is to say, if the defendant wants to accept a wider privilege than is contained in his draft amendment, he must do so within six days.

Mr. Hogarth:—Mr. Lord, my learned friend may amend his claim.

His Lordship:—If he amends his claim, then he has thrown it wide open; you would have your right to reply as you please.

PERRY v. CANADIAN PACIFIC R. Co.

Saskatchewan King's Bench, Brown, C.J.K.B. September 21, 1922.

COSTS (§II—29)—*Judgment—Directing taxation of—Taxation by taxing officer—Review of.*]—Appeal from the taxing officer's taxation of the plaintiff's costs. Affirmed.

P. H. Gordon, for appellants.

D. Buckles, K.C., for respondent.

BROWN, C.J.:—This is an appeal from the taxing officer's taxation of the plaintiff's costs. In giving the judgment of the Court of Appeal (1922), 67 D.L.R. 446, Lamont, J., says as follows at pp. 450-451:—

"In this Province the point came before MacDonald, J., in *Dalrymple* v. *C.P.R. Co.*, as appears from the judgment of Elwood, J.A., (1920), 55 D.L.R. 166, 13 S.L.R. 482. In that case MacDonald, J., dismissed the plaintiff's common law action. Counsel for the plaintiff then requested him to assess compensation under the Workmen's Compensation Act, which he did, fixing the amount at $2,000, and directing that the plaintiff should have the costs of the action on the District Court scale, and from these should be deducted the costs of the defendants on the King's Bench scale. In my opinion, this is the proper principle to apply."

This, as I view it, clearly means that the plaintiff should have his costs on the District Court scale from the time of receiving instructions to issue writ until the obtaining of judgment. The

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taxing officer proceeded with the taxation on this principle. The formal judgment which was taken out in this case does not, in my opinion, very clearly express the judgment of the Court and is capable of a different interpretation. I prefer, however, to interpret it in the light of the Court's judgment, and, in that way, give effect to the judgment and support the taxation.

The counsel for the appellants submits that the only costs which should be allowed are such as apply strictly to the proceedings connected with the actual assessment. I cannot agree with this contention, and the appeal will, therefore, be dismissed, with costs.

Appeal dismissed.

SICK v. TAYLOR.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, McKay and Martin, JJ.A. November 7, 1922.

CONTRACTS (§III D—185)—*To thresh grain—Person owning grain to supply team—Construction of agreement—Conduct of owner relieving from contract.*]—Action to recover amount due for threshing a portion of defendant's grain. Counterclaim for alleged damages for breach of agreement to thresh his grain on a certain date.

F. H. Bence, for appellants; *L. C. R. Batten*, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—In this case, the plaintiff agreed to thresh the defendant's crop, and the defendant Murdo Taylor agreed to supply a team and work for the plaintiff during the threshing. In accordance with the agreement, the plaintiff threshed the defendants' oats and barley, and then took his machine to his own farm as defendants' wheat was not ready for threshing. Later on, the plaintiff went to the farm of Paul Waholz and threshed for him. According to the plaintiff's evidence, he threshed for Waholz on September 27 and 28 and then went to thresh for one Steinke.

The defendant Murdo Taylor says that the plaintiff undertook to return to his place and thresh his wheat on September 26 after defendant had finished threshing for Waholz. The plaintiff denies this, and says that no date was fixed, but that he told defendant that he was going to thresh for Steinke as soon as he finished at Waholz' place and would then thresh for defendants.

According to the defendant Murdo Taylor's own evidence, he was still working for the plaintiff at Waholz' place on Septem-

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ber 27, and stopped working for him on that day because he said he was going to thresh for Steinke before going back to thresh for defendants. He also says that he told plaintiff he would have to look out for another machine. Owing to defendant's leaving him, plaintiff was obliged to hire another man and team. The plaintiff finished threshing for Waholz on September 28, and for Steinke (also referred to as Reiss) on September 29. Apparently, both parties took for granted that the agreement was at an end, as neither of them made a move to carry it out after September 29, when, according to the evidence, the plaintiff was free to proceed with the defendants' threshing. The defendants subsequently had their wheat threshed by one Schuman, the threshing being completed on October 12.

The defendants counterclaim for damages caused by an alleged breach of agreement on the part of the plaintiff to thresh their wheat on September 26. The damage said to have been caused by deterioration of the wheat resulting from the delay in threshing, and a drop in the market as well.

The evidence on this branch of the case does not, in my opinion, support this claim. Defendants' wheat was threshed on October 12, and, according to the evidence, the weather was fine and dry in the interval between that date and September 26. The defendant did not attempt to remove or sell his wheat before November 5, and, in the meantime, it was left exposed to the weather in a granary without a roof. He says that he could not market his wheat until after November 5, because he was working for one Schuman up to that time, and that it snowed on the night of that day and that that was the reason he could not get the wheat to market.

On the foregoing evidence, I would find that the plaintiff did not agree to thresh for the defendant on September 26, or before he threshed for Steinke, and that the defendant relieved him from any further claim on his services by leaving his work and informing the plaintiff that he would have to look out for another machine. In any event, any loss occasioned by weather conditions was entirely due to the defendants' delay in marketing their wheat.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

Re OTTO BROWN.

Saskatchewan Court of King's Bench, Brown, C.J.K.B. September 22, 1922.

MONEY IN COURT (§I—1)—*Payment in by Registrar of Land Titles—Application for payment out—Notice served on deputy*

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agent of Dominion Lands—Sufficiency of notice.]—Application for payment out of moneys paid into Court by the Registrar of Land Titles.

