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ANNOTATED

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VOL. 35

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TORONTO:

CANADA LAW BOOK CO., LIMITED

84 BAY STREET

1917

CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 35 INCLUSIVE.

Re QUEBEC FISHERIES.

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Quebec King's Bench, Appeal Side, Archambeault, C.J., Carroll, Trenholme, Lavergne, and Cross, JJ. February 7, 1917.

CONSTITUTIONAL LAW (§ I G—140)—POWERS OF PROVINCE—FISHERIES—TIDAL WATERS—PROPRIETARY RIGHTS—THREE MILE LIMIT.

The Province of Quebec has the power to grant exclusive fishing rights in tidal waters within its territorial limits, and has the proprietary rights in such fisheries, to a distance of 3 marine miles beyond low water mark, by virtue of sec. 92 (5) (13) of the British North America Act 1867, as to "public lands belonging to the province" and "property and civil rights in the province." (Archambeault, C.J., declined to commit himself as to the power of the province beyond the high and low water mark; Cross, J., dissented on the ground that the Dominion is given power, by sec. 91 (12), over "sea coast and inland fisheries.")

[*Re British Columbia Fisheries*, 15 D.L.R. 308, [1914] A.C. 153, distinguished; *Re Fisheries Case*, [1898] A.C. 700, referred to.]

[See Annotation following.]

ARCHAMBEAULT, C.J.:—Art. 579 of R.S.Q. 1909, confers upon the Lieutenant-Governor in Council power to refer any question which he deems expedient, to the Court of Appeal. Art. 582 adds that the opinion of the Court is advisory only and is final and without appeal. Archambeault, C.J.

In 1916, the provision of art. 582 was amended by the Act 6 Geo. V. ch. 10, which enacted that an appeal could be taken from the decision of the Court to the Judicial Committee of the Privy Council on questions concerning the rights of Canada or of the Province of Quebec as to the fisheries and fishing in the tidal waters of the province.

On May 9, 1916, the Attorney-General of the Province of Quebec submitted to the Executive Council a report reading as follows:—

That the power to grant exclusive fishing rights in the tidal waters within the territorial limits of the Province of Quebec or bathing its shores belongs, under the B.N.A. Act, 1867, and other Acts in force, to the government of this province and to the duly authorized officers under its control, except as regards such waters where an exclusive privilege to fish already exists.

That the government of Canada contests such power and claims the administration and control of the fisheries in such waters.

That the government of Canada gave public notice of its intention to administer such fisheries from January 1, 1915, and that, to avoid a conflict on the matter, the government of this province has consented to submit the

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questions raised by the federal authorities to the Courts by means of a reference.

Therefore, the honourable Attorney-General recommends that the Lieutenant-Governor in Council do submit the questions annexed to this report to the Court of King's Bench (Appeal Side), in accordance with arts. 579 and following of R.S.Q., 1909, and amendments thereto, for hearing, examination and opinion.

That the report of the Attorney-General was adopted by the Executive Council on May 12, 1916, and the questions annexed are accordingly submitted to us for examination and opinion. Those questions are three in number and read as follows:—

1. Has the government of the province or any member of the Executive Council of the province power to grant the exclusive right of fishing, either by means of engines attached to the soil or in any other manner, in the tidal waters of rivers, gulfs, bays, straits or arms of the sea in the province or bathing its shores to a distance of 3 miles from the same: (*a*) between high and low water mark; (*b*) beyond low water mark, and in the affirmative to what extent?

2. Can the provincial legislature authorize the government of this province or any member of the Executive Council of this province, or any other person, to grant the exclusive rights of fishing set forth in the foregoing question?

3. If there existed in the past, or if there still exists, any restrictions to the grant of the exclusive right of fishing in the tidal waters aforesaid, and such restrictions have been or are abolished, are the *fisheries* in the said waters the property of the province after such abolition, and has the legislature or the government of this province, or any minister of the government, or any other person the powers *regarding the said fisheries* which are mentioned in the foregoing questions?

The Privy Council has already pronounced itself upon the questions submitted to us; but its decisions have given rise to different interpretations, and a fresh reference has consequently become necessary. In any case, our task has been made much easier by the opinions already given.

The B.N.A. Act enumerates the subjects within the jurisdiction of the federal parliament and those which are subjects of exclusive provincial legislation. The former are set forth in sec. 91 and the latter in sec. 92.

Among the classes of subjects within the legislative authority of the parliament of Canada, the sea-coast and inland fisheries are mentioned (sec. 91, par. 12). In the class of subjects within provincial jurisdiction are: property and civil rights in the province and the management and sale of public lands belonging to the province (sec. 92, pars. 13 and 5).

With reference to public property, the Act (sec. 117) says that the several provinces shall retain all their respective public pro-

perty not otherwise disposed of in the Act; and schedule 3 mentions, among the public property of the province to be the property of Canada, public harbours and rivers and like improvements.

These various provisions of the Act of 1867 have already been the object of a decision of the Privy Council rendered in 1898 on an appeal from a judgment of the Supreme Court of Canada on questions submitted to that Court by the Governor-General in council (*Att'y-Gen'l for Canada* v. *Att'y-Gen'l for Ontario, etc.*, [1898] A.C. 700).

In that case, the Privy Council decided: 1. That the Act of 1867 did not convey to the Dominion of Canada the proprietary rights in relation to fisheries; that such rights continued to belong to the provinces or private individuals to whom they then belonged; and that such privileges or concessions as could be granted by the provinces prior to 1867 could still continue to be granted by them since 1867.

What are the privileges or concessions that could be granted by the provinces prior to 1867?

This question is answered by an Act passed in 1865, 29 Vict. ch. 11.

It authorizes the Commissioner of Crown Lands to issue fishing leases and *exclusive* rights of fishing for 9 years *in any place in the province* wherever such fisheries may be situated, and the Governor in Council to grant the same rights for any term exceeding 9 years.

It also permits the Governor in Council to make regulations respecting fisheries; to prevent the obstruction and pollution of streams, to regulate and prevent fishing and prohibit fishing except under leases or licenses.

Sec. 17 of that Act enacts a penalty not exceeding $100 or imprisonment not exceeding 1 month *against any person* taking or catching fish in any water or along any beach, or within the limits of any fisheries described in the leases or licenses granted by the minister or by the Governor in Council.

2. The Privy Council further decided in that fisheries case that the terms and conditions under which fisheries belonging to provinces may be granted or leased, are within the exclusive competence of the provincial legislatures, either under par. 5 of sec. 92 of the Act of 1867: "The management and sale of public

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lands;" or under par. 13: "Property and Civil rights;" that such legislation directly relates to the manner of disposing of the same and to the rights attached thereto. As Lord Haldane says, in another case dealt with further on:—

> The *solum* of a river bed is a property differing in no essential characteristic from other lands. . . . The general principle is that fisheries are, in their nature, mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the *solum*. . . . The fishing rights go with the property in the *solum*. (*B.C. Fisheries Case*, 15 D.L.R. 308, at 313, [1914] A.C. 153 at 167.)

The rights of the federal parliament, under the terms of the judgment of 1898, are reduced to the power of making regulations in relation to fisheries. The ownership itself of the fisheries and the right to fix the conditions of the granting of the right of fishing, belongs to the provinces.

Of course, as Lord Herschell says, the power to make regulations implies, to a certain extent, that of affecting the right of ownership, but the fact that the federal parliament might abuse its power in that respect, even as regards practically confiscating proprietary rights, would not justify the Courts in restricting in any way the absolute power conferred upon the federal parliament in that respect. It must not be presumed that such an abuse of power would occur.

It results from such decision of powers that the provincial legislatures cannot exercise their proprietary right of the fisheries in a manner incompatible with the regulations made by the federal power.

The federal government claims that the decision of the Privy Council, just referred to, applies only to the non-tidal waters of the province. I see nothing in the judgment to justify such a distinction. The decision rests upon the right of ownership of the *solum* covered by such waters, and that right must extend to the *solum* covered by tidal waters as well as to that covered by non-tidal waters.

The federal government bases its claim on a judgment delivered by the Privy Council, in 1914, in another reference submitted by the federal government to the Supreme Court of Canada, in connection with the B.C. Fisheries (15 D.L.R. 308, [1914] A.C. 153).

To properly understand the bearing of that judgment, it is necessary to see whether the rights of British Columbia in that

respect are the same as those of the Province of Quebec and, consequently, whether the decision referred to can apply to the case of our province.

The Province of British Columbia was established by an Imperial statute, passed in 1858. In 1867, the civil and the criminal laws of England, as they existed in 1858, were declared to be the laws of the colony. In 1871, the province was admitted into the Confederation on certain conditions, among which was the engagement by the Dominion to build a railway from the Pacific coast to a certain point east of the Rocky Mountains, to connect the province with the network of railways in Canada. On its part, the government of British Columbia undertook, in consideration of a subsidy of $100,000 per annum, to transfer to the Dominion a certain area of its public lands along the line of the railway to be built; such grant of land, however, was not to be more than 20 miles in width on each side of the railway.

The various obligations were fulfilled by both parties.

The question then arose—and it was that question which was submitted to the Supreme Court of Canada—as to whether the legislature of British Columbia could authorize the Government of that province to grant the exclusive right of fishing in the waters of the area so transferred to the Dominion, either in the tidal waters, or in those which are not tidal but are navigable, and also in the waters of the high sea within 3 marine miles from the coast.

An appeal from this judgment of the Supreme Court was taken to the Privy Council.

The latter ruled that, inasmuch as the ownership of the railway belt or area of 20 miles on each side of the railway had been transferred to the Dominion, the ownership of the fisheries had been transferred at the same time to the Dominion under the principles laid down by the judgment of 1898.

But the Lords of the Privy Council declared that such absolute principles regarding non-tidal waters had to be subject, for non-tidal waters, to the public right of fishing in such waters. That public right exists under English law.

As British Columbia had introduced English civil law in the province it became subject to that privilege possessed by the public. The Privy Council accordingly expressed this opinion:—

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So far as the waters are tidal the right of fishing in them is a public right, subject only to regulation by the Dominion Parliament. So far as the waters are not tidal, they are matters of private property, and all these proprietary rights passed with the grant of the railway belt, and became thereby vested in the Crown in right of the Dominion. (15 D.L.R. at 318.)

I must add, in order to reproduce the complete opinion expressed by the Privy Council, that Lord Haldane said:—

Their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general, which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it. They do not desire to pass any opinion on the question whether the subjects of the province might, consistently with sec. 91, be taxed in respect of its exercise, for the reasons pointed out by Lord Herschell ([1898] A.C. at 713); but no such taxing could enable the province to confer any exclusive or preferential right on individuals, or classes of individuals, because such exclusion or preference must import regulation and control of the general right of the public to fish, and this is beyond the competence of the provincial legislature (p. 318).

That decision is based upon two grounds: 1. British Columbia had passed an Act declaring that English civil law would be the law of the Province, and, consequently, that the public had a right to fish in the tidal waters of the province; 2. It had transferred to the Dominion its proprietary rights in what is called the "Railway Belt" in which were waters containing the fisheries, in question; and as a result, the ownership of the fisheries, like that of the soil itself, had been transferred to the Dominion.

Is the case the same for the Province of Quebec? There are two grounds for a negative answer to this question. The first is that English civil law never was the law of this province. We have always been governed by French law except where it has been amended by our own legislation.

My colleague, Carroll, J., will treat of this matter and I will merely mention it.

The second ground for saying that the British Columbia reference does not apply to our province is that, even if the right of the public to fish in the tidal waters of the province had ever existed here, it was repealed by the parliament that had the power to do so. I refer to the Act, 29 Vict. ch. 11, which I have already mentioned. As we have seen that Act empowered the Commissioner of Crown Lands to grant exclusive fishing privileges for a period of 9 years and the Governor in Council to grant similar privileges for a longer period.

It will, surely, not be claimed that the Imperial parliament,

whose powers are unlimited, could not abolish, for the United Kingdom, the right of the public to fish in tidal waters.

Now the parliaments of Canada, both that of the Dominion and those of the Provinces, have, within the bounds of their jurisdiction, powers as extensive as those of the Imperial parliament.

As the fisheries are the property of the provinces, according to the judgment of 1898, the provincial legislatures have power to do away with the kind of servitude which the public might claim to have, through user, in the provincial waters. In the *British Columbia* case, Lord Haldane expressly states, after citing a decision of the House of Lords in a case of *Malcolmson* v. *O'Dea*, 10 H.L.C. 493:—

> Since that decision, it has been unquestioned law that, since Magna Charta, no new exclusive fishery could be created by royal grant in tidal waters, and no public right of fishing in such waters, then existing, can be taken away without *competent legislation*.

Prior to Confederation the Parliament of United Canada was the owner of the fisheries and also had the power to make regulations regarding fisheries. By the Act of 1867, the provinces retained all their proprietary rights in the fisheries, but the right to regulate the fisheries was given to the federal parliament.

I cannot believe that this applies to fisheries in non-tidal waters only. The Imperial parliament would not have taken away the provinces' right to regulate those fisheries to give it to the Parliament of Canada. It would have left the provinces in possession of their powers over such waters. But it was thought that it was expedient to entrust the federal parliament with the regulation of the fisheries precisely because the fishing in tidal waters was a matter of general rather than of local interest.

If the provinces have not power to legislate with reference to the pretended right of the public to fish in tidal waters, the federal parliament certainly has not power to do so, except for regulating such right. Therefore, no parliament could legislate on the matter except the parliament of Canada, within the bounds I have mentioned.

For these reasons, I am of opinion that we should give an affirmative answer to the questions put to us. I am not speaking of the right of fishing in harbours, because the questions do not mention harbours. On this point the decision of the Privy

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Council, given in 1898, is that harbours do not belong to the provinces but to the Dominion, and this is, doubtless, the reason why the Quebec government has not mentioned harbours in its questions.

I make a reservation, however, and that is with respect to the 3 mile limit from the shore, that is to say the sea territory or territorial sea. In the *British Columbia* case, the Privy Council refused to pronounce upon that point because it was considered that it was a question of international law upon which the national or municipal Courts should not express an opinion (p. 319). For that reason, I deem it my duty to refrain from answering that portion of the first question relating to the territorial sea, that is to say the waters of the sea bathing the shores of the Province to a distance of 3 marine miles from them.

I have now to say a word about an intervention by the Labrador company. That company claims to be the owner of the territory of Mingan, on the north shore of the Gulf of St. Lawrence, and the lessee for 15 years, under a lease from the Quebec government, of the fisheries in the navigable waters of that seigniory and in the Gulf of St. Lawrence opposite to it. It asks us to formally recognize the rights at issue in the answers the Courts will give to the questions submitted to it by the Quebec government.

We cannot comply with that request. The matter before us is not one of litigation, but of reference made by the government under a special statute. Consequently, we have merely to answer the questions submitted, without going beyond them. I understand that the Labrador company had a reason for intervening in the reference to watch its interests, but it cannot ask that its rights be formally recognized.

I append to these notes my answers to the questions submitted:

Answer to Q. 1. The government of the Province of Quebec has the power, after having been thereunto authorized by the legislature, to grant the exclusive right of fishing, either by means of engines attached to the soil or in any other manner, in the tidal waters of rivers, streams, gulfs, bays, straits or arms of the sea of the province between high and low water mark. As to the waters in the open sea washing the coast of the province to 3 marine miles from the same, that is to say: the waters extending from low-water mark to the outer line of the said 3 marine miles, the under-

signed is of opinion that he should not answer the question, owing to the declaration respecting that portion of the sea-waters by the Judicial Committee of the Privy Council, in the British Columbia reference, that such question is not within the competence of National Courts.

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Answer to Q. 2. The legislature of this province can authorize the government of the province, or a member of the Executive Council of the province, or any other person to grant the exclusive fishing rights described in the first question.

Answer to Q. 3. If there existed, in the past, any restrictions of the exclusive right of fishing in the tidal waters, and if such restrictions have been abolished, the fisheries in those waters are the property of the province after such abolition, and the legislature has the powers mentioned in the foregoing questions, as regards such fisheries.

This answer is given with the reservation already made respecting the waters extending from low-water mark to the outer line of the 3 marine miles.

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CARROLL, J.:—I concur in the answers given by the Chief Justice, except as regards the question of the 3 marine miles. *I am of opinion that the ownership of the fisheries between low-water mark and the outer line of the 3 marine miles belongs to the Province of Quebec. The province has, at the least, the right to the profits of the fisheries between low-water mark and the outer line of the 3 marine miles.*

By sec. 109 of the B.N.A. Act, it was enacted that "all lands, mines, minerals and royalties belong to the province in which the same are situate," and, by sec. 92 (5) and (13), that: "In each province the legislature may exclusively make laws in relation to the management and sale of the public lands belonging to the province, and to property and civil rights."

But by sec. 91 (12), the exclusive legislative authority was given to the Parliament of Canada in relation to sea-coast and inland fisheries.

Under these sections, must the questions be answered which have been submitted to this Court.

The questions have already been discussed at length under various aspects in the *Fisheries* case, [1898] A.C. 700, and two principles were clearly laid down which, in my opinion, are of great weight for the purposes of this consultation.

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1. By the B.N.A. Act, the full ownership of the fisheries was given to the provinces;

2. But to the federal parliament was given legislative authority to make regulations in relation to the fisheries, an authority which does not do away with the right of ownership, since there is nothing to oppose the fisheries being provincial property while being at the same time subject to federal regulations which does not take away from the provincial legislature any legislative power within its competence in matters relating to civil rights and property.

It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament, proprietary rights were transferred to it. The Dominion of Canada was called into existence by the B.N.A. Act, 1867. Whatever proprietary rights were, at the time of the passing of that Act, possessed by the provinces, remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada ([1898] A.C. p. 709).

The following paragraphs clearly shew that the questions, as then studied, covered all waters, whether tidal or not.

With these preliminary observations their Lordships proceed to consider the questions submitted to them. The first of these is whether the beds of all lakes, rivers, public harbours, and other waters, or any and which of them situate within the territorial limits of the several provinces, and not granted before Confederation, become under the B.N.A. Act the property of the Dominion (p. 710).

The conclusion covered all the fisheries that could be claimed by the Crown.

Their Lordships pass now to the questions relating to fisheries and fishing rights. Their Lordships are of opinion that sec. 91 of the B.N.A. Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading: "Sea coast and Inland Fisheries" in sec. 91. *Whatever proprietary rights* in relation to fisheries were previously vested in private individuals or in the provinces respectively, remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legis-

lature was empowered to pass), might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is left entirely to the Dominion legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected. If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by sec. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the B.N.A. Act, been left to the provinces and not vested in it (pp. 712-13).