J. Lorne McDougall, for applicants.

P. H. Gordon, for the municipality and the tax sale purchaser.

BROWN, C.J.:—Upon an examination of the documents filed herein, I am not at all satisfied with the service that has been made on the Department of the Interior or with the information that has been brought to their attention in the service that has been made. I find that the Controller of Revenue for the Department of the Interior wrote the applicants the Emerson Brantingham Co. on November 21, 1921, pointing out to them that this money was in the Registrar's office at Swift Current, suggesting to them that they make application for payment out, and asking them to advise him of the action taken. The applicants then apparently made claim to the monies in the Registrar's hands, by notice dated February 16, 1922, and in this notice the applicants ask that the money be distributed in such a way as to allow the full claim of the Minister of the Interior in the first instance, the applicants seeking only to recover the balance after that claim is satisfied. This notice, instead of being served on the Controller of Revenue, as he requested in the letter to which I have referred, was served by registered letter addressed to the Minister of the Interior at Ottawa. I will assume that the notice reached the Minister of the Interior and perhaps the Controller of Revenue as well, and, in view of the admission made in this notice, the Minister would naturally assume that his claim was not disputed and it would, therefore, not be necessary to pay any attention to the notice.

Then we have the application to a Judge in Chambers, dated June 22, in which the applicants ask for an order for payment out to them of the monies in Court, same having been paid into Court by the Registrar of Land Titles. This notice was, according to the affidavit filed, served on the Deputy Agent of Dominion Lands at Swift Current. Whether or not this notice ever reached the Department of the Interior is more or less uncertain; and even though it did, it seems to me that in view of the admission that had been previously made admitting the claim of the Department, the notice does not sufficiently set forth that the applicants intend to press their claim in priority to the claim of the Department of the Interior; and it may be that this is the explanation why the Department was not represented on the application before me. I am of opinion that I should not allow this matter to be finally dealt with under such cir-

cumstances.

I, therefore, direct that notice of this application must be served on the Controller of Revenue at Ottawa for the Department of the Interior in accordance with his request of November 21 last, and that the notice should very clearly and explicitly set forth that the applicants claim priority over the liens of the Department. This notice must be served at least 1 month before the return date thereof, and the application herein will stand enlarged *sine die*, to be brought up upon 2 days' notice to the solicitors for the municipality and tax sale purchaser.

Judgment accordingly.

ALLIANCE SECURITIES CORP. v. POSNIKOFF et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, McKay and Martin, JJ.A. November 7, 1922.

COURTS (§IIA—150)—*Jurisdiction of local Master to make order appointing a receiver.*]—Appeal by defendant from an order of a local Master appointing a receiver. Affirmed.

J. G. Banks, for appellants.

J. M. Stevenson, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The only question to be decided on this appeal is whether or not a local Master has jurisdiction to make an order appointing a receiver. There is ample material in the appeal book to support an application for that purpose and to make it evident that it is "just and convenient" that such an order should be made. *Hyde* v. *Warden* (1876), 1 Ex. D. 309; Daniell's Chancery Practice, 8th ed. p. 1465.

The jurisdiction to appoint a receiver on a proper case being made out belongs to the Court of King's Bench, in the first instance, by virtue of the provisions of sec. 11 of the King's Bench Act R.S.S. 1920, ch. 39, by which the Court is granted the jurisdiction which in England prior to the Supreme Court of Judicature Act, 1873 (Imp.) ch. 66, was vested in and capable of being exercised by the High Court of Chancery as a Court of Equity. Sub-section 8 of sec. 26 of the same Act expressly confers power on the Court to appoint a receiver by an interlocutory order of the Court in all cases in which it shall appear just or convenient that such order should be made. This statutory rule is to be found in almost identical language in the Judicature Ordinances and Acts from 1885 to the present time. Prior to January 1, 1912, and as far back as 1897 the statutory Rules of Court provided that applications for in-

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terlocutory orders for mandamus injunction, or receiver, or the interim preservation of property, might be made *ex parte* in the first instance, or by notice of motion or on summons in chambers. Ordinance No. 6 of 1897, sec. 2; C.O.N.W.T. 1898, ch. 21, sec. 398. In 1911 the statutory Rules of Court contained in ch. 21 of C.O. 1898 were repealed under the authority of the Judicature Act of 1907, and new Rules were promulgated which came into force on January 1, 1912. The new R. (520) was in identical terms with the present Rule 482, which is as follows:—

"482. Applications for interlocutory orders for mandamus, injunction, or receiver, or the interim preservation of property, may be made *ex parte* in the first instance, or by notice of motion:

Provided that, on an *ex parte* application, the Court or judge may require notice to be given to any party or parties interested."

The latter part of the rule, giving power to the Court or Judge to require notice to be given, indicates that the application may be made to the Court or a Judge and "Judge" in that case means a Judge sitting in chambers. *Re Bathe*, [1892] 1 Ch. 459, at p. 463, per Kay, L.J.

In England, an application for an order under the same statutory provision as sub-sec. 8 of sec. 25 of the King's Bench Act may be made to the Court or a Judge under R.S.C., Order 50, R. 6.

From the foregoing, it will be seen that the practice applicable to the proceedings in question is prescribed by Rule 482 and not by any of the other rules in Order 34 relating to the interim preservation of property, or the appointment of a receiver. That appointment, as I have already shewn, can be made under R. 482 by a Judge in chambers and can, therefore, also be made by a local Master by virtue of the provisions of King's Bench Rules, Order 40, R. 589.

The appeal should be dismissed with costs.

Appeal dismissed.

PETERSON v. CANWOOD CO-OPERATIVE ASS'N AND H. A. COOK.

Saskatchewan King's Bench, Bigelow, J. October 31, 1922.

COURTS (§IIA—150)—*Appointment of receiver—Power to sell but not to buy—Jurisdiction of local Master to make order—Sask. Rules 620 and 483—Construction.*]—Application to con-

tinue an order made by a District Court Judge as local Master. Application dismissed.

L. McK. Robinson, for plaintiff.

C. M. Johnston, for defendant Cook.

No one for the other defendant.

BIGELOW, J.:—This is an application to continue an order made by Doak, D.C.J. as local Master on October 14, 1922. That order is more than an injunction; it appoints a receiver and gives him very wide powers, including power to sell the goods but not to buy more goods, with the very probable result that by the time this action is tried the goodwill of this general store business would be damaged beyond repair.