The line of demarcation between the Crown which possesses and the Crown which regulates is thus laid down clearly and in such a manner as to take away all possible proprietary right from the Crown in the right of the dominion.

The federal government and that of Quebec do not agree upon the meaning of that judgment. The former maintains that it does not apply to sea-coast fisheries; the latter that it covers all sea, coast and river fisheries.

After the adoption of a temporary *modus vivendi*, the case is submitted to us for examination and opinion under arts. 579 and following of R.S.Q. 1909. What contributed to setting aside the *modus vivendi* was another judgment of the Privy Council (15 D.L.R. 308, [1914] A.C. 153), in relation to the B.C. fisheries. It was decided there that, inasmuch as English law had been introduced in the Province of British Columbia before it entered the Confederation in 1871, the public had the right to fish in tidal waters and, consequently that waters do not belong to the province and that sec. 109 of the B.N.A. Act could not apply to it. Hence the conclusion that the provincial legislature has no right to legislate in relation to fisheries under sec. 92 of that Act, but that such right belongs to the federal parliament.

Of course this latter judgment is binding upon us, but with deference, can we not suggest that sec. 109 was intended to mean that the provinces have acquired the ownership of the fisheries—even as limited by the acknowledged right of user by the public—as there seems to be no reason in law against it?

All the more so that sec. 109 of the B.N.A. Act gives partial or limited rights of ownership to the provinces since it says:—

All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then

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due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

All the more so again that the right of user by the public under Magna Charta is in many places but a comparatively small portion of the fisheries, because no right is given to catch fish by means of engines fixed to the soil as recognized in the following expression of opinion by Lord Haldane (15 D.L.R. at 317):—

> It will, of course, be understood, that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs or other engines fixed to the soil. Such methods of fishing involve a use of the *solum*, which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner.

Neither is any right given to make use of the banks or shores.

> In England the public have not at common law as incidental to their right of fishing in tidal waters, the right to make use of the banks or shores for purposes incidental to the fishing, such as beaching their boats upon them, landing them, or drying their nets there, though they can do so by proving a custom from which such a grant may be presumed: (Encyclopædia Britannica, Fishing, p. 435, col. 1).

The foregoing reasons are therefore sufficient, in my opinion, to conclude that if the right of fishing exists for the public, there remains something in tidal waters that can be the object of a proprietary right. Even if there were only those fisheries with engines fixed to the soil, they would suffice to constitute the provincial domain from a legal point of view, and to make the same substantial through the profits they may yield.

The judgment of the Judicial Committee in *Ontario Mining Co.* v. *Seybold*, [1903] A.C. 73, would justify this interpretation because, under the same section, it declares that the Indian Reservation belonged to the province although it had been and remained subject to a privilege for hunting and fishing in favour of the Indians.

In other words, would not the fact of its being impossible for the Dominion of Canada to acquire, be recognized even as regards fisheries subject to the right of user by the public? And, if the provinces have not remained owners, the fisheries would thus belong to nobody because the Dominion could have only the right to make regulations.

The fact must not, however, be lost sight of that, in the case submitted to us, a conclusion favourable to the province would

not be contrary to that judgment of 1914, because the circumstances are different.

After the judgment in the *British Columbia* case, the Government of Canada published a notice in the Official Gazette stating that, from January 1, 1915, it would take all fisheries in tidal waters under its control.

The Quebec government at once gave notice that it intended to exercise the rights recognized by the judgment of 1898 which, it claims, are not affected by that of 1914, owing to circumstances being different in the two provinces. In order to avoid that conflict, it was decided to have recourse to the present reference. The answers to be given seem to me to depend on the following facts: Does French law apply in the matter submitted, and to what solution does it lead? Has French law been altered by our statutory law; what was the latter at Confederation; what has our statutory law been since Confederation, and what is its bearing upon the questions to be elucidated?

If, according to French law, not altered by the *Ordonnances des Eaux et Forêts* (1669), nor by that of the Marine (1691)—never registered in New France—or if, under our statutory law, those fisheries belonged to the Crown in an absolute manner, without any right of the public to fish in them as is done in England under the common law since Magna Charta, the ownership of those fisheries is, by sec. 92, already mentioned, in the province and the latter's claims would again be justified.

If, on the contrary, according to English law, supposing it to apply, or according to our statutes, the public had, on July 1, 1867, a right of user limiting the ownership of the Crown and opposing its granting exclusive rights, that ownership would not have been given to the province by the B.N.A. Act, and would have belonged to the central power.

It would be the same if it had to be concluded that the ownership of fisheries belonged to the King solely by a higher royal prerogative, making English law apply. Although it is not essential to the solution of the question to shew that by the Quebec Act (1774) French law was put in force in our province in such manner as to govern fisheries in tidal waters, it is proper that such aspect of the case be discussed.

No one contests the introduction of French law in Quebec at the cession of the country, in so far as it applies to property and

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civil rights. But it is objected: 1. That, as the fisheries belong to the Crown by royal prerogative, they are governed by constitutional law; 2. That the attribution of such fisheries does not come under the civil law but under public law, that is, English law.

In the first alternative, supposing that the ownership of the fisheries does not belong to the Crown on the principle that ownership of the soil carries with it the right of fishing in the waters covering it and originates in a royal prerogative—a very disputable pretension—it would still be necessary to make a distinction between the higher and minor prerogatives and to end by adopting the latter as the source of the right to be established, and then the civil law would always apply, as there is no higher prerogative governed by the conqueror's law.

The following extract from the factum of the province bears out this opinion indisputably:—

"The royal prerogative is defined by Blackstone as: 'that special preeminence which the King hath over and above all other persons and out of the ordinary course of the common law in right of His royal dignity.'" (Chitty, Prerogatives, p. 4; 6 Hals' Laws of England, p. 371.)

Therefore, in order that there be a prerogative, the privilege must be one which the King has as King. The rights he possesses on the same grounds as his subjects are not prerogatives. "Now, the King's right to the fisheries on public lands, whether covered by tidal or non-tidal waters, is a right he possesses as owner of the *solum* like the owner of any *solum* covered by water."

That this proposition is well founded is the necessary conclusion resulting from the judgments of the Privy Council in the two cases of the *Att'y-Gen'l of B.C.* v. *Att'y-Gen'l of Canada:* one reported in 14 App. Cas. 295, and the other, referred to above, reported in [1914] A.C. 153, 15 D.L.R. 308. Both related to the "railway belt" granted by British Columbia to Canada. The first is dealt with by Lord Haldane (15 D.L.R. at 310). By that first judgment, Lord Watson had decided that the grant of the "railway belt" by British Columbia to Canada did not include the rights in that territory belonging to the Crown as of prerogative right. Consequently, the grant did not include the precious metals belonging to the Crown by right of prerogative. Lord Watson's judgment was not disapproved of by Lord Hal-

dane in his judgment of 1914, and yet, speaking for the Privy Council in the latter case, he ruled that the transfer of the "railway belt" included the fishing rights. Thus, the right of fishing is not a prerogative like the right to precious metals, but a mere ordinary right. In this same judgment of 1914, Lord Haldane expressly says that the right of fishing belongs to the Sovereign because he is the owner of the *solum* as in the case of any land covered by water.

The second question is whether the Crown derives its right to the fisheries as an attribute of ownership of the *solum* covered by the water, which would bring it under the rules of civil law. On this point, I am of opinion that the answer must be in the affirmative, as stated by Lord Haldane in the case above mentioned. The fact of art. 399 of our Civil Code saying: "Property belongs either to the Crown or to municipalities or other corporations, or to individuals. That of the first kind is governed by public or administrative law"—does not alter the position, since, with the exception of the higher royal prerogative, the law of the conquered continues to apply so long as it has not been amended or replaced, as Lord Hansfield decided in *Campbell & Hall* (Houston, Constitutional Documents of Canada, p. 79; 20 State Trials, pp. 238 and 323; 10 Hals. Laws of England, p. 566; Chitty, Prerogatives, pp. 29 and 30).

Art. 588 of the Civil Code, touching things which are the produce of the sea and which never had an owner, does not relate to fisheries, nor does art. 585: "There are things which have no owner and the use of which is common to all. The enjoyment of these is regulated by laws of public policy." Nor in art. 587: "The right of hunting and fishing is governed by particular laws subject to the acquired rights of individuals" can arguments be found contrary to the conclusions resulting from the above principles.

It must, therefore, be concluded that French law, introduced in the colony by the *ordonnance* of 1663, was in force at the conquest, and that it must contribute to elucidating the questions submitted in so far as it may apply thereto.

The reasons given by the Supreme Court in the *Fisheries* case (26 Can. S.C.R. 444), justify this opinion, establishing moreover that French law differed from English law regarding the right of fishing which the latter recognized as belonging to the public.

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Girouard, J., said, p. 548:—

The old French law, followed in la Nouvelle France, never made the distinctions of the English common law as to tidal and fresh navigable waters, and laid no restriction upon the power of the King to make fishing grants, except with regard to navigation. At the time of the treaty of cession the law of France had been changed in some respects; the sea-coast fisheries had been declared free to the French people by the *Ordonnance de la Marine* of 1681, but this ordonnance as well as the *Ordonnance des Eaux* of 1669, and other subsequent statutes on the same subject which will be found collected in Guyot, vo. Pêche, were never in force in Canada for want of registration by the Superior Council of Quebec, as being unsuitable to the condition of the colony. Before the cession to Great Britain in 1763, the King was therefore the sole owner of the foreshore and the beds and banks of all navigable and floatable rivers and of the fisheries therein, subject to the public right of navigation and of fishing wherever no exclusive grant had been made. This public right was a statutory right which could be interfered with only by legislative authority. See ordonnances of Feb. 1415, art. 679; May 1520, arts. 1, 2, 3; Jan. 1583, art. 18; Isambert, vol. 8, p. 427; vol. 12, p. 173; vol. 14, p. 526. The public right of fishing was a mere royal grace or favour which could be ended by the Crown.

And Sir Henry Strong, C.J. (p. 528):—

What has been so far said has reference only to the provinces other than the Province of Quebec. With regard to that province the right of fishing in waters which are in fact navigable and floatable depends altogether on the old law of France, the ancient law of the province. By that law all waters of this class belonged to the domain of the Crown, and the public enjoyed the right of fishing therein subject to the prerogative of the Crown to grant, at its pleasure, exclusive rights of fishing to individuals. This prerogative is now vested in and can only be exercised by the Crown in right of the province. I refer on this head to Pothier (Bugnet edition) Traité de la propriété.

It would be easy to add many other authorities; to cite a number of concessions of seigniories by the French Kings with exclusive fishing rights on the St. Lawrence at places covered by water at high tide; to cite also many grants of exclusive fishing privileges clearly showing that there was no doubt as to the Sovereign's domain. I must say, however, that although the French law aids the solution of the question, it is not indispensable for coming to the conclusions arrived at by the Court. It is practically needless also to give an opinion as to whether the Ordonnance deMoulins was ever put in force in Canada; and also whether under the but little plausible pretext that the fisheries formed part of the royal patrimony mentioned in the ordinance it prohibited the alienation of the vast territories acquired by the French Kings in America. It would, however, be extraordinary that such a conclusion should have to be arrived at. In that case all grants to companies, particularly that to the Company of the

Hundred Associates, and all the seignorial concessions would have been given without the right to do so. Would that not be interpreting a wise law intended for the protection of the royal domains in France against indiscreet alienations in such a way as to produce an unjust rule hampering the development of the colonies without the least advantage?

The following paragraph from the ordinance confirms this reasonable deduction:

Le domaine de notre Couronne est entendu celui qui est *expressément consacré uni et incorporé* à notre Couronne ou qui a été tenu et administré par nos receveurs et officiers par l'espace de dix ans et est entré en ligne de compte.

I now come to the examination of our statutory law. Has it differed in a marked manner from French law from the conquest to Confederation? Has it recognized the privilege of the public set down in English law since Magna Charta?

The first statute regarding the fisheries is that of 1788. Without mentioning the Crown's right to grant fishing leases, it certainly does not recognize any right of fishing in favor of the public as clear and as general as that recognized in England. That right was not recognized, for instance, in all tidal waters, as shown by the following extract:—

That all His Majesty's subjects shall peaceably have, use and enjoy the freedom of taking bait, and of fishing in any river, creek, harbour or road, with liberty to go on shore on any part between Cape Cat on the south side of the River St. Lawrence, and the first rapid in the river of Restigouche, above the Islands that be higher up than the New Mission in the said river which empties itself into Chaleurs Bay within this province, and on the Island of Bonaventure for the purpose of salting, drying and curing their fish, and they may cut down wood and trees there, for building, making, mending or repairing stages, flakes, hurdles, huts or cook-rooms, and other things that may be necessary for curing and preparing their fish for exportation, and all other things that may be useful to their fishing trade, without any hindrance or interruption, denial or disturbance from any person or persons whatsoever.

Besides the limitation of territories, there is also the following restriction: "Provided they are unoccupied by any other person, or are not, in this and the preceding cases, private property by grant from His Majesty or by grant before the year 1760."

The next Act, with as general a bearing, is that of 1824, containing the same provisions more amply expressed. Then we come to the statute of 1857, for the intermediate legislation refers only to local questions and to details. That Act is a consolidation of all the previous fishery laws. It grants the right of fishing in all harbours, bays, etc., to His Majesty's subjects with the following

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restrictions: "But nothing contained in sec. 5 shall affect private property or prevent the Crown from disposing or taking possession of any public land or beach so occupied for fishing purposes."

The rivers in the King's Posts are reserved and licenses may be granted therein. The Act of 1858, which is also equivalent to a consolidation, always reserves the absolute domain over all the rivers in the King's Posts and even in all navigable waters, since, for the first time, it is declared in it that:—

> The Governor-in-Council may grant special fishing leases and licenses on lands belonging to the Crown, for any term not exceeding 9 years, and may make all and every such regulation or regulations as may be found necessary or expedient for the better management and regulation of the fisheries of the province.

That legislation was incorporated in the Revised Statutes of 1859.

Then comes the Act of 1865, which, alone, might serve as a basis for the judgment to be rendered because whatever restrictions may have previously existed, that Act of 1865, which was in force at the time of Confederation, left full domain over the fisheries in tidal waters to the Crown with the incontestable power to grant exclusive licences. For I am sure we could still determine this question, even if it were necessary to forego my interpretation of the judgment of 1898, supported by that decision respecting British Columbia in which the Privy Council decided that, in order to give a province the ownership of fisheries in tidal waters within its territories under sec. 109 of the Confederation Act, it is necessary that at the time when the Province was confederated such fisheries should not have been subject to any privilege for the benefit of the public. British Columbia lost its case because it was declared that the privilege of English law, in force since Magna Charta and which was introduced in that Province, existed and created that restriction there. Here, we must come to the conclusion that the French law which governed the ownership of those fisheries, and which was in force in the Province of Quebec both before and after the conquest, never restricted the royal domain by a similar reservation. When we further have the certainty that such domain existed in its entirety by the statute of 1865, the irresistible inference is that the province is the owner and possesses the legislative authority proceeding from its proprietary right.

Neither the legislation adopted since 1867, nor the control

assumed by the Parliament of Canada over the ownership of certain fisheries for several years have, in my opinion, had the effect of altering the situation or of extending the right acquired by the Confederation Act to the detriment of the province. It is therefore needless to analyse that legislation.

In view of the answer to the general question flowing from the reasons I have just set forth, the question relative to fishing with engines attached to the soil seems to me to present no more difficulties.

Neither can fishing between high and low-water mark and in rivers, estuaries, gulfs, bays and arms of the sea forming part of Canada, give rise to serious difficulties.

The Crown is owner of the soil and, consequently, the fisheries there belong to the province. Nevertheless a serious problem arises with reference to the area within the 3-mile limit. Although there is a controversy with regard to ownership by the Crown, it seems to me more logical to conclude in the affirmative, at least with reference to the profits of the fisheries. The weight of the authorities seems to me to be in that sense, notwithstanding the judgment in the case of (*Reg.* v. *Keyn* (1876) 2 Ex. D. 63) where the Judges were, nevertheless, divided. (Vol. 28, Hal's, Laws of England, vo. Waters and Watercourses, p. 360, No. 653 and notes).

The doctrine is there summed up as follows: The soil of the sea between the low-water mark and *so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown*, is claimed as the property of the Crown although outside the realm. The soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up the same as the tide flows, is *primâ facie* the property of the Crown. The Crown also claims to be entitled to the mines and minerals under the soil of the sea within these limits.

Vattel, Droit des Gens, edit. 1863, 289 in fine, pp. 582 and 187, p. 576):—

Aujourd'hui tout l'espace de mer qui est à la portée du canon, le long des côtes, est regardé comme faisant partie du territoire; et pour cette raison, un vaisseau pris sou le canon d'une forteresse neutre n'est pas de bonne prise.

Les divers usages de la mer, près des côtes, la rendent très susceptible de propriété.

Holmesdord, Droit International Public (Traduction francaise) pp. 105 and 106:—

La doctrine exprimée dans ces autorités est contraire à ce qui a été décidé par la majorité de la Cour dans *Reg.* v. *Keyn* (2 Ex.D., p. 124). Il ne faudrait pas oublier cependant qu'une minorité de la Cour qui comprend entre autres Lord Coleridge; Brett; Amphlett, JJ., ainsi que Grove et Lindley, JJ., a exprimé l'avis que la mer, dans les trois milles de l'Angleterre, forme autant

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partie du territoire du royaume que la terre ferme elle-même. D'ailleurs à l'endroit cité par Halsbury (Vol. 28, p. 360) on trouvera plusieurs décisions affirmant un principe contraire à celui reconnu dans *Reg.* v. *Keyn*.

In addition, at the place cited by Halsbury (vol. 28, p. 360) several decisions will be found affirming a principle contrary to that recognized in *Reg.* v. *Keyn*.

Moreover, shortly after the judgment in *Reg.* v. *Keyn*, the Imperial parliament passed a declaratory Act, called "The Territorial Jurisdiction Act," 1878, 41-42 Vict., ch. 3, completely destroying the effect of that judgment

Dalloz, p. 6, No. 21, tells us, according to that principle, that:

Tout état dont les côtes sont baiénées par la marée a un droit exclusif sur la partie de la mer qui peut être défendue du rivage et n'a aucun droit au delà. L'étendue qui peut être défendue du rivage est ce qu'on appelle la mer territoriale.

Fabreguettes, Traite des Eaux, vol. 1, p. 470:—

Bien que la mer n'appartienne à personne, qu'elle soit un res nullius, pourtant, d'aprés les régles du droit des gens, il est admis que chaque etat exerce un pouvoir privatif et de police dans ses eaux territoriales qui se différencient ainsi de la haute mer . . . on entend par eaux territoriales, la portion de mer qui borde les côtes de l'etat à une distance déterminée par les traités à trois milles géographiques à partie de la laisse de base marée.

The Act 14-15 Vict., ch. 63, whereby the Imperial parliament declares that the Baie des Chaleurs is comprised in the Province of Quebec and in that of New Brunswick, can also serve to support the opinion I adopt.

The question is, moreover, of no importance even according to those who maintain that it is merely a matter of jurisdiction and not of proprietary right with regard to the soil; *there is no controversy respecting the ownership of the fisheries*. Even in England, where the King cannot exclude his subjects from that fishing, aliens are nevertheless excluded. (14 Hals. Laws of England, p. 633, No. 1411 and note).

But all the French authors are not in favour of ownership.

Thus Fusier Hermann (Vo Mer Territoriale, no. 7) says:—

Pour résoudre la question d'une maniére raisonnable il ne faut pas perdre de que que l'etat riveraine, a sur la mer territoriale, *non un droit de propriété*, mais un simple droit de juridiction et de surveillance, dans le but d'assurer sa défense et de protéger ses intérêts économiques. No. 15: De ce que la mer territoriale est réputée faire partie du territoire, il résulte que l'etat y exerce en général tous les droits découlant de la souveraineté; ainsi le droit exclusif de pêche, au sens le plus large du mot (poissons, coquillages, huitres, perles, coraux, varach) sauf dérogation exceptionnelle expresse en faveur d'une autre puissance; le droit de réglémentation et de juridiction, l'administration de la police, spécialement de la police sanitaire, celle des douanes; la réglémentation

spéciale du pilotage, des signaux, des naufrages et des sauvetages, du droit de décider de l'admission des navires de guerre étrangers dans les ports et rades; le droit de régler le cérémonial maritime.

That question of the 3-mile limit must, like the others, be decided in the affirmative. It in nowise affects the rights of the federal government with respect to trade and navigation, nor respecting the regulation of the fisheries, even if we agree to decide for the case now before us, whether the fisheries in those territorial seas belong to the province as a domain which can be exploited to its own profit. Whatever alternative may be chosen, it seems to be that it must be said that they belong to it according to the spirit at least of the Confederation Act interpreted by the judgment of 1898, which says that the Dominion has no rights of ownership in the fisheries except in such as may be carried on in public harbours. This conclusion, naturally, does not exclude the Dominion's jurisdiction for all purposes within its competence. It seems to me, therefore, that it may be legitimately concluded that all existing rights in the fisheries, even within the three-mile limit, belonged to the province before Confederation and that the B.N.A. Act has not had the effect of taking them away from it. Of course an exception must be made regarding territory comprised in public harbours, which are declared to be the property of the Dominion by the same judgment ([1898] A.C. 700 at 711).

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green*, 6 Can. S.C.R. 707, where it was held that the foreshore between high and low-water mark on the margin of the harbour became the property of the Dominion as part of the harbour.

I am therefore of opinion that, *with the restrictions that could be imposed by international law*, and the others I have just pointed out, an affirmative answer must be given to the questions submitted to us.

TRENHOLME, J.:—I am of opinion to answer all the questions affirmatively. The Crown in the right of the province has the exclusive beneficial title to all lands in the province, not only down to low-water mark but out to the outer line of the 3-mile limit,

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and may dispose of the fishing rights in all such waters, subject only to the right of the Dominion to such portions as are assigned to it in ownership or control.

The Civil Code, the B.N.A. Act and the jurisprudence and authorities cited, in my opinion, support the above view.

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LAVERGNE, J.:—I am of opinion that an affirmative answer be given to the three questions submitted.

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CROSS, J.—(dissenting)—In substance, a decision is asked for upon the question whether or not the government of the Province of Quebec has power, with the authority of the legislature of the province, *to make a grant of the exclusive right of fishery in tidal waters in the province*. That is a summary of questions numbers one and two of the reference.

The rights of the province are those indicated in secs. 92 and 109 of the B.N.A. Act, 1867. In sec. 92 the legislature of the province is given exclusive power to make laws in relation to matters coming within several classes of subjects, one of which classes is: "The management and sale of public lands belonging to the province and the timber and wood thereon," and another of which is:—"Property and civil rights in the province."

The effect of sec. 109 is that lands in that part of the old Province of Canada which is now the Province of Quebec, which belonged to the old province now "belong" to the Province of Quebec.

The rights of the Dominion are declared in sec. 91 of the Act. They consist in the right to make laws in relation to all matters not coming within the classes of subjects assigned to the legislatures of the provinces, and, in particular, the exclusive right to legislate upon all matters coming within certain classes of enumerated subjects, three of which classes are:—2. The regulation of trade and commerce; 10. Navigation and shipping; and 12. Sea coast and inland fisheries.

The question before us can be decided and should be considered and decided upon a construction of the relevant provisions of the Act itself. So considered, it is not difficult of solution.

This is so, notwithstanding that an appearance of confusion has been created because counsel, in argument, have travelled away from the Act and dissipated their energies in making contrasts between expressions of judicial opinion in the previous

decisions or in attempts to reconcile these decisions. That was unnecessary.

I consider that the legislature of the province has not power to grant or to authorize the executive government to grant the exclusive right of fishery in tidal waters.

The argument for the province is, in substance, that a fishery is part or an accessory of the soil or bed under the water; that it is consequently property, and that the province can make exclusive grants of property.

In my opinion, there is a twofold error in this reasoning.

In the first place, while it is true that sec. 91, which places fisheries within federal jurisdiction, did not transfer property to the Dominion, it nevertheless did give the Dominion exclusive authority to make laws in relation to fisheries. Counsel for the province are in error when they ask us to read the words: "12. Sea coast and inland fisheries," in sec. 91, as if they were "12. The regulation of sea coast and inland fisheries". The Act must be taken as it stands and should not be cut down in any way. Allowing to the province its full jurisdiction over property and civil rights it is still clear that when it not only makes a grant of property or of right of use of property, but goes further and claims a right to determine that the grantee shall have the exclusive right of fishery in virtue of the grant, it is going outside of its jurisdiction over property and into the jurisdiction of the Dominion over fisheries. It is just as if it were to make a grant of the exclusive right to do a banking business or operate a mint in a specified locality.

The second error is in the assertion or assumption that a fishery is identified with or, so to speak, part of the soil of the bed over or upon which it may be set up. While there might be something to be said in support of that view as respects fisheries in non-tidal navigable waters, it does not hold good as respects fishery in tidal waters.

I take it to be well-established that the mere ownership of the soil under tidal waters does not give the owner any right to exclude the public from fishing there, though the owner may perhaps fish with weirs or fixed erections. Moore: Foreshore, 722.

If one were to take the headnote of the report in *Att'y Gen'l for B.C.* v. *Att'y Gen'l for Canada*, [1914] A.C. 153 (15 D.L.R. 308), as

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an accurate summary of what was there decided, it would appear there also to have been considered that the right of the public to fish in the sea does not depend upon any title in the Crown to the subjacent lands. If the headnote is too sweeping in form of expression, it would appear from the report itself to have been considered that fishing rights *primâ facie* go with the property in the *solum*. But, in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of this title is qualified by another and paramount title which is *primâ facie* in the public.

And it is added that "Neither in 1867 nor at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property."

But counsel for the province say that holding cannot apply to the case of Quebec, because the law of France had been continued in force here, and because, according to that law, the public right of fishing does not exist, but, on the contrary, the right was in the King of France and has passed to the Crown of Great Britain in right of the province.

To that I consider that it may be said that the cession of Canada to Great Britain replaced a King who sometimes assumed to grant rights of fishery in tidal waters by a King who had no such prerogative, and that it is quite consistent with the continuance in force of the French law in general. That would seem to have been the opinion of the Supreme Court of the United States upon a contention that a similar right had passed from the King of Spain to the Government of the United States. *Pollars* v. *Hagan*, 3 Howard 212, at p. 225, citing Vattel B.C., 19, s. 210.

It might also be said to have been the better opinion in France that the King in assuming to make such concessions of rights to be exercised in tidal waters, acted in disregard of law rather than in accord with it.

The distinction between *la pêche maritime* and *la pêche fluviale* was recognized there long before the time, early in the nineteenth century, when the law on each of these subjects was separately codified.

In Dalloz. Rep. V. des "Pêche Maratime," we read:

2. La mer est le domaine de tous, communia sunt haec; aer aqua pro fluens et mari. Par une conséquence nécessaire, les lois romaines déclarent que le droit de pêche fait partie de ce domaine public: Flumina autem omnia

et portus publica sunt, ideoque jus piscandi commune est omnibus, in portu flumibusque (Ins. tit. De rerum divis, §1). Si quis me prohibeat in mari piscari, vel overricurum . . . ducere, an injuriarum judicio possim eum convenire? (Dig. tit. 10, de injuriis, §13). Ce droit, comme celui de la pêche fluviale, fut longtemps usurpé en France par la féodalité.

I consider, moreover, that even if it could be said that *la pêche maritime* under the French regime was not a public right but something which could be made the subject of a royal grant, it was nevertheless an effect of the cession of New France to Great Britain that that public right became exerciseable in the tidal waters of Canada as in all other British Dominions.

I therefore conclude that counsel have failed to demonstrate the existence of a difference in the matter in question between the law of Quebec and that of British Columbia or to establish that a fishery in tidal water which is not property in British Columbia is property in Quebec. And when once it cannot be shown to be a property right, the foundation of the argument for the province is seen to be non-existent.

That is the second error to which I have referred.

It may be added that the provisions of the Acts 20 Vict., ch. 21, and 29 Vict., ch. 11, cited to us by counsel for the Dominion, also make against the contention of counsel for the province that the public right of fishery did not exist in Quebec before Confederation.

That contention, moreover, is inconsistent with the provisions of our Code to the effect that things which are the produce of the sea and which never had an owner belong, by right of prehension, to him who appropriates them (Art. 588); and that the "enjoyment" of things which have no owner and the use of which is common to all, is regulated by laws of public policy (Art. 585) and that the right of fishing is governed by particular laws of public policy, subject to the legally acquired rights of individuals. (Art. 587). These provisions also make it clear that in law a right of fishing is contemplated as something distinguishable from a title to land or to the use of land.

I also take it that the civil law is not our law of public policy or what it would be better to call "public law," so far as it bears upon fishing in tidal waters particularly if regard be had to sec. 21 of the B.N.A. Act, 1867.

I have said that the provincial legislative power over the subjects of property and civil rights in the province does not involve the existence of such power over the subject of fisheries,

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a subject which is rather of the nature of a commercial pursuit than one of property. That can be made clear by illustration of the way in which assertion of the provincial right would work out in practice. The power of the province being dependent upon property would cease to exist when the right of property would cease to exist. Whenever an exclusive grant would have been made, the power of the province would *pro tanto* lapse and nothing would remain to the province..

The Act before us is, however, one which apportions legislative and executive power, and I consider that it is not of the nature of legislative and executive power to exhaust itself by the first exercise of it and to be thus subject to piecemeal extinction or to be effective in some places in the province but non-existent in others.

Having arrived at the conclusion above stated upon the summarised question as to the right of the province to make a grant of the exclusive right of fishing, a few observations may be added as to what distinction, if any, should be made between fishery over the beach *above* the line of low tide and fishery outside of that line.

Here it would seem necessary to take account of rules of international law. The bed of the sea, like the sea itself, is *res communis*. It is only the shore and not the bed which our code includes in the Crown domain (Art. 400). But it is recognized in international law that a state may exercise sovereignty over coastal waters. That right is grounded upon the right of self-defence: defence against hostile aggression, and protection of its commerce, navigation and fisheries. It is in respect of these rights or subjects that territorial sovereignty is exercised over the bed of the sea under coastal waters, the soil itself being nevertheless regarded as being outside the realm.

We have seen that these rights or objects, namely: naval service and defence, regulation of trade and commerce, navigation and shipping, and fisheries are all classes of subjects assigned to Dominion jurisdiction. They include all the matters in respect of which there can be occasion to speak of a title of the bed of the sea, I would therefore say that outside the low-water line in so far as there may be such a thing as title to underlying land, it has passed to the Dominion as an incident of jurisdiction over the

classes of subjects which I have just enumerated. Above low-water mark or low tide, the beach or land is available for all purposes for which land so situated can be used, and provincial jurisdiction accordingly exists, subject to exercise of the public right of fishery in the water over it when it is under water and to navigation and naval defence.

But, as regards the bed or soil outside the line of low tide, that appears to me, to employ a homely illustration, to be like the naked ownership of the bottom of a vessel of which somebody else has the control for all useful purpose, in other words, to be a *quantité négligeable*.

It may be said that that is an arbitrary conclusion and that there is no sound reason, when distinguishing between Dominion and provincial legislative power, to make a division between what is inside and what is outside of the line of low tide. The answer is that we must give proper effect to the provisions of the Act and the distinction above indicated appears to me to be better than any other which has been suggested.

I would accordingly say, in answer to the first and second questions: That the legislature of the province cannot authorise the government or a member of the executive council to grant an exclusive right of fishery in tidal water, *either between the lines of high and low tide or outside the line of low tide*, nor can such an exclusive right be granted by the government of the province or by a member of the executive council. But the legislature may authorize the making of exclusive grants of the beach land above the line of low tide and of the right to erect weirs and other fishery structures thereon, but so as not to impede or interfere with the public right to fish everywhere in tidal water or with rights of navigation and of naval defense, upon being thereto authorised, the government or a member of the executive council may make such grants of beach lands.

I would say, in answer to the third question, that I do not find that the case therein stated has in fact arisen.

I consider it opportune to add the following observations upon a criticism by counsel for the province of the case sought to be made out for the Dominion. The substance of that criticism is as follows: The Dominion is given the same legislative power over inland fisheries as over sea coast fisheries. To establish its

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ground in the matter of sea coast fisheries, it relies upon the public right of fishery as known in Great Britain—that public right extends only to fishery in tidal waters. It is therefore inadequate to support the right in inland waters. Therefore it does not help to show what parliament intended and it can at least be said in opposition that parliament did not intend to give one kind of legislative power over sea coast fisheries and another over inland fisheries. All that I would say in regard to this criticism is that the view taken in Great Britain, which draws the line of distinction between tidal and non-tidal waters, does not appear to be grounded upon principle. It is the outgrowth of conditions in England.

Conditions here are such that the line of distinction is not to be drawn in the same way. I consider that the public right of fishery exists and is to be recognized as existing in the waters of our great lakes and navigable rivers.

In the Supreme Court of the United States, it was pointed out in *Shively and Bowlby*, 152 U.S. 1 at p. 43, that:—

> The confusion of navigable with tidal water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American continent. It had the influence for two generations of excluding the Admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines, with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy.

Accordingly, for some time, a different view has come to prevail in the United States. I consider that that view is sound and that in Canada it should be similarly recognized that exclusive private rights are not to be granted or exercised in the waters of the great lakes and navigable rivers any more than in waters which differ only in that tides rise and fall in them.

The Act gave to the Dominion exclusive legislative jurisdiction over fisheries both sea coast and inland. It cannot be other than an encroachment upon that power for a province to grant an exclusive right of fishery in a tract of water in Lake Ontario or Georgian Bay, say, twenty miles from land. If my view be right the criticism is inapplicable and I therefore do not pursue the subject further.

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Annotation—Public right of fishing in tidal waters—The three mile limit.

The judgments in the principal case touch upon two points of special interest. The first is the question whether the right of the public to fish in tidal waters, which the Privy Council decision in *Att'y-Gen'l for British Col-*

umbia v. *Att'y-Gen'l for Canada*, [1914] A.C. 153, 170-1, affirms as existing in British Columbia, and, therefore, undoubtedly, in all the British-Canadian provinces of the Dominion, exists also in Quebec; and the second is, whether such rights of fishing, be they in the public of the Dominion generally, or in the provincial government and its licensees, extend over what is generally called "the three mile limit," *i.e.*, for three marine miles below low water mark. Annotation.

Public right of fishing in tidal waters.—As to the first, the Privy Council say in the case above referred to: "Since the decision of the House of Lords in *Malcolmson* v. *O'Dea* (1863), 10 H.L.C. 593, it has been unquestioned law that, since *Magna Charta*, no new exclusive fishery could be created by Royal grant in tidal waters, and no public right of fishing in such waters then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia. . . . In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of *Magna Charta* no restriction can be put upon the right of the public by an exercise of the prerogative in the form of a grant or otherwise. It will, of course, be understood that in speaking of this public right of fishing in tidal waters, their Lordships do not refer, in any way, to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the *solum*, which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner."

The provision of *Magna Charta* of June 15, 1216, thus referred to, is as follows: "All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea-coast," or as it is expressed in the version of 1224 (9 Hen. III.): "All kydells from henceforth shall be utterly put down through Thames and Medway, and through England, except by the sea-coasts." A "kydell" is defined by the Oxford Dictionary as "a dam, weir, a barrier in a river having an opening in it fitted for nets or other appliances for catching fish;" and as "an arrangement of stake-nets on the sea-beach for the same purpose." Law Courts and writers on jurisprudence for many centuries have treated the above clause of *Magna Charta* as an absolute prohibition of the creation of "several" or exclusive fisheries in tidal waters, although McKechnie (*Magna Charta*, p. 403) says that this rests on a historical misconception, and that the Great Charter sought to protect freedom of navigation, not freedom of fishing.

But even if such public right of fishing in tidal waters does rest upon the clause in *Magna Charta*, it has been quite clear, at all events since the Colonial Laws Validity Act, 1865, that colonial legislatures can repeal the clause so far as their own colony is concerned; and in the principal case Archambeault, C.J., with whom Carroll, Lavergne, and Trenholme, JJ., evidently concur on the point, holds that Quebec did so repeal it in 1865, before Confederation, by the Act 29 Vict. ch. 11, inasmuch as such Act authorized the Governor-in-Council and the Commissioner of Crown lands to issue fishing licenses and *exclusive* rights of fishing *in any place in the province wherever such fisheries may be situated;* and imposed penalties and imprisonment on "any person taking or catching fish in any water or along any beach or within the limits of any fisheries described in the leases or licenses granted by the Minister or by the Governor-in-Council."