I am of the opinion that the local Master had no power to make such an order. *Latourneau* v. *Christie Rieger Realty Co.* (1914), 20 D.L.R. 965. Newlands, J., there states:—

"By Rule 620 the Master in Chambers may transact all business that may be transacted by a Judge in Chambers. The only power conferred on a Judge in Chambers as to the appointment of a receiver is by Rule 537, under which he may appoint a receiver by way of equitable execution, which is not this case, the receiver here being appointed to conserve property pending the disposition of the same in the action. By Rule 8 of the Rules of Law, sec. 30 of the Supreme Court Act, a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made. The application therefore must be made to the Court and not to a Judge in Chambers in all cases for the appointment of a receiver, excepting for one by way of equitable execution."

It was suggested that *Powell* v. *North Saskatchewan Lands Co.* (1914), 20 D.L.R. 967, 7 S.L.R. 417, a decision of the Court *en banc*, overruled the case last cited, but I cannot see any grounds for such a construction of the *Powell* v. *North Saskatchewan Lands Co.* case. In that the appointment of a receiver was claimed by the statement of claim, and it was held that a Judge in Chambers had power to make the appointment under Rule 130 dealing with default judgments. That is not this case at all. This case is applying for the appointment of an interim receiver pending the trial.

It may be contended that a Judge in Chambers, and, therefore, a local Master, would have power under Rule 483 to appoint a receiver. That rule provides:—

"When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court

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or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured."

But, under this rule, the Judge or the local Master would have such powers only where by any contract a *primâ facie* case of liability is established. This would apply to a frequent class of cases we have where by contract a vendor or mortgagee is entitled to a share of crop and an order for a receiver is made to preserve the property until the rights of the parties are determined. This case is not on a contract, but is an action by a shareholder to set aside a sale made by directors. It is my opinion then that the local Master had no power to make such an order.

If this were a motion made before me in Court under the King's Bench Act, R.S.S. 1920, ch. 39, sec. 26 (8), I would not grant the order on the material, as it is not shewn that irreparable injury is likely to be suffered unless the order is granted. See Kerr on Injunctions, 5th ed., p. 19. The sale is for $10,450, of which $3,000 was for real estate. Defendant Cook's affidavit shews he has surplus assets to the extent of $13,651, not including the goods the subject-matter of the sale. The evidence is far from shewing that the injury is one which cannot be adequately remedied by damages.

The application is dismissed with costs.

Application dismissed.

Re STONEBERG.

Saskatchewan Court of Bankruptcy, Charlton, Registrar. January 28, 1922.

BANKRUPTCY (§IV—36)—*Right of solicitors to charge for services before the first meeting of creditors.*]—Application for taxation of a bill of costs and to have same paid out of the estate of a bankrupt. Dismissed.

[See Annotations 56 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

A. Peterson, for solicitors; no one contra.

CHARLTON, REGISTRAR in BANKRUPTCY:—The debtor made an authorised assignment on November 12, 1921. The solicitors who purport to have acted for the trustee now bring in a bill of costs for taxation totalling $121.30 which, subject to taxation, it is sought to have paid out of the estate. Notice of the taxation appears to have been given to the trustee and on the bill is the endorsement, "consented to this 9th of January,

1922," which is signed by the trustee. What effect this is intended to have is not clear but it would indicate that the trustee agrees to the amount and does not intend to attend on the taxation. The first meeting of creditors was held on December 16, 1921, and all the items charged for, excepting these relating to taxation, are for services performed between November 12 and that date. They consist chiefly of attendances on debtor and trustee receiving statement of affairs ($20), preparing same, preparing notices of first meeting, making copies of documents, conducting correspondence with printers, and various attendances and letters, these services embodying the simple duties prescribed by the Act 1919 (Can.) ch. 36, sec. 20, to be carried out by a trustee in every assignment preparatory to the first meeting of creditors. There are charges for preparing the assignment with regard to which it appears to me a solicitor cannot in any event be paid for out of an estate but must look to the debtor or other person who employs him (see Rule 61). There is no similar provision in the Act such as exists in the English Bankruptcy Act 1883 (Imp.) ch. 52, for cases of voluntary bankruptcy which provided that the petitioning debtor's solicitor's costs up to the time of the receiving order being made may be paid out of the estate. There is also a charge of $15 for drawing a bond guaranteeing payment of the trustee's charges and solicitor's costs in the event of the assets proving insufficient for the purpose. The amount of this item surely cannot be charged against the estate. I am of the opinion that the whole of the costs should be disallowed and, therefore, not paid out of the estate on the ground that no written authority has been produced giving the trustee permission to engage the solicitors. Inspectors cannot be appointed before the first meeting of creditors and it is apparently the intention of the Act to preclude the trustee from doing any of the things mentioned in sec. 20, 1919 (Can.), ch. 36, until such meeting is held. This section is similar to the English Courts sec. 56, 1883 (Imp.) ch. 52 and in order that it may be seen how the English Courts regard the absence of authority I would draw attention to the cases referred to in Williams on Bankruptcy 12th ed. at p. 336, and particularly to the cases of *Re Yeatman*, [1916] 1 K.B. 780, reversing [1916] 1 K.B. 461; *Re Branson; Ex parte The Trustee*, [1914] 2 K.B. 701; *Re Geiger*, [1915] 1 K.B. 439, and *Re Vavasour*, [1900] 2 Q.B. 309.

Application dismissed.

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Re McCABE ESTATES.

BENTLEY v. CANADIAN BANK OF COMMERCE.

Saskatchewan King's Bench, Taylor, J. October 28, 1922.

DESCENT AND DISTRIBUTION (§IA—1)—*Right to inherit—Death of father and son in cyclone—Presumption of survivorship or contemporaneous death—Matter incapable of determination.*]—Issue to determine the time of death of a son and his father, both having been killed in a cyclone and as to the distribution of the estates.