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It is somewhat curious to note that Carroll, J., speaks of the Privy Council in *Att'y-Gen'l for B.C.* v. *Att'y-Gen'l for Canada*, [1914] A.C. 153, as deciding that because the public had the right to fish in tidal waters, consequently these waters do not belong to the province, and that sec. 109 of the B.N.A. Act could not apply to them, even as limited by such acknowledged right of user by the public, for in that case their Lordships expressly say that they "feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark to what is known as the three mile limit because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land. . . . A right of this kind" (meaning it is submitted a right of the public to fish) "is not an incident of property."

If and where there is any proprietary right at all to the *solum* of tidal waters in Quebec (other of course than public highways) it must, I submit, be in the Crown as represented by the province or its grantees, whether subject to a public right of fishery or not. The legal position seems very clearly indicated in a good old law book, Matthew Bacon's New Abridgment of Law (7th ed., London, 1832, pp. 392-8): "The King by our law is universal occupant, and all property is presumed to have been originally in the Crown. . . . It is universally agreed that the King hath the sovereign dominion in all seas and great rivers. . . . And as the King hath a prerogative in the seas so hath he likewise a right to the fishery and to the soil; so that if a river, as far as there is a flux of the sea, leaves its channel it belongs to the King. . . . But notwithstanding the King's prerogative in seas and navigable rivers, yet it hath been always held that a subject may fish in the sea, for this being a matter of common right, and the means of livelihood and for the good of the commonwealth, cannot be restrained by grant or prescription."

But such common right may, of course, be taken away by the legislature and, as the majority of the judges hold in the principal case, it was taken away in Quebec before Confederation.

The Three Mile Limit.—But is there a proprietary right in the *solum* of the sea below low water mark? In holding that there is such a proprietary right to the *solum*, or at all events to the fisheries, which surely must if it exists as a provincial right, arise from the former, the judges in the principal case (other than Cross, J.), certainly do seem to have rushed in where the Judicial Committee of the Privy Council, and even the Imperial Parliament, have feared to tread. A national right recognized by international law, to the fisheries within the three mile or other limit, and to exclude foreigners therefrom, is a different matter, and would seem clearly to fall under the Dominion legislative jurisdiction over "sea coast and inland fisheries:" *The King* v. *The Ship "North"* (1906), 37 Can. S.C.R. 385, 11 Can. Ex. 141, 148-50, 11 B.C.R. 473; *Miller* v. *Webber* (1910), 8 E.L.R. 460. In *Regina* v. *Keyn* (1876), 2 Ex.D. 63, the majority of the Court held that it was not possible under the common law to punish a foreign subject for an offence (in the special case, manslaughter) committed by means of a foreign ship in British territorial waters; and although six judges out of fourteen held that the sea within three miles of the coast is part of the territory of England, the others did not so hold: Clement, Law of Canadian Constitution, 3rd ed., p. 109. The grounds of the decision and its validity Professor Berriedale Keith informs

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us ("Imperial Unity and the Dominions" (1916), p. 129) remain very doubtful, but much of its effect was done away with by the enactment of the (Imp.) Territorial Waters Jurisdiction Act, 1878, which expressly provides that an offence committed by a person whether or not a British subject on the open seas within the territorial waters of the King's dominions is an offence within the jurisdiction of the admiral whether committed on board or by means of a foreign ship or not, and declares (sec. 7): "The territorial waters of Her Majesty's dominions in reference to the sea means such part of the sea subjacent to the coast of the United Kingdom or the coast of some other part of Her Majesty's dominions as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the admiral, any part of the open sea within one marine league of the coast measured from low water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

The Act also recites that "the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions."

But it will be seen the Act by no means asserts that the *solum* under the marine league below low water mark is British soil. In *Att'y-Gen'l for B.C.* v. *Att'y-Gen'l for Canada*, [1914] A.C. 153, their Lordships say that they "feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark, to what is known as the 3 mile limit," and they add (pp. 174-5): "The doctrine of the zone comprised in the three mile limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally, but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling, the topic may be examined at such a conference. Until then the conflict of judicial opinion which arose in *Regina* v. *Keyn* is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shores below low water mark to within three miles of the coast form part of the territory of the Crown or is merely subject to special powers necessary for protective and public purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn, C.J., in that case. But apart from these difficulties there is the decisive consideration that the question is not one which belongs to the domain of municipal law."

And in the course of the argument before their Lordships in this last case (W. H. Cullin, King's Printer, Victoria, B.C., pp. 62-4), the following is reported:—

Haldane, L.C.: "I do not find any trace of an argument having been addressed to the fullness, at any rate which this question requires, as to the nature of the property of the country within the marine league. . . . We do not desire to decide the question of the right to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province. . . . You must remember the sort of questions

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which may arise. In the *Franconia* case (*Regina* v. *Keyn*) this was touched on, and it was quite impossible for the Judges to come to anything like a unanimous conclusion about it. It is a question which affects every part of the King's dominions."

And in the same argument occurred also the following most interesting passage (p.81, *seq.*):—

Haldane, L.C.: "First of all, as to the three mile limit, in the *Franconia* case the majority of opinions were to the effect that there was no right of property within the three mile limit. Although Lord Esher delivered a judgment in the contrary sense, there is a judgment of Lord Chief Justice Cockburn which was concurred in by the majority of the other judges. I do not say that that settles the law in a way that is binding upon us."

Sir Robert Finlay: "May I say one word as to the effect of the decision in that case? . . . I do not think that the majority attempted to consider the question of the property in the *solum*."

Haldane, L.C.: "I do not think they did. On the other hand, I think there is a preponderance of opinion on the side of Cockburn, L.C.J., in what he said, both upon the international law part of the case and upon the property part of the case. It was certainly not made out to the satisfaction of the Court that there was a right of property."

Sir Robert Finlay: "Your Lordship will recollect that directly after that decision Parliament proceeds to fill up the gap by legislating."

Haldane, L.C.: "Not as to the property; parliament is most cautious to take care not to assert any right of property. . . . We all feel that a question of this kind, which affects the whole of the Dominions of the Crown without exception, which involves questions not only of municipal law, but of international law of a most far-reaching kind, is not a question which we should be disposed to entertain unless there were very strong reasons why we should."

And, again, at p. 173, Haldane, L.C., is reported as saying, "Questions involving the consideration of the marine league are questions of such far-reaching importance, and they turn to such an extent on the views that may be taken by the Great Powers as regards international law, that I doubt whether there are materials to decide the question yet."

True, as Clement, J., points out (Law of Can. Const., 3rd ed., p. 242), "the soil beneath the water beyond low water mark is often appropriated in the erection of piers, wharves, lighthouses, etc., but as these are usually in aid of navigation and useful to all nations no objection is raised."

The three mile limit seems to have been first adopted by the United States when, in 1793, Jefferson, then Secretary of State, wrote to the British Minister (November 8th), that the limit of a sea league had been provisionally taken as the limit of the territorial waters of the United States. A sea league was supposed at the time to be about the range of cannon. Since then different international treaties and conventions have sanctioned this distance; it was adopted by the North Sea Fisheries Convention, 1882, between Great Britain, Belgium, Germany, Denmark, France and Holland for the purpose of "regulating the police of the fisheries of the North Sea outside territorial waters;" and it may be said to be the more generally accepted limit at the present day. But it is very generally agreed that the three mile limit no longer meets contemporary requirements. "And if States are not yet agreed whether the proper limit is three miles (Great Britain, France, United States) or six miles (Spain) or cannon range (Germany), they are all agreed that what-

ever the limit be, fisheries within it are reserved to the subjects and citizens of the adjacent State exclusively, that all States have a right of innocent passage throught territorial waters, but are subject to the jurisdiction of the adjacent State, if they cast anchor or hover in them, and that if the adjacent State be neutral, acts of war committed within them are an infringement of its neutrality:" (Eng. Encyc. of Law, 2nd ed., vol. 14, pp. 68-71). Annotation.

It may be that if the principal case be carried to the Privy Council, as we presume it will be, and if their Lordships agree that the Quebec Act of 1865, and previous Acts *eodem intuitu*, did take away all public rights of fishing in the territorial waters of Quebec province, they will have to pass one way or another upon the question of ownership of the *solum* under such waters, in order to determine whether the fisheries therein belong to the province under section 109 of the British North America Act, or no.

It seems unnecessary to notice those portions of the judgments in the principal case, which touch the point that, to adopt the words of Cross, J., "the cession of Canada to Great Britain replaced a King who sometimes assumed to grant rights of fishery in tidal waters by a King who had no such prerogative," because the Quebec Acts of 1858 and 1865 above referred to transferred the matter from the sphere of prerogative to that of legislation.

A. H. F. LEFROY.

REX v. POMERLEAU.

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Alberta Supreme Court, Harvey, C.J. February 7, 1917.

INTOXICATING LIQUORS (§ III A — 59) — PERMITTING DRUNKENNESS "TO TAKE PLACE"—ALBERTA LIQUOR ACT.

The offence of permitting drunkenness to *take place* in the house of the accused (Alberta Liquor Act, sec. 36) involves something more than merely permitting drunkenness to exist on the premises; there must be proved against the accused some act or default on his part conducing to or continuing the drunkenness of the person who was allowed to remain on his premises while drunk.

MOTION to quash a summary conviction. Statement.

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

H. H. Parlee, K.C., for the Crown.

HARVEY, C.J.:—The accused was convicted for that "he did unlawfully permit drunkenness on his premises, to wit, the Richelieu Hotel, Edmonton, contrary to sec. 36 of the Liquor Act." Harvey, C.J.

This is an application to quash the conviction by way of *certiorari*.

It is to be observed that sec. 36 provides that: "If any person permit drunkenness or any violent, quarrelsome, riotous or disorderly conduct, arising from drunkenness, to take place in the house or on the premises of which he is the owner, tenant or occupant . . . he shall be guilty of an offence."

It is apparent, therefore, that unless "permitting drunken-

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ness" is the same thing as "permitting drunkenness to take place" the conviction is not for the offence specified.

Thompson v. *McKenzie*, [1908] 1 K.B. 905.

In my opinion, however, there are two or three reasons why that decision is scarcely applicable. To my mind the words "permit drunkenness to take place" suggest not merely a state or condition of drunkenness existing but some action, bringing that state or condition into existence, or out of which it arises. In other words, while the permitting of a drunken man to be on the premises is permitting drunkenness to be or exist on the premises, it is not permitting it to become or take place on the premises.

In the English Act, however, there was another section which practically defined the words of the section quoted as meaning what the Judges treated it as meaning, in the following words: "When a licensed person is charged with permitting drunkenness on his premises and it is proved that any person was drunk on his premises, it shall be on the licensed person to prove that he and the person employed by him took all reasonable steps for preventing drunkenness on the premises." The Court held that he had not satisfied the burden cast on him by this section.

There is the further fact that is to be noted, that the offence there was an offence by a person who was securing a privilege under the Act, for the manner of the use of which he was to be held accountable.

Our Act, on the other hand, is one which prohibits, instead of licenses, and the person subject to the offence is not any privileged person but any ordinary citizen. If permitting any drunken person to be on his premises which is permitting drunkenness on the premises, is an offence, then any person who, moved by ordinary humane motives takes a person on the street whom he finds drunk into his home to prevent him perishing, would be guilty of the offence and liable to the penalty.

I cannot think that can have been the intention of the section, especially as the words, in my opinion, in their ordinary meaning, convey a different intention.

In my view, therefore, this conviction does not disclose any offence and it should therefore be quashed.

There will be the usual order for the protection of the magistrate. *Conviction quashed.*

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Ontario Supreme Court, Riddell and Lennox, J. J., Ferguson, J. A., and Rose J. February 26, 1917.

LIBEL AND SLANDER (§ II E—65)—PRIVILEGED COMMUNICATION—COURSE OF DUTY OR BUSINESS.

The delivery of a letter to be typed is publication when the occasion is not privileged and the letter does not concern the ordinary course of business in which the typist is employed.

A communication in writing on an occasion of qualified privilege is not privileged if on its face it is clearly in excess of the occasion.

[See also 30 D.L.R. 381, 36 O.L.R. 474, *Knott* v. *Telegram Printing Co.*, 32 D.L.R. 409.]

Statement.

AN appeal by the defendant from the judgment of SUTHERLAND, J., at the second trial, upon the verdict of a jury, in favour of the plaintiff, for the recovery of $5,000 damages and costs, in an action for libel.

The verdict at the first trial was for $15,000. A new trial was directed by a Divisional Court: *Quillinan* v. *Stuart* (1916), 30 D.L.R. 381, 36 O.L.R. 474, where the facts are stated.

I. F. Hellmuth, K.C., for appellant.

Wallace Nesbitt, K. C., and *J. M. Godfrey*, for plaintiff, respondent.

Lennox, J.

LENNOX, J.:—This is an action for libel. The jury assessed the damages at $5,000.

What is complained of in the statement of claim is, that the defendant, (*a*) "by publishing of and concerning her," the plaintiff, "to one W. B. Masters in a letter written by the defendant to the said Masters . . .," (*b*) "by publishing of and concerning her to the stenographer of the defendant in a letter written to the plaintiff," and (*c*) "by publishing of and concerning her in a letter written to W. B. Masters and dated April 6th, 1915," defamed and injured the plaintiff.

The two letters first above referred to are dated the 8th April, 1915. The first of these is the letter containing the expressions "Call off your slut," etc., and is the one of which the plaintiff most strenuously complains.

The case upon the pleadings is broader in some, and narrower in some, respects than the case—apparently with the concurrence of all parties—finally left to the jury. It is broader in that the

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statement of claim charges three distinct libels, but the learned Judge, in charging the jury, seems to have regarded the letter to Masters of the 6th and the letter to the plaintiff of the 8th April as matters indicating the attitude of the defendant rather than substantive libels; and, without objection from either counsel, said (p. 93 of the shorthand report of the proceedings at the trial): "On the same day" (the day he wrote the plaintiff), "he wrote the letter which is *the letter complained of in this action.* All these other letters and the evidence concerning Masters antecedent to this letter, in so far as they shew the defendant's conduct and intentions, are matters you can use in the consideration of your verdict in this case." The learned Judge then read to the jury the letter first set out in the statement of claim, being the letter there said to have been published *to W. B. Masters* only, and of course by far the most objectionable letter of the collection. I refer to this as, with the concurrence of all parties, he practically withdrew the other letters from the jury as libels *per se;* and this makes it comparatively, if not wholly, unimportant to consider whether the delivery of the manuscript of the letter of the defendant to the plaintiff of the 8th April to O'Donnell to be copied was, legally speaking, a publication; and this circumstance certainly does not give the defendant any ground for complaint, and is not complained of by either party.

On the other hand, the action, as tried and left to the jury, was broader than the allegation of para. 2 of the statement of claim, in that it was pointed out, as the evidence given without objection established, that this letter was published—whether in the legal sense or not—to two persons, namely, to Masters, to whom it was written and addressed, and to O'Donnell, who made the typewritten copy.

Speaking of the letter to Masters, the learned Judge, at pp. 77, 78, said: "Now, it is necessary in the case of a libel that there should be publication—that is, the communication of the words complained of to some person or persons other than the plaintiff—the person who claims to have been defamed. . . . Upon the evidence here, I think you will be able to find—and, in my opinion, you would be warranted in so finding—that the communication reached only two people; that is, it was published in the legal sense to two people. One was the assistant manager,

O'Donnell, employed in the same bank as the defendant, to whom the draft letter written by the defendant was given, and who, in copying it afterwards to send forward, of course became aware of its full contents. The other was the man Masters, to whom it was sent, and who read it and then passed it on to the plaintiff. So that, in considering the amount of damages, the fact that the communication reached only these two people is something for you to bear in mind. Of course, on the other hand, it will be also for you to consider that Mr. O'Donnell was living in Niagara Falls, where the plaintiff was living, and coming in contact with the same business people, more or less, that she was coming in contact with."

This brings up a definite clear-cut question, raised by counsel for the defendant, namely: Was the letter sent by the defendant to Masters and returned to the plaintiff "published in the legal sense to two people," as the learned Judge says? In the concluding sentence I have quoted, emphasis is laid upon the fact that it was published to O'Donnell, a man living in the same town and coming in contact with the same business people as the plaintiff; and this, coupled with the fact that Masters swore that the letter had no influence on his mind, and that O'Donnell is silent as to how it affected him, is almost certain to have greatly influenced the jury in their assessment of damages. If this is misdirection—if as a matter of law what was done was not a publication to O'Donnell—the judgment cannot be supported. I am of opinion that it was not a misdirection. The letter was undoubtedly written on a privileged occasion; there was the qualified privilege which exists whenever the writer has an *interest* or duty, legal or moral, to make the communication complained of to the person to whom it was made, and when this person has also a correlative duty or interest. See the cases collected in Halsbury's Laws of England, vol. 18, p. 687; Odgers on Libel and Slander, 4th ed., pp. 272, 273; *Hamon* v. *Falle* (1879), 4 App. Cas. 247.

Here it was a case of joint interest; the defendant and Masters were upon the same promissory note in the Imperial Bank; both were liable; and the defendant was insisting upon a renewal, and claiming, I think with some justice, that he was entitled to a renewal. He had a perfect right to address Masters and to com-

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plain in a reasonable and temperate way, or even in a somewhat violent way, of the action of Masters or the plaintiff, and to remonstrate from his standpoint with a view to redress. It was a privileged occasion, as the defendant contends. I will refer, later on, to the question whether the defendant abused his privilege. The immediate question is, whether the communication of this letter to O'Donnell was a publication in law. Counsel for the defendant contends that, having an interest, and a communication to make concerning it, he was entitled to take all reasonable means of protecting himself; that it was reasonable and in the ordinary course of business to have O'Donnell copy the letter; that the use of these ordinary methods does not destroy the privilege; that it is impossible to carry on the affairs of modern mercantile business, including banking, without the intervention of stenographers, typewriters, clerks, and the like—and that the privilege of communication includes all things necessary to its transmission; and all this is certainly within the decision of *Edmondson* v. *Birch & Co. Limited and Horner*, [1907] 1 K.B. 371 (C.A.), in which *Boxsius* v. *Goblet Frères*, [1894] 1 Q.B. 842 (C.A.), and *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L.R. 4 Q.B. 262, were followed, and *Pullman* v. *Hill & Co.*, [1891] 1 Q.B. 524 (C.A.), distinguished. See also *Robinson* v. *Dun* (1897), 24 A.R. 287, in our own Courts.

It is all clear enough as a matter of law, but these principles, the necessary outcome of modern business methods and conditions, have no application to the letter written and transmitted by the defendant to Masters on the 8th April, 1915.

The fallacy is in assuming that the manager of the Bank of Hamilton, as such manager, was writing to a customer of the bank, as such customer, on a matter concerning that bank, and was writing as a matter of duty or business, and concerning a matter of mutual interest, and that in doing what he did he employed the ordinary and necessary methods of communication adopted by the bank. I cannot find any basis for this argument. There was no necessity to have the letter copied, and the right to employ stenographers, etc., is based on necessity: *Finden* v. *Westlake* (1829), Moo. & Malk. 461; *Williamson* v. *Freer*, L.R. 9 C.P. 393. "There must be a proper motive and need of communication," that is, communication to O'Donnell. This letter

had nothing whatever to do with the Bank of Hamilton, and the defendant might as well have employed any other acquaintance as O'Donnell, for in this matter O'Donnell acted in no sense as a servant or agent of the bank. The letter was solely and purely in reference to the defendant's own private affairs, arising out of transactions in another bank, and in which the Bank of Hamilton had no concern. I think the learned Judge was right, and that there was a publication to the two persons named; and "in all these cases" (of qualified privilege) "only those words are protected which are published to persons having a duty or interest in connection with the matter; any publication to others will be outside the privilege:" Odgers, p. 281.

It is also argued that it was for the learned Judge to direct the jury that, the letter being written on a privileged occasion, they could bring in a verdict for the plaintiff only in case they found that the defendant had abused the qualified privilege of the occasion, had been actuated by improper or indirect motives or ill-will, or what is summed up by the Courts as actual or express malice. It is certainly for the Judge to determine whether the letter was written upon a privileged occasion and to determine whether the language was capable of a defamatory meaning, a question already dealt with, in this action, by the First Divisional Court of the Appellate Division (30 D.L.R. 381, 36 O.L.R. 474). It was for the Judge to tell the jury that there was qualified privilege to publish the contents of the letter *to Masters*, and that, as to this publication, they must find evidence, extrinsic or intrinsic, of actual malice, before they could give a verdict for the plaintiff; and that, in determining the question of malice, all the correspondence, the conduct of the defendant, and his statement of defence, his answers upon examination, and his evidence at the trial, should be taken into consideration.

I think all this is fairly covered by the Judge's charge. I think it is quite impossible to conclude that the jury were not instructed in a way to enable them to understand clearly that, in the circumstances of this case, and as to this publication, they should find for the defendant unless they came to the conclusion upon the evidence that he was actuated by malice, as explained to them; and, to my mind, the meaning of "malice" was carefully pointed out.

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Mr. Odgers says, but without citing authority, at pp. 321, 322, that "if malice is proved the privilege attaching to the occasion, unless it is absolute, is lost," but the question of malice is still for the jury. My learned brother has been more diligent, and has been good enough to refer me to *Fryer* v. *Kinnersley* (1863), 15 C.B.N.S. 422; *Tuson* v. *Evans* (1840), 12 A. & E. 733; and *Robertson* v. *McDougall* (1828), 4 Bing. 670. I do not find it necessary to dwell upon the fact that no privilege of any kind attached to the publication of any of the letters to O'Donnell (Odgers, p. 281), as this Court cannot apportion the damages or reduce them—*Watt* v. *Watt*, [1905] A.C. 115—except by consent.

It is not to be expected that everything will be said that might be fittingly referred to, or that every sentence in the instruction to the jury will be beyond the pale of plausible criticism. In *Rex* v. *Duckworth* (1916), 37 O.L.R. 197, 247, 31 D.L.R. 570, I said, and I venture to repeat, that "it has not yet happened that any Judge, even the most distinguished and experienced in the Empire, has always succeeded in so framing every sentence of his charge as to preclude more or less plausible *ex post facto* suggestions of improvement; and, as it is not likely to happen in the future, it is well to keep actual and probable conditions and limitations clearly in mind."

When all is said, the substantial question to be considered is, "Has miscarriage of justice been occasioned by anything said or omitted?" I am satisfied that no substantial wrong or injustice has been occasioned; and, if not, we are not at liberty to interfere upon this ground. "A new trial *shall not be granted* on the ground of misdirection . . . unless some substantial wrong or miscarriage has been thereby occasioned:" Judicature Act, R.S.O. 1914, ch. 56, sec. 28; *Winnipeg Electric R.W. Co.* v. *Wald* (1909), 41 S.C.R. 431; *McGraw* v. *Toronto R.W. Co.* (1908), 18 O.L.R. 154; *Wood* v. *McPherson* (1888), 17 O.R. 163.

There was a fair trial, and ample evidence, both intrinsic and extrinsic, to go to the jury in support of express malice. There is no reason to assume that the jury were misled, and they were justified in finding the plaintiff entitled to damages; but the amount is another question.

The amount to be awarded for damages in a libel action is

peculiarly, and *primâ facie* solely, a question for the jury I am strongly of opinion that the sum awarded is greatly in excess of what, in the circumstances of this case, it should have been; but this is not, as I have his approval in stating, by any means the view entertained by the Judge presiding at the hearing of the appeal, my very experienced and learned brother Riddell. In view of the conclusion I feel compelled to come to and the judgment I shall give, it is unnecessary to state in detail why I think the damages are too large. It is enough to say that the authorities are quite clear and uniform that the finding of the jury, where there is no practically certain measure of damages, is not to be disturbed unless there has been misdirection calculated to mislead the jury, improper rejection or admission of evidence, reason to believe that damages were assessed on a wrong principle, or that the jury must have acted perversely, or the damages are so large that no jury could reasonably have given them, or something of that kind: *Praed* v. *Graham* (1889), 24 Q.B.D. 53; *McCarthy* v. *Maguire*, [1899] 2 I.R. 802; *Johnston* v. *Great Western R.W. Co.*, [1904] 2 K.B. 250, where many of the cases are reviewed and distinguished.

I cannot substitute my opinion for the action of the jury in a fair trial. The defendant was ill, there was serious provocation, he was dealing with his business interests, the plaintiff's letters to him were quite unnecessarily harsh, aggressive, and dictatorial, and very provoking; the defendant filed a plea of regret and apology of a kind—he acknowledged his wrong upon examination for discovery and at the trial, and admitted the good character and business ability of the plaintiff in a way; he is a man of little means and without occupation or ability to make money now; he wrote apologising to the plaintiff after the first trial, and made an entirely inadequate offer of compensation, and the plaintiff's reply was not what it should have been; but all these circumstances were before the jury, and I cannot say that they were wrong, and that my opinion is right, as to what would be reasonable damages. When all is said, it falls very far short of a justification or even a reasonable excuse for the letter the defendant wrote about an admittedly and unquestionably respectable young woman, whose only fault, if it is a fault, was that she was

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perhaps over-zealous in the interest of her absent employer, and may have expressed her demands upon the defendant a little too emphatically.

The appeal should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—I agree in the result.

Rose, J.

ROSE, J.:—The defendant was the manager of a branch of the Bank of Hamilton, of which branch Mr. W. B. Masters was a customer. In addition to the business dealings which he had with Mr. Masters in his (the defendant's) capacity of banker, he had private dealings which resulted in his being indebted to Mr. Masters in the amount of two promissory notes, upon which he was making, or was expected to make, payments from time to time.

Mr. Masters, taking ill and going away, appointed the plaintiff to be his attorney to look after his affairs in his absence. There were various interviews and a considerable amount of correspondence between the plaintiff, as such attorney, and the defendant, the interviews and correspondence relating both to Mr. Masters' business with the bank and to his business with the defendant personally. The plaintiff and the defendant did not get on well together, and the letters that passed between them contain a good deal of abusive language.

The promissory notes given by the defendant to Mr. Masters fell due, and the defendant, ignoring the plaintiff, wrote to Mr. Masters a letter enclosing renewal notes. Mr. Masters sent these renewal notes to the plaintiff, who, on the 5th April, 1915, wrote to the defendant remonstrating with him for attempting to deal with Mr. Masters directly, and stating what renewals of the two notes she was prepared to accept.

At this time, the defendant was ill and confined to his house and in considerable pain. The plaintiff's letter was vigorously worded. It seems to have annoyed the defendant, who did not like being "pestered about (his) private business at that particular time." He, accordingly, drafted in pencil a letter to Mr. Masters, enclosing the plaintiff's letter of the 5th April, and using the language that is complained of as libellous. Later, on the same day, Mr. O'Donnell, the accountant and acting manager

of the defendant's branch of the bank, called upon the defendant, who gave him the draft letter and asked him to make a typewritten copy, sign it in the defendant's name, and send it to Mr. Masters. In this the defendant was apparently following a practice that he had adopted in connection with other matters on other occasions during his illness. Mr. O'Donnell followed the defendant's instructions. The letter is set out in full on p. 382 of the report of the judgment upon the appeal from the judgment at the first trial of the case: 30 D.L.R. 381, 36 O.L.R. 474.

The case went down for a second trial pursuant to the order of the First Divisional Court. At the second trial, the defendant, having previously given notice of motion, moved for leave to amend so as to claim privilege, and the amendment was allowed. The trial resulted in a verdict and judgment in favour of the plaintiff for $5,000. This appeal is from that judgment. It is contended that the damages are excessive and that the learned Judge erred in his charge to the jury and in his dealing with the plea of privilege.

The only publication of the libel was to Mr. Masters, and to Mr. O'Donnell if, upon the facts above stated, there was publication to him.

Dealing first with the question as to publication to O'Donnell: it is argued, on the authority of *Edmondson* v. *Birch & Co. Limited and Horner*, [1907] 1 K.B. 371, that, the letter having been written on a privileged occasion, the publication to O'Donnell is within the privilege. With this I am unable to agree. The letter in question in the *Edmondson* case was written on the business of the defendant company. It was dictated by the managing-director to a clerk, transcribed by the clerk, copied in a letter-book, and sent out, all in the usual and ordinary course of the business of the company, and it was sworn that the course followed was practically necessary as a matter of business. The trial Judge, Lawrence, J., held that the case of *Pullman* v. *Hill & Co.*, [1891] 1 Q.B. 524, compelled him to rule that there had been publication to the defendants' clerks, and that this publication was not upon a privileged occasion; and he left the case to the jury, who found a verdict for the plaintiff, upon which judgment was entered. The Court of Appeal reversed that judgment, upon the ground that a person writing upon a privileged occasion is

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entitled to take reasonable means for the purpose of availing himself of the use of that occasion, which means may include the introduction of third persons, where such introduction is reasonable and in the usual and ordinary course of business. As Cozens-Hardy, L.J., put it, to hold otherwise would practically destroy the protection of privilege in the case of all companies and large mercantile firms, because, as a matter of business, it is impossible that a business document can be written and pass through the hands of one partner or person only.

The *ratio decidendi* of the *Edmondson* case does not seem to me to apply to the case in hand. The letter of the 8th April, 1915, was not written upon the bank's business; it was not in the usual course of *any* business that it was typewritten by O'Donnell. Moreover, I do not think that, giving the greatest possible effect to the judgment in the *Edmondson* case, the fact that the defendant was not, at the time, able to use a pen, can make any difference. There does not seem to have been any real necessity for writing the letter in ink, or any reason why the original pencilled letter would not answer the defendant's purpose.

It is possible that if *Edmondson* v. *Birch & Co. Limited and Horner* had been decided before *Puterbaugh* v. *Gold Medal Furniture Manufacturing Co.*, 7 O.L.R. 582, the judgment in the last-mentioned case might have been different. But that is by no means certain. See the judgment of Osler, J.A., at p. 587: "Typewriters, human and mechanical, may now perhaps be said to be reasonably necessary and useful for ordinary business purposes, but how in such a case as this can it be said that it was reasonably necessary to employ the typewriter in order to make a defamatory communication unconnected with the ordinary business of the firm?"

In my opinion, then, even if the occasion on which the defendant wrote his pencilled letter was privileged, the handing of the letter to O'Donnell was a publication which is not protected. See *Moran* v. *O'Regan* (1907), 38 N.B.R. 189.

Then was the occasion one of qualified privilege? I think it was. If two persons have business together, and one of them sends his agent to the other upon that business, and the one to whom the agent is sent, thinking that he has cause to complain of the agent's conduct, writes to the principal making complaint,

it seems to me that he is writing upon a privileged occasion. This is practically the state of affairs that in *Toogood* v. *Spyring* (1834), 1 C.M. & R. 181, was treated as supporting the claim of privilege.

If the occasion was one of qualified privilege, and if the communication was privileged, it seems to follow that the trial Judge ought to have so ruled, and, in so far as concerns the publication to Masters, ought to have directed the jury that there could be no recovery unless they found express malice. It is argued that, taken as a whole and fairly read, his charge is such a direction. I am not clear that the charge can be so construed. It is true that in several places language is used that would indicate to the jury that they were not to bring in a verdict for the plaintiff unless they found malice; and from this, if it stood alone, one might fairly infer that there had been a ruling that the occasion was one of qualified privilege; but the effect of this language is rather displaced by the statements towards the end of the charge that "if the plaintiff has been libelled she is entitled to a verdict" and that if the jury "come to the conclusion that the defendant libelled the plaintiff by writing, through ill-feeling or ill-temper, an unwarranted letter and publishing it to others," they will consider this in assessing the damages. It seems to me that, the question of malice having been discussed in connection both with the right to recover and with the *quantum* of the damages, and there having been no categorical statement to them that there could be no recovery unless they found express malice, they may have been left with the impression that they might bring in a verdict for the plaintiff, even if they did not find malice, but that that verdict would be for a larger amount if there was malice than if there was none. However, I do not think that this question as to the form of the charge is of importance. It does not necessarily follow that a communication is privileged because it is made on an occasion of qualified privilege. "If the language has been published in writing, and appears upon the face of the libel to be clearly in excess of the occasion, the communication will not be privileged:" Folkard on Slander and Libel, 7th ed. (1908), p. 194. The expressions "slut" and "carrion" are as clearly unnecessary and in excess of the occasion as was the expression "raving madman" in *Fry* v.

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Kinnersley, 15 C.B.N.S. 422. In that case it was held that, because of the excess, the letter did not fall within the rule as to privileged communications, and that the plaintiff was entitled to a verdict, although the jury had expressly negatived the existence of malice. So, in the present case, I think that there was no right on the part of the defendant to have the jury directed that they could not bring in a verdict against the defendant unless they found actual malice. Therefore, whether or not the charge is to be construed as Mr. Nesbitt contends it ought to be construed, I think the objection to it fails. See also Newell on Slander and Libel, 3rd ed. (1914), p. 415.

The only question remaining to be considered is the question whether the damages are so excessive as to warrant the Court in directing a new trial. I think that, in view of the order of the First Divisional Court declaring that the words complained of do not impute unchastity to the plaintiff, I should have awarded a smaller sum than the jury have awarded; but, while the damages are large, I do not think that it is at all clear that the jury refused to be governed by that order, or otherwise were influenced by views and considerations to which they should not have given effect. An action of defamation is one in which the question as to the damages is peculiarly one for the jury. This jury had before them evidence introduced by the defendant as to his inability to pay any large amount, the admissibility of which evidence was, I think, open to doubt. They were charged by the trial Judge as to the damages in a way that was at least fair to the defendant. I do not think it has been demonstrated that they failed to consider the evidence or the charge, and I do not think that a case is made out for interference with the verdict on the ground of excess.

In my opinion, the appeal fails and ought to be dismissed.

Ferguson, J.A.

FERGUSON, J.A.:—Appeal by the defendant from a verdict of $5,000 in a libel action, on a retrial thereof before Sutherland, J., and a jury, pursuant to a direction of the First Divisional Court of the Appellate Division, reported in 30 D.L.R. 381, 36 O.L.R. 474, where the circumstances leading up to the action are fully set out, and therefore need not be here repeated.

At the trial of the action the plaintiff put in and read to the

jury certain correspondence between the plaintiff and the defendant and between the defendant and Masters, commencing with a letter of the 14th January, 1915, and marked exhibits 1 to 11 inclusive. Exhibits 2, 4, and 10 contain the alleged libels; and the other letters were put in by the plaintiff to shew the circumstances surrounding the publication of the alleged libels, and as evidence of malice; the defendant may also refer to the correspondence to shew provocation and that the alleged libels or some one or more of them were written on privileged occasions.

Statements in two letters, Stuart to Masters, dated the 6th and the 8th April, 1915 (exhibits 4 and 2), and in a letter Stuart to the plaintiff dated the 8th April (exhibit 10), form the subject-matter of the plaintiff's claim.

The letter, exhibit 4, dated the 6th April, from the defendant to Masters, is apparently in the defendant's handwriting, and no attempt was made to shew that it was published except to Masters, and a perusal thereof shews it to be with reference to business matters in which the sender and receiver were interested, and a privileged communication, on which the plaintiff could not succeed unless the jury found that it was written for an improper purpose or exceeded the privilege. The letter to the plaintiff of the 8th April was not actionable because not directed or published to any one other than the plaintiff, unless the typing of it by O'Donnell, accountant of a branch of the Bank of Hamilton, and also typewriter for the bank and the defendant (in the claim it is pleaded that he was the defendant's stenographer), amounted in law to publication; to arrive at a conclusion on this point and to ascertain whether or not the typing of the letter by O'Donnell comes within the exception founded on the principle of business necessity stated in the decision of *Edmondson* v. *Birch & Co. Limited and Horner*, [1907] 1 K.B. 371, the pleadings and all the correspondence and the circumstances adduced in evidence should be considered to see whether or not the letter refers solely to the defendant's personal business or to both the defendant's business and the business of the Bank of Hamilton, and further to ascertain whether or not the employing of O'Donnell for the purpose of typing such letters was the usual and ordinary course of the business of the defendant, or of the Bank of Hamilton, and was a business necessity.

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A perusal of the letter itself shews, I think, that it was a letter written in connection with both the bank's business and the defendant's business. A perusal of the evidence also shews that the typing of these letters, or letters of a similar nature, by O'Donnell, was, at least during the illness of the defendant, the usual and ordinary course of business in connection with both the bank's and the defendant's correspondence, and the proving of the system is evidence that such course was a business necessity. The evidence further discloses that at the time this letter was written the defendant was so ill that he was confined to his bed and unable to write a letter with pen and ink, and this is evidence of an actual necessity.