E. B. Jonah, for plaintiff.

R. J. Brandon, for defendant.

TAYLOR, J.:—Charles McCabe and James McCabe are father and son respectively. Both died on August 14, 1913, meeting death in a cyclone or tornado which raged in the evening of that day. Both left estates: the son's estate it is admitted is insolvent; in the father's estate there is a surplus for distribution of about $3,000. He left a will made on March 1, 1913, in which, after the usual direction for payment of debts and funeral expenses, he gave, devised and bequeathed all his estate, described as an homestead and pre-emption, with all effects, furniture and belongings thereto, to his son James McCabe. All the residue not disposed of he devised and bequeathed also to James McCabe, and appointed one Rozell S. Stevens and James McCabe executors. Administration to both estates was taken out by the Western Trust Co. as official administrators, for the judicial district in which the property was situate. The question has arisen as to whether the son, James McCabe, survived to take the interest given to him under this will, and an issue was directed to determine whether he died, either at the same instant or before the time that the said Charles McCabe died.

I may say in the first place that the real matter in controversy is, as I have stated it, whether the estate of James McCabe is entitled to any share or interest under the will of Charles McCabe, and if so, what share or interest; and the neat point as to which the issue was directed will dispose only of one portion of the controversy, and in my opinion the issue should be amended to include and finally dispose of the whole question in order that as expeditiously as possible the funds in hand be distributed amongst the persons entitled thereto. There has already been too much delay.

So far as determining which of the two, Charles McCabe or James McCabe, survived the other, so far as I am concerned the

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matter will have to be treated as one incapable of determination. The law on the matter appears to be correctly stated in Taylor on Evidence, 11th ed., vol. 1, sec. 203, at p. 194: "In cases of this nature the law of England recognises no presumption, either of survivorship or contemporaneous death; but, in the total absence of all evidence respecting the particular circumstances of the calamity, the matter will be treated as one incapable of being determined . . . If any circumstances connected with the death of either party can be proved, the whole question of survivorship may be dealt with as one of fact, and the comparative strength, or skill, or energy, of the two sufferers may then very fairly be taken into account."

The father and son lived together in a small place (the witnesses called it a shack) on the prairie, and were, it may reasonably be inferred, both in the little house when the wind struck it. The father was in bed and had only a shirt on; the son was up and fully dressed, the hour being about 6 o'clock in the evening. The father had reached the ripe age of 84, was very frail and failing fast; complained at times of shortness of breath, due to, as he stated, heart trouble, had been under medical attention all that summer, and was failing quickly. I have not, however, any medical testimony as to his exact condition; apparently his then medical advisor has left the country and his whereabouts cannot be discovered. The son was in the forties, well and strong. Some years before he had lost both his feet, and wore artificial limbs, but the witnesses who were called and who knew him stated that he was strong and healthy and quite able to get around. The father was unable to work, and the son cared for him and looked after the work on the farm. No one else lived with them.

That they had perished during the storm was not discovered until the morning following. Early in the morning nearby neighbors noticed that there was no smoke from the chimney and that the little house was gone, and going over they discovered conditions which would indicate that the wind had torn the little house to pieces and had scattered it across the prairie for a distance of a quarter of a mile; even the stove was carried for some little distance. The walls were torn from the roof and the floor, and had all scattered, with the furniture and bedding, across the prairie. The father's body was found at a point about twenty yards distant from the site of the house, and he was, when discovered, dead. There was no covering on him except the shirt which he would have been wearing in bed. There were few bruises on him, but whether he died at the mom-

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ent of the first shock of the wind when the little house was picked up and carried in the wind, or at the moment he would be thrown upon the ground, or from the exposure in the cold wind, rain and hail which followed the storm, is to my mind a matter of conjecture only. On it I can arrive at no fixed conclusion.

The son's body was found some seventy or eighty yards further from the little house than the body of the father. It was partly resting under the overturned floor of the house; the legs and body up to the chest were pinned under the floor and held in position by it, but I should infer that his death had not been brought about by being thus carried and pinned under the floor, or as a result of exposure therefrom, but rather as a result of a blow which he received on the head. For something had struck him so violently on the head that his skull was, as one witness described it, caved in, and you could see his brains. The neighbors who saw his body at the time were of the opinion that this injury to the head had caused death instantaneously. It was suggested that perhaps in the turning over on the floor he had been struck on the head. Again it seems to me a matter of conjecture only as to when he received this injury. It may have been from some object such as the stove, in the first moment of the impact of the wind and whirl of the house, or it may not have been until after he was pinned under the floor. Again I can arrive at no fixed conclusion.

It would seem highly improbable, as it appears to be noted in the discussion in Taylor's Medical Jurisprudence, 6th ed. vol. 1, pp. 356 *et seq* and in *Wing* v. *Angrave* (1860), 8 H.L.Cas. 183, 11 E.R. 397, that life departed from the body of both at the same instant of time. Splitting time into its finest fractions that would seem inconceivable in any case, and the facts in this particular case would not point to that. But after all the same calamity brought about the death of both father and son; a calamity of such force and suddenness in its visitation that against it the strength of the strongest human body would offer no more protection than that of the weakest. Human affairs cannot be conducted on an exact and nice science, and in determining such a question of fact in ordinary affairs men will be quite content to conclude that two events happening in such close proximity as the death of this father and son, took place simultaneously.

I find, therefore, that it cannot be determined whether or not James McCabe survived his father, Charles McCabe, or predeceased him.

Now on that conclusion I am not on the argument which has

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been presented to me as prepared to dispose of the controversy and declare what is the result. The next of kin of the estate of Charles McCabe were made plaintiffs in the issue, and the creditors of James McCabe, defendants. If it is necessary that James McCabe survived his father before he could take an interest under his father's will, I gather the impression, under the authorities which I read in connection with the question of survivorship, that the onus would be on those representing the estate to establish that fact. In *Re Green's Settlement* (1865), L.R. 1 Eq. 288. However, the matter was not argued before me, and before reaching a conclusion thereon I would like to hear counsel further.