For these reasons, I am of the opinion that the typing of that letter by O'Donnell comes within the exception and the principle of the exception stated in the *Edmondson* case (*supra*).

The letter of the 8th April from the defendant to Masters (exhibit 2) was also, in my opinion, when read with the prior correspondence, a communication with reference to the transaction of the business of Masters by the plaintiff, not only with the defendant personally, but with the defendant as manager of the Bank of Hamilton. The expressed purpose of the letter was to send to Masters a *specimen* of the plaintiff's letters, no doubt in the hope that this would bring about the curbing of the plaintiff or her elimination from these personal and banking transactions. Therefore, for the reasons given in reference to the prior letter, I am of the opinion that the typing of this letter by O'Donnell also comes within the exception and principle stated in the *Edmondson* case (*supra*). In any event, the plaintiff does not put forward publication to any one other than to Masters as a ground of her claim, and therefore we are not called upon to deal with publication to O'Donnell. See paragraph 2 of the claim. If I be right, then there was no legal publication of the letter from the defendant to the plaintiff dated the 8th April (exhibit 10), and her cause of action thereon fails, and as to exhibits 2 and 4 there was no legal publication other than to Masters; in reference to publication to Masters, it was the duty of the trial Judge to decide whether these two letters or either of them were written under qualified privilege; and, if he concluded that they were, he should have left to the jury the question, "Were the

letters written with a wrongful intent or an improper motive—in short, were they written with express malice?" See Newell on Slander and Libel, 3rd ed. (1914), p. 578; Odgers, 5th ed. (1911), pp. 305, 355.

It was argued before us that the letter of the 8th April from the defendant to Masters, in which he uses the words "slut," "carrion," and "dog," bore on its face evidence of excess of privilege and actual malice, and that the learned trial Judge, for this reason, was not called upon to leave to the jury, in reference to that letter, the question of actual malice.

From a perusal of the authorities referred to in Odgers, pp. 305, 306, 355, and particularly *Cooke* v. *Wildes* (1855), 5 E. & B. 328, overruling *Tuson* v. *Evans*, 12 A. & E. 733, I think that that proposition of law is not tenable, and in any event it is not applicable to the other letter to Masters, which forms part of the subject-matter of the plaintiff's action.

As I read the charge, the learned trial Judge did not think it was his duty to make a finding of privilege or no privilege in reference to either letter, or, having found qualified privilege, to instruct the jury that they could not find for the plaintiff unless they concluded that the letters were written with a purpose not permitted by the occasion of privilege. However, it is plain that he failed to make any express finding of privilege or no privilege or to instruct the jury that they could not find for the plaintiff unless they found actual malice; and, therefore, if these letters or either of them were written on an occasion of qualified privilege, he failed to put the issues before the jury in a way to assure their due appreciation of the issues they were to decide or so as to enable them to pass upon and value the evidence in respect of those issues; to that extent the defendant has not had the benefit of his plea of privilege: *Rex* v. *Finch* (1916), 12 Cr. App. R. 77.

It may be argued that the learned trial Judge fully instructed the jury as to the law of qualified privilege, and left it to them to decide whether or not the letters or any of them were in law written under circumstances of privilege. If that view can be taken, then it is plain that the instructions were inadequate in that, among other things, they failed in any way to distinguish between the letters complained of, or to whom they were ad-

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dressed, or the purposes for which they were written, and further failed to instruct the jury in reference to the difference between ill-will, anger, and pique, as affecting the question of damages, and actual wrongdoing or wrongful purpose as affecting the question of privilege. This appears to me to be unjust to the defendant.

Again, in leaving these questions to the jury, the learned trial Judge seems to have in some respects improperly stated the law in reference to qualified privilege and actual malice and to have failed to distinguish clearly malice presumed in law from express or actual malice. See p. 76, lines 2 to 23, where he says: "Here I tell you as a matter of law there is no absolute privilege, and I tell you as a matter of law, also, that, if these words can be construed by you—reasonably looked at—to refer to the business, occupation, or calling of the *plaintiff*, there is not even qualified privilege. If you should consider that they were written as a banker to a customer with the object of pointing out to him that the plaintiff was improperly dealing with his business in his absence and prejudicing it—that is to say, if the defendant were doing it in the discharge of a duty—then that would be a case of qualified privilege. In that event it would be your duty to see whether he used words which would not be warranted under those circumstances and were not such as were necessary in the discharge of a duty, but were extreme and coarse and such as should not have been used. If you conclude from the evidence or the documents that the defendant wrote this letter in anger or pique or from some other improper impulse and stated what was not true or made reckless and careless statements, then the jury is entitled to find, if they see fit—they are the judges of all the facts—that the occasion did not warrant him in using that language and that he used it from some ulterior or indirect motive."

Now, if we take it for granted that the charge, read as a whole, was a direction to the jury that, in the opinion of the learned trial Judge, the letters complained of were written under qualified privilege, and that it was their duty to find one way or the other on the question of express malice (which, in my opinion, cannot be done), yet the statement "If these words can be construed by you . . . to refer to the business, occupation, or calling of the *plaintiff*, there is not even qualified privilege," is

not, I think, the law; for, in my opinion, it matters nothing whose business the letter referred to, so long as it was written *bonâ fide* on business in which the sender and receiver were interested, and if the jury accepted and acted on that statement it was at once relieved of the necessity of considering the question of express malice arising on the plea of qualified privilege.

Having made the foregoing statement of the law as being proper where the words complained of refer to the *plaintiff's* business, the learned trial Judge proceeds to instruct the jury in the law of qualified privilege where the words are written in reference to the *defendant's* business, and he says: "If the defendant were doing it in the discharge of a duty, then that would be a case of qualified privilege."

To my mind, that too is stating the law too narrowly.

See Newell on Slander and Libel, 3rd ed. (1914), p. 477, where the law is stated as follows: "It extends to all communications made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation."

The learned trial Judge further instructed the jury that, if the defendant's words were *extreme and coarse* or were written in *anger* or in *pique*, they might find that he used the language from some improper motive.

At p. 83 of his charge, he says: "If you find he was moved by anger or pique to write these words, that would be malice in the legal sense."

At p. 92: "Did he write that letter in an honest discharge of his duty, or was it because he was annoyed and angry?"

At p. 100: "If the plaintiff has been libelled, she is entitled to a verdict at your hands."

Page 101: "If you come to the conclusion that the defendant libelled the plaintiff by writing, through ill-feeling or ill-temper, an unwarranted letter and publishing it to others, you will then deal with the question of damages fairly and reasonably."

The foregoing quotations in reference to anger, coarseness, and pique, may have been proper direction to assist the jury in arriving at the quantum of damages, but they seem to me to have been

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improper in directing the jury whether or not the letters were written from an improper motive or for an improper purpose or with actual malice necessary in law to take away privilege, as distinguished from letters written *bonâ fide* but at the same time written in anger, and that the learned trial Judge, in this regard, failing so to distinguish, failed in a duty that he owed to the defendant.

I am of the opinion that these instructions did not give the defendant the benefit of having the issue of qualified privilege determined according to law; but, on the contrary, that all these instructions in reference to malice, without distinguishing between malice as affecting the damages and malice as affecting privilege, and these references to anger, pique, improper motive, etc., in the absence of such distinction, had the result of befogging the real issues and of inflaming the minds of the jury and of aggravating the damages.

As I read the authorities—see Odgers, 4th ed., p. 265; *Shipley* v. *Todhunter* (1836), 7 C. & P. 680; *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q.B. 156—the fact that the letters were written in anger is not, in itself, sufficient to justify a finding of express malice or improper motive. It is not for an excessive, in the sense of an angry or abusive, statement, but for a statement in reference to something outside the privileged occasion, that the protection is taken away. The question of malice or no malice is for the jury: *Cooke* v. *Wildes*, 5 E. & B. at p. 340.

Reverting again to the correspondence prior in date to the letters complained of, a perusal of exhibits 7 and 8, which were read to the jury, shews that therein the defendant made certain charges against the plaintiff which may well have been taken into consideration by the jury, not only on the question of actual malice or malice in law, but as in themselves affording a cause of action on grounds outside the alleged libels, or for assessing damages to the plaintiff against the defendant; and I am of the opinion that it was the duty of the learned trial Judge to have warned the jury against doing so: *Anderson* v. *Calvert* (1908), 24 Times L.R. 399.

Another circumstance in the charge to the jury which, in my opinion, may have prejudiced the minds of the jury against the defendant, was the reference made by the learned trial Judge to

certain pleas set up by the defendant. In denying publication the defendant pleaded that Masters did not receive the letter of the 8th April (exhibit 2), but that it was received and opened by the plaintiff herself. The construction, purpose, and meaning of this plea were left to the jury, it being suggested that the defendant, continuing to pursue the plaintiff, had by this plea maliciously accused the plaintiff of having committed a wrongful, dishonourable, and even criminal act.

As I read the plea, it was not put upon the record for any such purpose or with any such meaning, but was a plea that the letter had not reached the hands of Masters, and therefore that there was not in law a publication to him, and it was not a plea or not intended as a plea that the plaintiff had exceeded her duty as the general agent of Masters and wrongfully opened his letters, and therein committed a wrongful, dishonourable, and criminal act; and, in my opinion, the jury should have been so told.

Again paragraphs 12 (*a*) and 16, pleading privilege and lack of special damage, were read to the jury and not explained by the Judge. The reading of these, unexplained, also probably tended to prejudice the jury and to increase the damages.

A perusal of the letter in which are used the words "slut," "carrion," and "dog," is likely to anger and annoy the reader and to lead him to conclude that the writer was a pompous ass or, as has been said, a "cad." Before us the plaintiff's counsel argued and put forward the theory that the defendant was a "cad" writing for a wrongful purpose; while counsel for the defendant argued and put forward the theory or excuse of temporary irresponsibility on the part of the defendant, alleging that at the time of writing these letters the defendant was mentally unbalanced, that he was so ill and under such suffering mentally and physically that he was not then able to exercise proper judgment or to restrain his impulses and keep within bounds when he was, or thought he was, provoked, or, as he puts it, was "pestered," by the plaintiff.

With that "slut," "dog," "carrion" letter in the hands of skilful, experienced, and forceful counsel, acting as here against a bank manager, and there being no principle to guide or restrain the jury in fixing the quantum of damage, something more than

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passive resistance or colourless comment on the part of the trial Judge was required to keep in the minds of the jury the facts, circumstances, and issues put forward by the defence, or to keep the quantum of damage within bounds.

I cannot help but think that the learned trial Judge did not shake himself free of the first impressions created by a reading of the letter, and consequently did not put before the jury either the defendant's excuses and the facts, circumstances, and evidence in support thereof, or his defence of privilege, in such a manner as to ensure the due appreciation by the jury of the real issues raised by the defence and the relevancy of the circumstances and evidence adduced and put forward by the defence in reference thereto, and in reference to the quantum of damage: *Rex* v. *Finch*, 12 Cr. App. R. 77.

Having arrived at these conclusions, I am obliged to consider whether or not a new trial should be granted, in face of the provision contained in the Judicature Act, R.S.O. 1914, ch. 56, sec. 28, that a new trial shall not be granted on the ground of misdirection, etc., unless some substantial wrong has been thereby occasioned; in arriving at an opinion on this question, I think I am entitled to consider the quantum of damage.

The plaintiff suffered no actual damage—that was conceded upon the argument. Mr. Masters' evidence, and the fact that the plaintiff continued in the employ of Masters, demonstrate that these statements did not prejudice Masters' mind. The letters passed into the plaintiff's possession and remained there and would not have been published otherwise than to Masters, except by the voluntary act of the plaintiff. That being so, the question arises, Were the punitive damages in all the circumstances excessive? Does the punishment fit the crime?

It was adduced in evidence that the defendant is well over sixty years of age, and without financial resource, except that he has been by the bank retired on a pension of about $150 a month. In these circumstances, a verdict of $5,000 and costs means that the defendant is for the rest of his life burdened with a debt that he cannot hope to liquidate, largely because, in a state of ill-health, when he was not himself, mentally or physically, in a state of anger and pique, and under provocation, in writing a business letter under circumstances of qualified privi-

lege, he used insulting and abusive language in reference to which no innuendo is alleged, and which he retracted and apologised for, and which did not actually damage the person abused. That seems to me to be an improper result. I cannot help but think that, had these matters been presented to the minds of the jury in such a way as to ensure their due appreciation thereof, their verdict would not have been so large. Now, unless I am able to say (which I am not) that the misdirections or nondirections which I have endeavoured to point to have probably not substantially affected the result, then a new trial should be granted.

I am not unmindful of the other objections to granting a new trial: see *Gray* v. *Wabash R.R. Co.*, 28 D.L.R. 244, 35 O.L.R. 510, 517; but, in view of the declarations of the Divisional Court after the first trial, I do not look on this last trial as altogether a retrial of the same issues, nor do I think the defendant has had a decision on the question: Was the letter written with an improper motive? Were the words complained of written, as is alleged, with the object of holding the plaintiff up to hatred, ridicule, and contempt, or were they written in an angry attempt to impress Masters with how objectionable it was to the defendant to continue to conduct business with Masters through the plaintiff? Nor do I think the defendant has yet had the question of the quantum of damages put to the jury in a way to ensure their appreciation of the basis on which the same are to be assessed.

For these reasons, I am of opinion that the appeal should be allowed and a new trial granted.

Appeal dismissed; FERGUSON, J.A., *dissenting.*

REX v. BUCK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and McCarthy, JJ. December 23, 1916.

1. INDICTMENT (§ II E—25)—DESCRIBING THE OFFENCE—VAGUENESS OF CHARGE—ORDER FOR PARTICULARS.

A charge against a company director under Cr. Code sec. 414 for concurring in the making of a false statement with intent to induce the public to become shareholders will not be quashed for failure to set out the alleged false statement; but such details may properly be made the subject of an order for particulars under Cr. Code secs. 859 and 860. (*Per* HARVEY, C.J., and BECK, J., affirming the conviction on an equal division.)

2. EXTRADITION (§ I—6)—IMMUNITY FROM PROSECUTION FOR DIFFERENT OFFENCE.

It is usual to describe the offence in an extradition requisition, and in the order for surrender, in the generic words of the extradition treaty, but the trial Court hearing the charge in the demanding country after the surrender may look at the evidence upon which the surrender was

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ordered for the purpose of deciding the claim of the accused that the offence for which he is being tried is a different one from that on which he was surrendered and for which alone he was subject to trial under the treaty and under the Extradition Act, R.S.C. 1906, ch. 155, sec. 32. The onus of proof on such a claim is upon the accused.

[*R.* v. *McNamara*, 22 Can. Cr. Cas. 351, 16 D.L.R. 356, 19 B.C.R. 175, and *Ex parte Terraz*, 4 Ex. D. 63, applied; see also *R.* v. *Kelly* (No. 3), 34 D.L.R. 311; 27 Can. Cr. Cas. 282, 54 Can. S.C.R. 220.]

Statement. APPEAL by defendant by way of case reserved on certain questions and a motion for leave to appeal upon other questions as to which Judge Winter of the District Court, Calgary, had refused to reserve a case.

The appeal and motion stood dismissed, the Court being equally divided on the validity of the conviction, Harvey, C.J., and Beck, J., being to affirm the conviction, and Stuart and McCarthy, JJ., to quash it.

A. A. McGillivray, for appellant.

James Short, K.C., for the Crown.

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

Beck, J. BECK, J.:—A motion is before us by way partly of a reserved case and partly by way of an appeal from a refusal to reserve certain questions.

The prisoner who had been extradited from the United States of America was charged before His Honour Judge Winter on three counts: One relating to an offence on the 17th of May was withdrawn. There remained two charges, as follows:—

(1) That he at Calgary on or about the 7th day of May, 1914, being a director and manager of a body corporate, to wit: Black Diamond Oil Fields Limited, did concur in making, circulating or publishing a statement, which statement was known to him to be false in a material particular with intent to induce persons to become shareholders in such body corporate.

(2) A count in the same words except stating the offence to have occurred at near the city of Calgary. These charges were laid under sec. 414 of the Criminal Code.

The learned trial Judge gave oral reasons for judgment. From these it is quite clear that he found the accused guilty on the following findings of fact: that one Cheeley, a writer for the Calgary *Albertan* newspaper, was taken by the accused from Calgary to the company's oil well, some twenty-five or thirty miles distant, on the 8th May; that the accused shewed him about the well and made statements which were false, intending and expecting that Cheeley

would publish them in the *Albertan;* that Cheeley did publish in the issue of the *Albertan* of the 9th May a false statement made to him on that occasion by the accused; that the accused had "salted the well," that is, he had poured oil into it; that he had exhibited the well with this oil in it to Cheeley and had satisfied him that oil had been struck. The learned Judge said:—

> "I find that between the 7th and 9th May, 1914, George E. Buck was guilty of the charge as laid, in that he did at the city of Calgary concur in publishing a statement, which statement was known to him to be false in a material particular with intent to induce persons to become shareholders of the Black Diamond Oil Fields Limited."

He says, he tried the charges as one. There is no difference between them except the statement of the place; one at Calgary and one near Calgary. I think the facts justify a conviction under both or either of the charges or counts as I think they were and must be treated.

(1) The first contention raised is that the charges as drawn do not disclose an offence.

A motion to quash on this ground was made at the opening of the trial and before plea. It was refused. It was rightly refused. No application was made for "details." Had it been, it ought to have been granted: *Rex* v. *Trainor*, 27 Can. Cr. Cas. 232.

(2) The second contention and the one which assumed the largest proportions on the argument was that the prisoner was not extradited for the particular offences or any of them with which he was charged.

The Extradition Treaty with the United States of America contains among the crimes listed:—

> "9. Fraud by a bailee, banker, agent, factor, trustee, or by a director or member or officer of any company which fraud is made criminal by the laws of both countries."

The prisoner had on the 10th November, 1915, been charged before a police magistrate at Calgary with conspiring at Calgary on the 6th May, 1914, with one Beatty and others by deceit or falsehood or other fraudulent means to defraud the public contrary to sec. 444 of the Criminal Code. He was also charged that he at the same place and on the same date conspired with Beatty and others by deceit or falsehood or other fraudulent means to

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affect the public market price of shares in a body corporate, to wit: Black Diamond Oil Fields Limited, contrary to section 444 of the Criminal Code, and further with the offence of which he has now been convicted.