There is also another question upon which counsel addressed no argument at all, and that is the question as to the proper interpretation of the will. I have pointed out that the son is not only a specific devisee and legatee under the will, but also takes the residue and is appointed executor. Under sec. 25 of the Wills Act, R.S.S. 1920, ch. 74, a devise of real property or an interest therein which fails by reason of the death of the devisee in the lifetime of the testator, shall be included in the residuary devise, if any, contained in such will. Is that, what I may term statutory amendment of the will, contingent upon the statutory devisee surviving the testator? Is the statute which reversed the right of an executor, quo his office, to retain certain assets, applicable where an executor, or one of two executors, is a residuary devisee or legatee; and, in the special circumstances of this case, what is the result in that respect? See Theobald on Wills, 6th ed., pp. 339 *et seq.* Perhaps there are other arguments that may be advanced as to the disposition of the estate of the father on the finding on the issue as it now stands. I think the issue should be amended to set up issues to completely and finally dispose of the matters in controversy; and that the matter should be set down for argument as to what disposition should now be made of the estate, and whether the personal representative of the estate of James McCabe is entitled to any share or interest in the property of Charles McCabe, deceased; and for the convenience will hear argument thereon in Chambers at Regina on Monday October 23, 1922, at 2 p.m.

Counsel have now agreed upon the amendments to be made to the issue, as follows:—

1. The plaintiff avers and the defendant denies that James McCabe, late of Ogema in the Province of Saskatchewan, deceased, died either at the same instant or after the time that the said Charles McCabe died.

2. In the event of the Court being unable to determine

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whether or not the said James McCabe, deceased, survived or pre-deceased his father, the said Charles McCabe, deceased, the plaintiff avers and the defendant denies that the next of kin of Charles McCabe, deceased, as represented by the plaintiff, are entitled to the estate of the said Charles McCabe, deceased.

This amendment is allowed and directed.

After hearing counsel and giving the matter further consideration I am of the opinion that on the findings I have made, that the plaintiff, the next-of-kin of the said Charles McCabe, deceased, are entitled to the estate of the said Charles McCabe, deceased, and the said estate of James McCabe, deceased, is not entitled to any share or interest in the estate of Charles McCabe, deceased.

It is conceded by counsel as settled by *Re Green's Settlement*, L.R. 1 Eq. 288, following *Underwood* v. *Wing* (1855), 4 DeG. M. & G. 632, 43 E.R. 655, afterwards affirmed in the House of Lords, 8 H.L. Cas. 183, 11 E.R. 397, *sub-tit Wing* v. *Angrave*, that the burden of proof is on the estate of James McCabe, deceased, upon those whose claim is contingent upon his survivorship, to shew that he survived to take the gift.

The question as to whether the rule as to gifts by will lapsing by reason of the death of the beneficiary in the lifetime of the testator extends to a residuary gift, and whether or not under the circumstances set out in this will it could be considered that the executor was taking a beneficial interest so as to take the residue, is disposed of in *Bennet* v. *Batchelor* (1789), 3 Bro. C.C. 28, and 29 E.R. 389, and in the cases referred to in the head-note of the report in 29 E.R. 389. In *Bennet* v. *Batchelor*, *supra*, it will be noted that a gift to a residuary beneficiary also made one of several executors was held to have lapsed by death of the beneficiary in the lifetime of the testator.

Section 25 of the Wills Act R.S.S. 1920, ch. 74, to which I referred has no application. It was passed for an entirely different purpose,—to prefer a residuary devisee to the heir-at-law where there was a lapse in a devise of real property or an estate therein.

As to costs: The official administrator, who had taken administration of both estates, was in a difficult position. He had to come to the Court and have these issues determined before he could safely proceed. The costs up to the direction for an issue were by order made payable out of the estate of Charles McCabe, deceased. In *Wing* v. *Angrave*, *supra*, in which the facts and contentions were very similar, it was held that no order should be made as to costs, and I think I should follow that principle here in reference to costs not already disposed of.

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The plaintiff's costs, therefore, will be paid out of the Charles McCabe estate, and the defendant's out of the James McCabe estate. As neither the next-of-kin nor the creditors of the estate of James McCabe actively prosecuted the litigation on their own behalf, and the solicitors practically appeared for the two estates, I think I should go further and direct that their costs should be taxed as between solicitor and client. It will be ordered accordingly.

Counsel concurring let the above costs be taxed by the Registrar of the Court at Regina with counsel fees on trial (in addition to necessary travelling expenses) to counsel for each party $125.00.

MORTIMER v. SHAW.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Martin, JJ.A. November 7, 1922.

DAMAGES (§IIIA—62)—*Measure of compensation—Reference to Local registrar to ascertain.*]—Appeal by defendants from the finding of the Local Registrar as to the mesne profits of certain farming operations. The judgment directing the reference is reported in (1922), 66 D.L.R. 311.

A. Casey, K.C., and *L. L. Dawson*, for appellants.

S. R. Curtin, for respondents.

The judgment of the Court was delivered by

MCKAY, J.A.:—By the majority judgment of the Court of Appeal (1922), 66 D.L.R. 311, a reference to the Local Registrar was directed to ascertain the mesne profits of the farming operations for the season of 1921, of the farm which was the subject matter of the action herein. The said reference having been held, the deputy local Registrar reports, in part, as follows:—

"(2) I find that the income derived from the land in question by Mr. Dredge was as follows:—

1 car of wheat shipped by Mr. Dredge personally, gross amount from sale of wheat	$1,133.37
Less freight and elevator charges	270.06
Net proceeds from car	863.31
The balance of the crop was seized by the sheriff and he paid into Court	826.85
Dredge pastured 10 horses for 7 months at $1.25 and he received therefrom	87.50
Total receipts	$1,777.66

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Dredge used 460 gallons of gasoline at 47c.	$ 216.20
414 gallons of coal oil at 44c.	182.16
And 46 gallons of machine oil at $1.50	69.00
Total for gas and oils	$ 467.36

Mr. Dredge had to expend for repairs to the machinery the following:—

1 shaft for case separator	$ 8.66
1 chafer	35.02
Repairs to Fordson tractor	79.83
Total for repairs	$123.51
Dredge bought 500 pounds of binder twine at 20c. pound	$ 100.00
Mr. Dredge broke 35 acres of prairie and summer fallowed 160 acres. Total 195 at $6 per acre	1,170.00
Dredge had no help outside of his own family except Shaw, his older three sons came home and helped him to harvest and thresh which took a total of 24 days. He claims that $7 was the going daily wage, but he admits that he has not paid anyone. Therefore, I am not allowing anything for help. Evidence as to living expenses was put in but I have not taken it into account. I find, therefore, that the mesne profits are	1,777.66

Less $467.36 paid for oil, $123.51 for repairs, $100.00 for twine, $1,170.00 for breaking. Total deductions $1,860.87 which shews that Dredge operated the farm at a loss for the year of $83.21."

On motion the respondents' counsel asks to have the said certificate varied by striking out the item of $1,170 allowed for breaking and summerfallowing, and the appellants' counsel asks that the following items be added:—

"3 extra men hired by Dredge for harvest and threshing 24 days at $7 per day	$504.00
1,500 lbs. flour at $5.00 per 100 lbs.	75.00
600 lbs. sugar at 10c. per lb.	60.00
25 lbs. tea at 60c. per lb.	15.00
400 lbs. beef at 11c. per lb.	44.00
	$698.00."

As to the income from the land, the deputy local Registrar found that $1,777.66 had been received. It was admitted on the hearing of the motion that to this should be added $150, allow-

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ed by the sheriff for exemptions at the time of the seizure of the grain, and $71.95, costs of seizure by sheriff, making the total received $1,999.61.

With regard to the above item for wages $504, I am of the opinion that this should be allowed, as these extra men were required for the harvesting and threshing. I am also of the opinion that the items for flour, sugar, tea and beef should be allowed, as all these articles were used on the farm in connection with the farming operations.

With regard to the item of $1,170 allowed by the Deputy Local Registrar and objected to by respondents' counsel, the evidence shews that the defendant Dredge broke 35 acres and summerfallowed 160 acres ,and that $6 was a reasonable price for doing said work.

It was contended that defendant Dredge was not in possession in good faith and should not be allowed for any improvements. The trial Judge Bigelow, J., (1921), 62 D.L.R. 672, found that Dredge had full knowledge and notice of the dispute between the plaintiffs and Shaw, but, notwithstanding this, I am of the opinion that something should be allowed for the summerfallow, as this is more than ordinary improvements.

In *Hawn* v. *Cashion* (1873), 20 Gr. 518, an action between vendor and purchaser for specific performance, the Court expressed an opinion that the only repairs made after suit commenced that could be allowed were such as it was plaintiff's duty to make in order to save the premises from deterioration.

While defendant Dredge was in possession, it was his duty to properly cultivate and farm the land in question. And, to do this, it was necessary for him to summerfallow according to the practice of good farming in the district where this land is situated, otherwise the farm would deteriorate. Summerfallowing was necessary for the profitable enjoyment of the land, and the appellants would receive the benefit from it in the following year. There should, therefore, be a proper allowance for the summerfallowing, but not for the breaking.

Dredge in his evidence stated that $6 per acre was a proper charge for the summerfallowing, and there is no evidence to the contrary.

The evidence shews that oil and gasoline were used in doing this work. These have already been allowed. The implements used were those belonging to the farm, consequently, all that should be allowed to Dredge is a reasonable wage for the man or men who did the work. The amount of such wage should be calculated by ascertaining the number of days it would reason-

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ably take to summerfallow 160 acres in the way the defendant Dredge says it was done; namely, by ploughing it with engine and ploughs used by Dredge, harrowing it twice, and going over it with the big cultivator once.

In the absence of any evidence as to how long it took or should have taken to do this summerfallowing, and of what was a reasonable wage for doing said work at the time it was done, I cannot make any definite finding as to the allowance to be made to Dredge.

The variation, then, of the Deputy Local Registrar's certificate, in so far as it can now be definitely varied, is as follows:—

He found the total deductions to be $1,860.87; from this de-95; total receipts $1,999.61.

He fonud the total deductions to be $1,860.87; from this deduct allowance for breaking and summerfallow $1,170; leaving $690.87.

To this add 3 men's wages, flour, sugar, tea and beef $698; total deductions $1,388.87; leaving $610.74 due to respondents.

From this amount there will be deducted a reasonable wage for the work in summerfallowing the 160 acres to be ascertained as above set forth. If the parties cannot agree upon the amount to be allowed for said wages, either party will be entitled to a reference to the Local Registrar to ascertain the amount to be allowed.

The respondents will be entitled to judgment for the balance of $610.74, after deducting the amount allowed for wages for the summerfallow, together with costs of the reference and of this motion.

Judgment accordingly.

VINEY v. B.C. ELECTRIC.

British Columbia Supreme Court, McDonald, J. October 30, 1922.

JUDGMENT (§IIB—72)—*By default—Slip of solicitor—Motion to set aside—Imposition of terms*]—Motion by defendant's solicitor to set aside a default judgment. Judgment set aside.

Ross, for plaintiff; *Gilmour*, for defendant.

MCDONALD, J.:—This is an action for damages in which the plaintiff, owing to a slip of the defendant's solicitor, entered judgment by default. The plaintiff's solicitor immediately upon signing judgment wrote a letter to the defendant's solicitor stating that he was prepared that the judgment be set aside upon the terms that the defendant should not be allowed to set up its

special Statute of Limitations. The defendant now moves to set aside the judgment. Plaintiff's solicitor does not ask for costs but asked that the term above mentioned be imposed. In my opinion, there is no power to make any such order. It seems clear on the authorities that where there is a meritorious defence and judgment has been obtained by a slip the only terms to be imposed on setting the judgment aside are that the defendants shall pay the costs of the entering of the judgment and the application to set it aside. See *MacGill* v. *Duplisse* (1913), 15 D.L.R. 608, 18 B.C.R. 600; *Pooley* v. *O'Connor* (1912), 28 Times L.R. 460, and *Kronau* v. *Rutenetier* (1916), 28 D.L.R. 212, 9 S.L.R. 168.

The judgment is accordingly set aside without costs to either party inasmuch as the plaintiff's solicitor does not ask for costs.

Judgment accordingly.

BURCH v. TOWDER.

Yale County Court, B.C., Swanson, Co. Ct. J. November 11, 1922.

ADVERSE POSSESSION (§IK—59)— *Residence on land by Indian woman—Possessor of title by prescription—Burden of proving—Rights as against holder of paper title*]—Action to recover possession of certain land of which plaintiff holds a certificate of indefeasible title. Judgment for plaintiff.