The evidence before the magistrate appears to have been commenced as if confined to one or both charges of conspiracy, and in the course of the proceedings, to have been accepted as applicable to the three charges, for ultimately the prisoner was committed for trial on all three charges. The prisoner was admitted to bail and afterwards fled from Canada to the United States of America. Proceedings to extradite him were undertaken. It then came to the attention of the Crown officers that the prisoner could not be extradited on the conspiracy charge. The evidence established by the Crown to the Extradition Magistrate was that already taken before the Police Magistrate.

On the 3rd of July, 1916, the Secretary of State for the United States of America, by instrument reciting the request for the surrender of the prisoner "charged with the crime of fraud by a director and official of a company committed within the jurisdiction of the British Government," directed his surrender "to be tried for the crime of which he is so accused" and he was accordingly surrendered.

On his arraignment and before plea, Mr. McGillivray moved to quash the charge on the ground already stated that the prisoner had not been extradited upon either of the charges to which he was asked to plead. The motion was refused and the trial proceeded.

It seems quite clear that in extradition proceedings the warrant of the Extradition Magistrate for apprehension may describe the offence in the generic words of the Extradition Treaty (*Ex p. Terraz*, 4 Ex.D. 63, 48 L.J. Ex. 214, 39 L.T. 502, 14 Cox C.C. 153; *Ex p. Piot*, 15 Cox C.C. 208), and the practice seems to be to so describe it in the requisition and in the order for surrender.

On the other hand, the accused is entitled when brought before the Extradition Magistrate to have the offence particularized so as fairly to apprise him of the particular offence with which he is charged and to enable the magistrate to judge whether or not it is in truth an offence covered by the treaty (4 Cyc., tit. Extradition, p. 66.) The trial Court has nothing to do with this, except where the accused raises the point that the charge, upon

which he is sought to be tried, is for an offence committed prior to his surrender, other than that in respect of which he was surrendered (Extradition Act, 32).

The burden of establishing such a contention is on the accused: *R.* v. *McNamara*, 22 Can. Cr. Cas. 351, 16 D.L.R. 356, 19 B.C.R. 175.

The prisoner's counsel in the present case urges, with a great sense of personal conviction, that the evidence before the Extradition Magistrate shews that his contention is right. I have no doubt that he is entitled to ask us to look at the evidence inasmuch as neither the requisition nor the order for surrender particularize the offence nor does there appear to be any information or warrant among the papers, which were before the Extradition Magistrate, which does so.

As has been already stated, the evidence before the Extradition Magistrate was that taken by the police magistrate at Calgary.

What is urged by the prisoner's counsel is this: The evidence shews that one Tryon, a newswriter on the Calgary *News-Telegram*, went down to the oil well, was given information by the prisoner with the intention that he should publish it, but that what he did publish as a result of the prisoner's statements turned out to be unobjectionable and, as a matter of fact, His Honour Judge Winter acquitted of the charge, so far as it was attempted to be supported by evidence relating to the Tryon article; and that it was only by reason of the evidence respecting the Tryon article that the surrender of the prisoner was ordered.

There is, however, the following evidence given by one Fletcher:—

"Q. Was there a big strike of oil there? A. According to the *Albertan*.

"Q. The *Albertan* is a pretty reliable journal? A. They are when they get reliable information.

"Q. Were you present when the *Albertan* ever got any information? A. No, sir.

"Q. You don't know anything about it? A. I know Mr. Buck told me he put (it) over them—that is all I know—and could not over the *News-Telegram*.

"Q. When did Mr. Buck tell you that? A. In Medicine Hat on the 12th day of May.

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"Q. And where were you when he told you? A. I don't know which street.

"Q. What day was the big strike? A. The 7th of May was the supposed strike."

This was in cross-examination. In examination-in-chief, Fletcher had said this (referring to the conversation at Medicine Hat on the 12th May):—

"He said Tryon of the *News-Telegram* was taken out but they did not take the matter seriously, and they had to get the *Albertan*, and he had got a good write up from them, but they had not obtained the monetary results they expected."

"Q. From the salting? A. From putting the oil in."

This evidence would seem to make it highly probable that it was not upon the evidence relating to the Tryon article in the *News-Telegram* but, perhaps only upon that relating to the Cheeley article in the *Albertan* that the surrender was ordered. If it were upon the evidence relating to both, the prisoner's contention would not be sustained, but it seems to me that there is the highest probability that it was at all events, in fact, at least in part upon the evidence relating to the Cheeley article that the surrender was directed. The prisoner could properly be convicted on evidence relating to that article, as in fact was what happened, without contravention of sec. 32 of the Extradition Act.

Much was made of the fact that the Cheeley article was not before either the Police Magistrate or the Extradition Magistrate. It seems to me that this is a matter of no consequence. Both enquiries no doubt were, as they ought to have been, conducted on the principle that the magistrate ought to commit for trial in the one case, and to commit to await the pleasure of the executive in the other, if there was evidence sufficient to put the accused upon his trial for the offence charged: (19 Cyc. 7).

That there is a difference between the amount, character and completeness of the evidence which is sufficient to put the accused on his trial (Criminal Code, sec. 690), and that which is sufficient to justify a conviction is quite well established.

The evidence which I have quoted makes it quite clear that the prisoner had induced Cheeley to publish a material false statement in the *Albertan* with the intent alleged. Surely that was sufficient upon the preliminary enquiry, though upon a trial it would be improper not to insist upon more particularity.

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I think all the objections taken to the conviction have been covered expressly or impliedly by what I have already said, except the question of the propriety of the trial Judge securing the evidence of Fletcher, taken upon the preliminary enquiry. This evidence was tendered and received by the Judge under sec. 999 of the Criminal Code. No objection was taken to it or to its reception, except on the ground that it had not been shewn that Fletcher was either "so ill as not to be able to travel" or was "absent from Canada."

The trial Judge was satisfied that the witness, at the time his deposition was tendered, was absent from Canada. The evidence which was before the trial Judge is before us and I think he was justified in coming to the conclusion he did. Even if there was doubt about it it would have to be a strong case to justify an Appellate Court in differing from him: *Rex* v. *Angelo*, 22 Can. Cr. Cas. 304, 16 D.L.R. 126, 19 B.C.R. 261.

I see I have not expressly referred to the question whether the words: "prospectus, statement or account" cover such a statement as that relied upon in the present case which in various forms was to the effect that oil had been discovered in the company's well.

Such a statement if forming part of a prospectus would be perhaps the most material statement that it contained. Prospectuses, though they may properly contain expressions of opinion, are more properly statements of fact, and to a large extent are required by law so to be. I cannot see any reason for doubting that such a statement as is in question here, made as it was, by the director and manager of the company for advancing the interests of the company, is clearly within the meaning of the section.

I think the trial Judge was right on all points and that consequently the conviction should be affirmed.

Stuart, J.

STUART, J.:—I think this appeal should be allowed and the conviction quashed.

It seems impossible to me to avoid the conclusion that the accused was not extradited for the offence of which he was convicted. All the formal charges, that before the magistrate, before the Chief Justice prior to the extradition, before the Extradition Commissioner and before the trial Judge here, referred to the accused having concurred in the publication of a statement known to him to be false without specifying the statement. Mr. Short, as agent for the Attorney-General, that is, in place of a grand

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jury, signed the charge laid before the Chief Justice. This was before the extradition. In his affidavit upon an application for a commission to take evidence for use at the trial after the extradition, Mr. Short said that the 4th of October, 1916, a few weeks before the trial and long after the extradition, was the first time he had ever seen the article by Cheeley with respect to which the conviction before us was made. Yet it was claimed that he was extradited in respect of the publication of the Cheeley article. For my part I cannot believe it.

The charge as laid before His Honour Judge Winter was in general terms to the effect that on or about the 1st day of May, 1914, the accused, being a director, concurred in the publication of a false statement. The statement was not specified. The Crown filed particulars which did specify certain statements. The accused was entitled as of right to that, if he demanded it. See *Rex* v. *Trainor*, 27 Can. Cr. Cas. 232, and *Smith* v. *Moody*, [1903] 1 K.B. 56, 20 Cox C.C. 369, therein cited. He had a right to that because otherwise he could not know what the statement was, with the publication of which he was being charged. He could not be asked, as of right, to look at the depositions and find out. It could not be said to him that he knew perfectly well already, especially in this case where even the depositions themselves made no reference to any particular statement.

Yet it is contended that though the charge made before the extradition commissioner was similarly indefinite, we can now say that *we* know that the extradition was ordered with respect to a particular statement specified in the particulars given for the first time at the trial which statement was not identified and at most only vaguely hinted at before the Commissioner. The accused was extradited on a charge which merely spoke of a statement generally. If the charge as first laid before His Honour Judge Winter could not be said to be a charge with respect to the Cheeley statement and admittedly it could not because that statement had to be specified before the accused was put on his trial, how could it be said that the charge before the Commissioner was with respect to the Cheeley statement? It was a general and therefore a defective charge, and I think the consequence is that it was not a charge with respect to the Cheeley statement.

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Taking this in connection with the affidavit of Mr. Short above referred to I think the accused has shewn that he was tried and convicted for an offence for which he was not extradited. This, I think, is a violation of the arrangement contained in the treaty. I agree with the view which the trial Judge apparently took that the word "offence" in article III. of the treaty means the particular offence and not the general kind of offence.

I notice that at the trial even counsel for the Crown admitted that if an accused has been extradited for the murder of A. he cannot be tried after extradition, for the murder of B., committed before the extradition. Neither do I think that, if the foreign extradition officials chose to order extradition on a charge that the accused "committed murder" and in the depositions there were merely vague hints that there had been a number of men killed whose identity was only hinted at in the vaguest fashion, the Crown could put the accused on trial for the murder of any man it chose to select. I think the accused could properly say in such a case that he had not been extradited for the offence charged.

There was not sufficient evidence, in my opinion, to support any other charge than that for which he was convicted. I think also that the "statement" referred to in section 414 of the Code means necessarily a written statement.

McCarthy, J.

McCarthy, J., concurred with Stuart, J.

Appeal dismissed on an equal division.

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Re DOMINION MARBLE Co. IN LIQUIDATION.

Quebec Superior Court, Greenshields, J. May 30, 1917.

1. CONSTITUTIONAL LAW (§ II A—195)—DOMINION POWERS AS TO CORPORATIONS—PROPERTY AND CIVIL RIGHTS IN THE PROVINCE.
The power conferred upon a Dominion trading corporation by sec. 69 of the Dominion Companies Act (R.S.C. 1906, ch. 79) to hypothecate, mortgage, or pledge its real and personal property, in so far as it is in conflict with the law of the Province of Quebec, is *ultra vires* the Dominion Parliament, as an encroachment upon "property and civil rights in the province" under sec. 92 of the British North America Act.

2. COMPANIES (§ IV A—35)—INCORPORATED BY DOMINION LEGISLATION—LIMITATIONS IN CARRYING OUT OBJECTS.
A trading corporation of Dominion-wide scope, incorporated by Dominion legislation, is subject to the limitation that in carrying out its objects it must comply with the laws relating to property and civil rights in each of the provinces of Canada.

Statement.

The Dominion Marble Co. was incorporated as a trading company by letters patent dated June 26, 1911. Its liquidation was subsequently ordered and Gordon W. Scott was appointed

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liquidator. He took possession of the company's assets which, so far as the present case was concerned, were stated to consist wholly of movables.

Under the provisions of sec. 69 (*c*) and (*d*), R.S.C. 1906, ch. 79, the company issued bonds which were sold to the public. To secure their payment in capital and interest a trust deed was executed. This named the Prudential Trust Co., Ltd., trustee for the bondholders. It then proceeded to hypothecate, mortgage and pledge to, and in favour of, the trustee "all the property of the company, real and personal, movable and immovable, corporeal and otherwise, including all improvements, easements, appurtenances, rents, revenues, immunities, claims, rights, privileges and franchises, wheresoever situated, held, owned or enjoyed by the company, or which at any time hereafter, during the continuance of this security, may be acquired, owned, held or enjoyed by it." The execution of the deed was not followed by registration.

The liquidator sold the movables of the company, and the trustee for the bondholders (the Prudential Trust) claimed, in virtue of the trust deed which created the hypothecate, mortgage and pledge, that they had a right to be paid out of the proceeds of the sale the amount of the bonds, in capital and interest, over and to the exclusion of the ordinary creditors if the proceeds were sufficient to meet the claim in full, and, if not, then they had a right to be paid the whole amount realized by the liquidator from the sale.

The liquidator contested this claim, asserting that the trustee had no privilege or right of preference. He submitted that the whole sum realized should be distributed *au marc la livre* (at so much on the dollar) among all the creditors of the insolvent company. In support of this the liquidator cited the well-known principle of the law that all the property of the debtor is the common gauge of all the creditors unless and where a valid privilege exists. He insisted that the company had no power to mortgage, hypothecate or pledge its movable property, present and future, in the manner and form it purported to have done, and challenged the power or authority sought to be given to the company by legislation of the Parliament of Canada. This legislation, the liquidator asserted, was *ultra vires* and unconstitutional.

The two questions submitted to the Court were as follows:—

1. Had the company in liquidation power and authority, in

virtue of the Companies Act, R.S.C. 1906, ch. 79, to create in favour of the Prudential Trust Co., Ltd., trustee for its bondholders, a privilege upon its movable property?

2. If the company had this power, would the privilege extend to movable property acquired subsequent to the execution of the deed creating the same; or would it be restricted to the property acquired and owned by the company at such time?

Statement.

Eugene Lafleur, K.C., for liquidator.

R. C. Smith, K.C., for bondholders.

Greenshields, J.

GREENSHIELDS, J.:—Broadly stated the answer to the first question involves the decision as to whether it was within the legislative authority of Parliament to enact sec. 69 (*c*) and (*d*), R.S.C. 1906, ch. 79.

The section has for its caption "Borrowing Powers," and in effect it enacts that if authorized by by-law, sanctioned by a vote of not less than two-thirds in value of the subscribed stock of the company, the directors may, from time to time, (*a*) borrow money upon the credit of the company; (*c*) issue bonds, debentures, or other securities of the company for sums not less than $100 each, and sell the same, or pledge the same; (*d*) hypothecate, mortgage or pledge the real or personal property of the company, or both, to secure any such bonds, debentures or other securities and any money borrowed for the purposes of the company.

The question really is: In carrying on its trading operations in any province, must the company comply with the civil law of such province; or has the author of its being—the Parliament of Canada—legislative authority to empower it to carry on its trading operations in any province in a defined method or manner, notwithstanding the civil law of that province to the contrary?

If the pretension of the trustee in the present case is well founded, we have the condition of a civil person in the Province of Quebec carrying on its trading operations in utter disregard of the important provision found in the body of our civil law touching "property and civil rights." The company is told that it may "hypothecate, mortgage and pledge," without possession, its movable property, to secure a debt due by it. If the company has that power under this legislative enactment of the Parliament of Canada, it can do something which is repugnant to, and in conflict with, a most important provision of our Civil Code.

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There can be no uncertainty as to our civil law respecting the hypothecation and pledge of movable property. Pledge is a contract, by which a thing is placed in the hands of a creditor to secure his debt, or being already in his possession, is retained by him, with the owner's consent, for like purpose. There can be no pledging of goods which do not at the time of the contract exist. What is known as a "chattel mortgage" in other provinces finds no place in the body of our civil law. I do not forget the existence of a provincial statute recently passed, which, however, has no application in the present case.

But there is the pledge of immovables which is called a "hypothec." True it differs essentially in its effect, at least, from the English mortgage. It is a pledge without possession, and with the right to follow *droit de suite*. Armed with a hypothec the creditor may sell the property in the hands of whomsoever it may be, and be paid by privilege and preference out of the proceeds the amount of his debt. Then follows the clear-cut provision that movables are not susceptible of hypothecation, with certain exceptions which are of no interest in the present consideration.

The hypothec is an accessory of the debt, and provision is clearly made in our Civil Code that a hypothec cannot be validly created and validly preserved only if the formalities required by law are strictly observed; one is, the instrument must be in notarial form and another, its execution must be followed by registration.

These provisions clearly touch property and civil rights, and any legislation extending, limiting, or varying these formal enactments is certainly legislation affecting property and civil rights in this province, and if that legislation emanates from a legislative authority other than the Province of Quebec, its authority to enact is open to dangerous attack, and calls for careful defence.

Exclusive legislative authority is given to the provinces to make laws relating to property and civil rights in the province, and if the Parliament of Canada assert its power and right to make laws relating to property and civil rights, it must justify and maintain its authority by some express or implied right under the British North America Act.

I have no hesitation in saying that the authority of parliament to enact legislation destructive of the effect of the civil law of this province as a pledge and hypothec cannot be found in the state-

ment that parliament has exclusive legislative authority to regulate trade and commerce. But it is well recognized that all matters which are not specifically and exclusively assigned or allotted to the legislative authority of the provinces fall within the subject matter of the legislative authority of parliament. And upon that, I take it, the trustee seeks and vigorously asserts he finds justification for the enactment. Let us consider it.

Sec. 92 (11) of the British North America Act gives exclusive authority to the provinces to incorporate companies with provincial objects. It must at once be stated, therefore, that if it is proposed to create a trading company, such as the one in question, with Dominion-wide objects, the exclusive legislative authority to create that company rests with the Parliament of Canada. If, then, the power to create a company, a civil being, with distinct definement of objects or purposes, necessarily, although impliedly, carries with it the right and power to enact the whole corpus or body of the civil law that will govern and control that company in carrying out its operations; if the right to create carries with it, necessarily, although impliedly, the right and authority to legislate as to property and civil rights which shall govern that company in the various provinces into which the company may penetrate in carrying out its objects, and that with utter disregard to the law relating to property and civil rights in any and all provinces, then, I take it, the trustee in the present case is fortified beyond all danger of successful attack.

But, on the other hand, if the power to bring into being a trading company, with objects well defined, and a Dominion-wide field of operations, is subject to the limitation—that in carrying out the objects of incorporation or creation regard must be had to and compliance with the law relating to property and civil rights in each of the provinces—then the trustee in the present case is exposed, in the position of privilege which he so vigorously asserts, to dangerous attack.