R. R. Earle, K.C., for plaintiff.

C. H. Dunbar, for defendant.

SWANSON, Co. Ct. J.:—The plaintiff's action is to recover possession of a certain portion (about $\frac{3}{4}$ ac.) of lot 13, group 1, Lytton Division of Yale District, B.C. for which lot he holds a certificate of indefeasible fee, dated August 2, 1922.

The defendant, an Indian woman, who resides on the land in dispute at Nicomen, near Thompson Siding in this County, asserts a possessary title, by prescription, alleging that she has been in adverse, open, visible, notorious, continuous, uninterrupted possession for over 30 years.

I have read very carefully all the cases referred to by counsel, and a number of others. The law as to the character of the possession required to assert successfully such a possessary title against the paper title is set forth in the two decisions frequently quoted of the Supreme Court of Canada. *Sherren* v. *Pearson* (1887), 14 Can. S.C.R. 581. See particularly judgment of Ritchie, C.J., p. 585—also judgment of Gwynne, J., at p. 606 where he quotes from the judgment of Draper, C.J., in *Dundas*

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v. *Johnston* (1865), 24 U.C.Q.B. 547, at p. 550 and also from the judgment of Wilson, J., in *Davis* v. *Henderson* (1869), 29 U.C.Q.B. 344 at p. 353 also *McConaghy* v. *Denmark* (1880), 4 Can. S.C.R. 609, *per* Gwynne, J., at pp. 632-633, also *McIntyre* v. *Thompson* (1901), 1 O.L.R. 163, *per* Osler, J.A., at pp. 166, 167. Also *Harris* v. *Keith* (1911), 3 Alta. L.R. 222, *per* Stuart J., at pp. 226, 227. Stuart, J., quotes the Privy Council decision in *Belize Estate* v. *Quilter*, [1897] A.C. 367, Lord Watson's decision on Land Registry Act of Honduras. The Court of Appeal of Manitoba in *Smith* v. *National Trust Co.* (1911), 20 Man. L.R. 522, shows that the Privy Council decision has no application to the Manitoba Statute, Real Property Act R.S.M. 1902, ch. 148, sec. 75. The same reasoning applies to the interpretation of our Land Registry Act, 1921 (B.C.), ch. 26, sec. 37. (3).

Mr. Earle has not however invoked sec. 37 (3.) against the defendant as she attempts to justify her possessary title under sec. 37 (2.) thereof, as well as under sec. 16 and sec. 41 of Statute of Limitations R.S.B.C. 1911 ch. 145.

See also Lamont, J., in *Bradshaw* v. *Patterson* (1911), 4 S.L.R. 208.

The burden of proving her possessary title by prescription lies upon defendant.

Defendant is 56 years old. She was born in her father's house on the other side of Nicomen Creek, near the land in dispute. She has lived in that vicinity ever since. She lived with a white man named Jerry Collins (not being married to him) for a number of years (11 years). She says that she went to live with Jerry Collins on the land in dispute in 1893 and resided there with him until his death some 17 years ago, and that since his death she has continued to reside there without a break up to the present moment. Jerry Collins died 17 years ago last September. The land in question is about $\frac{3}{4}$ of an acre worth about $55. There is a house on the place in which this woman lived with Jerry Collins and their children until his death, and in which she has since lived. Jerry Collins built the home; she says Jerry built a "wall along the creek." The land runs down from a knoll to the creek, she states that Jerry built a fence about a portion of the land, which, subsequently, fell down, and that she put up another fence about a year ago. She says that Jerry planted trees, pears, cherries, plums, some apples, some small fruits, currents, raspberries, and that she planted the small stuff. Some of the witnesses, her fellow tribesmen, testify the defendant having assisted Jerry in plant-

ing these trees. The abstract of the title was put in evidence. It shews that in October 7, 1897, John Boyce Barrick got a conveyance in fee from Joseph Smith Place of this land. Mr. Barrick, the owner of this land, at that time lived across the creek. He had a store there which was subsequently burned down. Defendant said that Mr. Barrick never bothered her, never asked her to get out. A letter to defendant from Archdeacon Pugh (Administrator of the Barrick estate) was put in evidence stating that Barrick had "just let you (defendant) stay in the house when he (Barrick) had the store out there." Defendant never paid any taxes for the property. Taxes were paid year by year by J. T. Barrick and from 1909 by the Barrick estate, through Archdeacon Pugh, down to 1920, the taxes for 1921 and 1922 being paid by R. D. Burch the present registered owner of the land. The registered owners never abandoned this property. Archdeacon Pugh who conveyed this property to R. D. Burch July 14, 1922, informed the defendant by letter that Burch purchased this property, and that defendant had no right to put up any fences on the land, intimating to her that as long as she "behaved," (presumably not interfering with Burch's enjoyment of the land outside of her house) "Burch is willing enough to let you stay in the house etc. etc."

Burch complains that she has been interfering with his calves and stock running on the place. Defendant testified that Barrick did not tell her to get off the place, that she employed Stuart Henderson, a barrister, at one time practising in the Upper Country. As she puts it "Mr. Henderson told Barrick not to bother me." This was about 1 year after Jerry died. Then she added "Barrick told me to get off and then I went to Stuart Henderson and Mr. Henderson got a paper from Mr. Fraser, administrator of estate of the deceased Jerry Collins paying $160 for the rights set out under ex. No. 10." No reference whatever is made here to any conveyance or assignment of any rights to possession of the lands in question or to any right title or claim therein from the estate of Jerry Collins to defendant. Apparently, it is well settled law that such inchoate possessory rights, even when not sufficiently matured to constitute a statutory possessory title can be devised, alienated or conveyed to another, who may be able to implement such rights by further length of possession so as to ultimately constitute a full and complete statutory title to land by prescriptive right. Such rights were never attempted to be passed on or conveyed to defendant. She, no doubt, believed she was buying for $160 these rights, but they were never passed on to her. With some reluctance, I am obliged to hold that the possession of the

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land (whatever its legal effect may, in fact, have been) was held by Jerry Collins during his lifetime, and not by defendant. Although not married to defendant, Jerry was none the less the undoubted head of the house, the head of affairs "Where McGregor sits is the head of the table" is an old saw which even this age of feminism has not quite abrogated.

No doubt, the defendant did her share of the work. That is to be expected—Married or unmarried man's mate has her obligations to fulfil. One naturally feels sympathy for the unfortunate defendant. On the other hand, no Court is justified in taking away the title which a registered owner has to his land, unless clearest proof is shewn that his title has been "extinguished" (as sec. 41 of the Statute of Limitation puts it) by the statutory title alleged in the defence. I am obliged, therefore, to find that during the lifetime of Jerry, the possession (such as it was) rested in him and not in his woman, the defendant Annie Towder. Since Jerry's death it has been impossible for defendant to acquire a sufficient possession by effluxion of time to extinguish the plaintiff's title. Particularly, however, I must point out that the defendant must satisfy me by proper affirmative proof that, amongst other things, the character of her possession has been an "*adverse*" one—one not recognising any dominion or authority over the property by Mr. Barrick in his lifetime, or by Mr. Pugh the administrator since Barrick's death, or of any one else. I am inclined to think that the reverse is the case, and that both Jerry and his woman, Annie Towder, after him, were only on the place by sufferance, or as tenants at will of Barrick and of the Barrick estate.

The claim for damages is sadly magnified. I will allow nothing whatever for any damages. The plaintiff will be entitled to judgment declaring that he is entitled to the land as against the defendant. As to possession of the land I think that defendant should not, after being permitted to remain there for so many years, be now at this season of year with winter approaching asked to give up the actual physical possession of the land (to which possession plaintiff must be considered now legally entitled). If defendant relinquishes possession to the plaintiff by May 1, 1923, I think it will be meeting the ends of justice. I will not meantime make any order in the nature of an injunction, but will reserve to plaintiff liberty to apply later on for same should the needs of the matter require such a remedy. The plaintiff is entitled to costs should he ask for same which I hope he will not.

Judgment accordingly.

KYNOCH v. BANK OF MONTREAL.

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British Columbia Supreme Court, Murphy, J. October 11, 1922.

NEGLIGENCE (§IC—35)—*Dangerous premises—Stairway—Nature of a trap—Finding of jury—Unreasonableness of verdict.*]—Action for damages for injuries received by falling down a stairway. Action dismissed.

F. A. Jackson, for plaintiff.

Charles Wilson, K.C., for defendant.

MURPHY, J.:—Plaintiff's counsel frankly admits that to succeed he must shew the staircase to have been something in the nature of a trap. That this is the law seems clear from such cases as *Huggett* v. *Miers*, [1908] 2 K.B. 278; *Lucy* v. *Bawden*, [1914] 2 K.B. 318, and *Dobson* v. *Horsley*, [1915] 1 K.B. 634.

In the light of these authorities and the argument thereon, I think my charge to the jury placed the duty of defendant higher than the law justifies. Two questions now arise—1st—Does the finding of the jury amount to a finding that there was any trap or hidden danger in the staircase to which the plaintiff or any one lawfully using the same would be exposed and the existence of which the plaintiff was not bound to anticipate, and so guard against. Second, could the jury, on the evidence, have reasonably found that there was any such trap or hidden danger in the staircase to which the plaintiff or anyone lawfully using same would be exposed and the existence of which plaintiff was not bound to anticipate and so guard against. My answer to both questions is in the negative and the plaintiff's action must accordingly be dismissed. The jury stated "The balustrade, in our opinion, is too low for the stairs in question." This points to a patent defect in construction not to a hidden danger. It does not imply that plaintiff was led to believe there was something there which was not there. The person using such a staircase (to quote and adopt, if I may, with deference, the language of Buckley, L.J., in *Dobson* v. *Horsley*, [1915] 1 K.B. at p. 639) is not trapped in any way for he knows perfectly well the height of the handrail and he accepts the risk of using the access in the form in which it was provided. True the jury has found the plaintiff did not know of the defect, but I am of opinion this finding was made in the light of my charge. The jury could not reasonably have found the plaintiff did not know or at any rate ought not to have known the height of the balustrade, if they approached the question from the point of view of a trap as that term is hereinbefore explained and I think I erred in not requesting them to so approach it.

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I also think the jury could not reasonably have found this staircase a trap. If this accident is analyzed, it will be found that it occurred primarily because plaintiff slipped on the floor at the head of the stairs and pitched forward before he had stepped upon a tread at all. If he had so slipped and even pitched forward, when on a tread, in all probability no such accident would have happened. Pitching from the floor he necessarily had the height of the riser to the floor as an additional space through which his hand must pass before reaching the handrail as compared with the space his hand must pass through had he pitched forward when standing on a tread.

In my opinion, no jury could reasonably say that this accident could have happened unless plaintiff had slipped and pitched forward in a particular way and at a particular spot. To impute to defendants, the knowledge of the likelihood of such a conjunction of circumstances to such a degree as to be able to say they thereby laid a trap for plaintiff is, to my mind, something a jury, acting as reasonable men, could not do.

The action is dismissed.

Action dismissed.

Re PROVINCIAL HOTELS Co.

British Columbia Supreme Court in Bankruptcy, Murphy, J. March 10, 1922.

BANKRUPTCY (§I—6)—*Meetings of creditors—Right of certain shareholders to attend and vote.*]—Application by a creditor for an order that the claims of certain two creditors each for $40,000 representing their respective shares in the capital stock of the company be disallowed and that they are not entitled to vote at any meeting of creditors. Application dismissed.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

E. M. Yarwood, for the applicant.

T. D. M. Latta, for the authorised assignee, referred to sec. 2 (*m*), sec. 39, sec. 42 (9) and 44 (2) and sec. 114 of the Bankruptcy Act, 1919 (Can.) ch. 36.

MURPHY, J. ordered and directed that the two shareholders may attend all meetings of creditors of the debtor and vote thereat as creditors, their vote to be recorded separately in the class of shareholders.

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