If impliedly any given company, with Dominion letters patent, and well-defined objects, has power in carrying out these objects to do so in disregard of the civil law of any province, the extent or degree of such disregard, I should say, is limited only by the nature and extent of the company's operations. If parliament can assign to a given company certain objects, and at the same time

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give it authority to carry out its objects, or carry on its operations without regard to a particular provincial law relating to property and civil rights (which otherwise would govern the company in its operations) another company with different objects could well be empowered to make a further encroachment or inroad on the law in relation to property and civil rights in any or all the provinces, and in the end, and finally, the Parliament of Canada could, so far as its creatures—its companies—are concerned, legislate the whole body of the law touching property and civil rights.

This would seem to be the irresistible conclusion—if the pretension of the trustee's case is to be maintained. Counsel for the trustee urges that every trading company has "implied" power to borrow money—implied when not expressed; and having the power to borrow money for the purpose of carrying out its objects of incorporation, it also has the implied power to give security, and that security, in the case of a company, usually and necessarily, takes the form of a bond issue; and that when the Parliament of Canada is creating a company with power to borrow money it is well within its authority to legislate as to how the company will secure the payment of the money so borrowed.

With the first part of the statement I have no quarrel whatever; with the latter part, I cannot agree. The creatures of the Parliament of Canada may borrow money for the purposes of their business, and that in every province; but their contracts of loan, and the accessory—the giving of security—must, in my opinion, conform in the case of trading companies with the law in relation to property and civil rights in each of the provinces.

Again counsel for the trustee relies with confidence upon the holdings of the Privy Council in what he calls the "railway cases": the *Canadian Pacific Railway Co.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367, known as the "drain case"; *Madden* v. *Nelson and the Fort Sheppard Railway*, [1899] A.C. 626, known as the "cattle guards case." With vigour, counsel asserts the decisive authority of these cases in the present submission.

In both the cases cited the railways involved came within sec. 92 of the B.N.A. Act. They were railways, the making of laws concerning which was removed from the legislative authority of any province and exclusively conferred upon the Parliament of Canada—not to incorporate the company, but to enact the

whole law governing the company. It was desirable that all railways, other than purely local railways, just as all banks, which were not local, should be governed by the same uniform law irrespective of the law of the provinces.

The case is different with trading companies in general. The corporate objects of trading companies are almost as wide as commerce or commercial transactions, and in the carrying out of the multiplied objects of trading companies, contracts, civil and commercial, are necessarily multiplied, and necessarily govern almost every branch of the law relating to property and civil rights.

Now, then, sub-sec. 11 of sec. 92 of the British North America Act would read in conjunction with the opening or governing clause in part as follows: "In each province the legislature may exclusively make laws in relation to the incorporation of companies with provincial objects." There is not a word in sec. 91, giving parliament express authority to incorporate any trading companies. It is in its quality of "residuary legatee" that this authority is found.

What is the "residuum" that the parliament inherits under sub-sec. 11? I should say it is the power to make laws relating to the incorporation of trading companies, the objects of which are not purely local, but Dominion wide. If this be a correct statement, then it follows that the Parliament of Canada may exclusively enact legislation or make laws in relation to the incorporation or the creation of the "civil being"—its company. It may define, when creating it, the objects or purposes for which it is created; it may give it a head office and chief domicile in any province, and may empower it to carry out its objects, or carry on its operations, throughout the whole Dominion. But can we go farther? Because it has the power to bring into existence its creature, can it be said that it has, impliedly, power to relieve it from the operation of the law relating to property and civil rights in every province? In other words, can it change the law relating to property and civil rights so far as concerns its company or any number of its companies, with unlimited and multiplied objects. I cannot admit it. With such emphasis as words can give to the expression of a firm conviction, I deny it. I am convinced that my opinion, as now expressed, is not in any way in conflict with the decisions of any, including the highest tribunals of the Do-

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minion and Empire, when called upon to decide questions of conflict between parliament and the legislatures.

Other cases I have been referred to, and have had the benefit of considering. They might be called "bank cases" as distinguished from "railway cases." I readily accept the holdings in these cases, and I find in them support to my present opinion.

It is clear that under the British North America Act the legislatures of the provinces have no authority to enact legislation to incorporate banks or to directly govern or control banking operations. I do not wish to be understood to say that a bank is entirely free from the operation of provincial laws. That would be an incorrect statement, but the Parliament of Canada has exclusive paramount authority not only to incorporate a bank, but to make laws governing "banking, the incorporation of banks, and the issue of paper money." (Sec. 91 (15) B. N. A. Act.) The Parliament of Canada proceeds to enact the whole corpus or body of the civil law governing banks. It is something entirely distinct from creating the bank. It might well be, that the whole body of law relating to banking might be enacted without the existence of an incorporated bank; but when the Parliament of Canada has incorporated its bank, then the corporation thus created comes at once under the control and operation of the banking law enacted by the same authority as created the corporation. This is manifestly the principle which underlies the finding of their Lordships of the Privy Council in the leading case of *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31. Again, I say, the case is clearly distinguishable from the one presently being considered. If in the making of laws governing banks or railways that law is in conflict with the provincial law, it must go.

There is, and must necessarily be, in the application of the British North America Act, which brought about a federation and not a legislative union, what has been called, and properly called, an "overlapping" as between legislatures and parliament. As has been often pointed out, as an example, when and so soon as the Parliament of Canada exercises its exclusive legislative right to enact an insolvent law. It has Dominion-wide application, and is supreme. It is difficult to conceive that such an enactment would not at some point conflict with the law of property and civil rights, in some, if not all, of the provinces. But, notwith-

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standing, the Dominion legislation must prevail, even though it does affect property and civil rights in the provinces.

Counsel for the liquidator suggested that the first question to be decided is whether, as a matter of construction, sec. 69 of ch. 79, R.S.C. 1906, intended to supersede the provincial laws as to the pledging of personal property. To determine this matter in the sense suggested by counsel, namely, that as a matter of construction no such power was given, would be to follow the line of least resistance. I am of opinion, however, that the Parliament of Canada did by that section intend to give to a trading company incorporated by letters patent of the Dominion power and authority to hypothecate, mortgage or pledge its real and personal property, contrary to and in disregard of the law of this province, and that such legislation, insofar as it is in conflict with the law of this province is unconstitutional and *ultra vires*.

I, therefore, and for the reasons given, answer the questions submitted as follows: (1) The company in liquidation had no power and authority, in virtue of ch. 79, R.S.C. 1906, to create in favour of the Prudential Trust Co., Ltd., a privilege upon its movable property.

The first question being answered in the negative, it follows that a negative answer must be given to the second question, and a negative answer is given. No privilege extended to movable property acquired subsequent to the trust deed; and I order the costs in the case to be paid by the liquidator out of the mass.

Judgment accordingly.

NOTE:—The Quebec Legislature, in 1914, by statute 4, Geo. V., ch. 51, amended the Quebec Companies' Act, authorizing the pledging and mortgaging of movable property to secure bonds issued by a company and validating such pledge or mortgage, notwithstanding that the company may be permitted by the trustee to remain in the possession and use of the property so mortgaged or pledged. This brings the law of Quebec for all practical purposes into line with that throughout the rest of Canada. This statute, however, is not retroactive and only affects bond issues effected since the date of its enactment, which was February 19, 1914.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, and Lennox, J. J., and Ferguson, J. A. March 2, 1917.

COSTS (§ II—20)—TAXATION—AMBIGUOUS ORDER.

Where the words of a Judge's order for costs are ambiguous, the proper course is to apply to the Judge who made the order to correct the ambiguity, and the meaning which he intended should be adopted. Costs down to, and including the trial, should be taxed on the Supreme Court

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scale; costs subsequent to the trial should be taxed as provided for in Rule 649.

APPEAL by the defendant from the order of MIDDLETON, J., in Chambers, 38 O.L.R. 535. Affirmed except as to costs.

H. H. Davis, for appellant; *J. M. Ferguson*, for plaintiffs, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Our right to entertain this appeal has not been questioned; though the question was asked, during the argument, whether the appeal was properly before the Court. If no right to appeal exists, or if no such right exists without leave—which has not been obtained—the appeal ought not to be heard. The want of objections by, or even the assent of, the respondents, does not confer the power to entertain it.

If the case be within the provisions of sec. 25 of the Judicature Act, R.S.O. 1914, ch. 56, or within the further restrictions imposed by the Rules, as provided for in sec. 26 of the Judicature Act, we have no power, and should refuse, to hear the appeal.

But, in the view that I take of the merits of the case, it is not necessary that that question should be considered: and it has not been considered.

It seems to be necessary, however, to state that fact plainly so as to prevent any notion that the Court has impliedly, or inferentially, or in some other manner, decided the question either against or for the right of appeal.

Upon the reference, the amount found to be due to the respondents was an amount plainly within the jurisdiction of a County or District Court; and the Referee's finding as to the costs subsequent to the trial was: "I find that the defendants should pay to the plaintiffs their costs of the reference forthwith after taxation."

No attempt was made to tax any costs until after the Referee's report was confirmed; after it was finally settled that the proper amount of the respondents' claim, against the appellants, was one within the jurisdiction of a County or District Court.

At Chambers it was held that, though there was no expressed "order to the contrary" to take the case out of the provisions of Rule 649, such an order was to be inferred because this Court had directed payment of the costs of the action down to trial "forthwith after taxation;" that that meant a taxation before

the reference had settled the amount of the liability, and, if before that, then, in the uncertainty, the taxation must, or ought to, be upon the higher court scale, even though when the taxation took place the reference was ended and the County or District Court jurisdiction established.

But there is obviously much to be said against such a ruling: for instance, that an order to the contrary means an order in fact, not an inference; just as, in the days of the Common Law Procedure Act, when a certificate was required, the certificate was, always, an actual, an expressed, one. If taxing officers were at liberty to draw inferences, instead of being required to obey expressed rules and orders, the rule, or order, or judgment which ought to bind them might be read and acted upon so as really to be theirs, not that which they should obey; again, the direction is not a direction to tax forthwith, but is to pay forthwith after taxation; and either with or without a comma between the words "forthwith" and "after," there, literally, is no reason why the Court might not have used those words—without comma in this case—as meaning that the costs should be paid within a reasonable time after they could be properly taxed: again, under Rule 651, the Taxing Officer is required to make all inquiries necessary to determine whether an action is within the competence of an inferior court; and it may be that the Court, knowing of this order, meant that it should be acted upon: see *White Sewing Machine Co.* v. *Belfry* (1883), 10 P.R. 64; *Cradock* v. *Piper* (1850), 1 Macn. & G. 664, at p. 674; *Re Forster* (1898), 18 P.R. 65; and *Brown* v. *Hose* (1890), 14 P.R. 3.

The matters involved in the appeal are wholly matters of practice arising upon the taxation of the costs of the action; the questions being: whether, and if so to what extent, such costs should be upon the Supreme Court scale; and whether, and if so to what extent, there should be a set-off of costs as provided for in Rule 649.

The Taxing Officer in Toronto held that all such costs should be taxed upon the County Court scale with the usual set-off of costs as in the Rule is provided; and taxed accordingly.

Upon an appeal, against such taxation, to a Judge in Chambers, it was held that, though the case was within the provisions of that Rule, this Court had made an order that its provisions should

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not be applied to this case, and, accordingly, the Taxing Officer's ruling was reversed, and all costs ordered to be taxed on the Supreme Court scale without any set-off.

That Rule provides that costs shall be taxed just as the Taxing Officer taxed these costs, unless "the Judge" makes an "order to the contrary." At Chambers it was held that this Court, upon an appeal against the judgment at the trial, did make such order to the contrary.

This Court, upon that appeal, according to the formal order of the Court, as settled by the proper officer at the instance of the respondents, directed payment of the costs of the action down to the trial "forthwith after taxation;" and, having directed a reference to ascertain the amount which these respondents were entitled to recover from these appellants, ordered "that the costs of the said reference shall be paid as the said Master may direct," and also ordered that these respondents pay to the appellant part of the costs of the appeal, which were to be set off against the costs directed to be paid by these respondents to the appellant.

Upon the appeal against the judgment at the trial, the whole of the facts were gone into fully, so that it was known that the inquiry would be one likely to be of short duration, and involving probably only a calculation of available amounts, as, from the small amount of the costs of the reference it appears, it proved to be; and, again, the parties, in awaiting the final determination of the amount of these respondents' claim before taxing any costs, have, in effect, interpreted the words "forthwith after taxation" as meaning payment forthwith after such costs could be properly taxed; nothing then stood in the way of a taxation in obedience to the provisions of Rule 649.

There are therefore several possible meanings of the words "payable forthwith after taxation," attributed to this Court, nothing more. But I may add that it is common knowledge that in some Courts the practice is that no interlocutory costs are to be taxed until the final taxation.

The case then, put as strongly as it can be for the respondents, is one of an ambiguous order; one in which several different inferences might be drawn of the intention sought to be conveyed by the words in question. I should not have attributed to them

the meaning which the Judge at Chambers attributed to them; it seems to me to be taking quite too much liberty with the words "payable forthwith after taxation" to convert them into "payable forthwith after taxation upon the Supreme Court scale without any set-off of costs," especially in a case in which "an order to the contrary" is expressly required to justify such a liberty.

Nor can I think it the duty of Taxing Officer, or Judge in Chambers, in any case of ambiguity, to make his conjecture the order which he is to obey. There is no need for conjecture, with the possible result of substituting an erroneous guess for the judgment of the Court.

The proper course is to find out, from the Court, which of the two, or several, meanings is the true one. That was very plainly laid down by the Lord Chief Justice of England and Mr. Justice Grove in the case of *Abbott* v. *Andrews* (1882), 8 Q.B.D. 648; in which it was said that: in a case of ambiguity in a judgment, upon a question of costs, the Judge who made the judgment should be applied to, to correct the ambiguity, instead of appealing.

The learned Judge at Chambers adopted that course; but I cannot think that he followed it to a logical conclusion. Finding that the Court had not considered the question of the scale of costs, it was made certain that the Court had not made "an order to the contrary" consciously, and that there could have been no intention to make it, if unconsciously made; so that the ruling should have been that there was no order to the contrary, a ruling easily made in any case of ambiguity, and the more easily in this case, in which the words in question were capable of conveying several meanings not involving an order to the contrary. The onus of proving an order to the contrary is upon those who seek the benefit of it against the positive words of the Rule and the policy of the practice.

And, even if there were no ambiguity, there is no difficulty in giving effect to the actual intention of the Court; for, if the formal judgment, whether in the words of the solicitors of one or other of the parties or of an officer of the Court, do not convey the meaning of the Court, they can and should be changed to conform to it: *Kidd* v. *National Railway Assoc.* 31 D.L.R. 354, 37 O.L.R. 381. It need hardly be added that, if the formal judgment as signed does express the intention of the Court, the case cannot

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then be reconsidered and a different judgment substituted for it. Making an order give effect to the intention of the Court must not be confused with reforming a contract, between litigants, on contradictory evidence.

In this case the Court really made no order as to costs; it held that the trial Judge was right as to certain credits to which the plaintiffs claimed to be entitled, but that he was wrong in the manner in which he had assessed the plaintiffs' damages, and it set aside his judgment in that respect and directed a reference to ascertain the true amount of such damages. That was all, as a mere glance at the Judges' note-books would have shewn.

The parties subsequently desired that the order of this Court go further than that; and, accordingly, the minutes of it were drawn pretty much in the form in which the order was finally issued. The parties were, apparently, not agreed in all things, and then, by consent evidently, went before a Judge of the Appellate Division in Chambers, who, at their request, settled the order in the form in which it now is. No fault seems to have been found by either side with that settlement of the minutes of the order: at all events no appeal or motion respecting it was made.

In these circumstances, the learned Judge who settled the minutes of the order is alone able to say which of the several meanings of the words in question was intended; and, as he is in favour of the meaning which gives the words "payable forthwith after taxation" the effect of "payable forthwith after taxation upon the Supreme Court scale without any set-off of costs;" and, as that is one of the meanings which might be attributed to them, in my opinion it should be given to them.

But that does not dispose of this appeal altogether. The order in appeal gives to the respondents the costs of the reference upon the Supreme Court scale without set-off also, though they were not made payable forthwith after taxation before, but only on, the final taxation of costs in the action. This may have been inadvertently done: the reasons given by the Judge in Chambers for making that order shew, I think, that, if his attention had been called to the subject, he would not have included these costs with those which are to be taxed upon the higher scale. It is another case of want of conformity in the formal order to what

was really intended; but it is not a case in which that Judge had any power as to the scale of costs.

Whether they should be so taxed depends upon: whether they are, or are not, costs coming within the provisions of Rule 649. There is plainly no order to the contrary as to them.

The Taxing Officer, and the Judge in Chambers also apparently, considered that these costs also came within the provisions of that Rule; and there seems to me to be no sufficient reason for doubting the correctness of those views.

The policy of the practice in this respect, as shewn in legislation as well as in the Rules of practice, is that those who bring actions, or take proceedings, in a higher court, which could as well have been brought, or taken, in a lower court, if awarded costs, should have no more than if the action or proceeding had been brought, or taken, in the lowest competent court, and that such a party should make good to the party, who is to pay costs, all loss in respect of his costs which he has been put to by reason of the action, or proceeding, having been brought, or taken, in the higher court.

But Rule 649 is not wide enough to cover all cases. It seems to me to cover only those over which the Judge of the High Court Division has a disposing power when disposing of an action or matter, and which he does then dispose of. And it is true that the disposing of the costs now in question was not made by such a Judge personally, that it was made by this Court; but what this Court did was only to determine what the trial Judge should have done, and, both in substance and in form, to vary his judgment accordingly; so that the judgment at the trial is now in the form that it ought, in the first place, to have been; and so, in my opinion, it comes fairly within the Rule, as well as within the policy of the law.

That part of the order which refers the question of costs to the Referee is one of the parts added by the parties; no such reference was directed by the Court: but, however made, the effect of the order must be that the costs are recoverable under the order which should have been made at the trial; that the Referee in substance ascertains and states who should pay them, and in what manner, but the judgment of the Court awards them: and so the case is not, by the reference in this case, taken out of the provisions of Rule 649.

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Riddell, J.

RIDDELL, J.:—An appeal by the defendant from an order of Mr. Justice Middleton reversing a decision of the Taxing Officer on a question of the scale of costs to be allowed.

At the trial of the action, Mr. Justice Clute awarded the plaintiff $1,250. On appeal to this Court we thought the damages awarded proceeded on a wrong principle. We therefore allowed the appeal and varied the judgment and directed that the "judgment . . . as varied" should be "as follows:" para. (1), a declaration of right; (2) directing a reference; (3) a special direction (not of importance); (4) order for payment; (5) "And this Court doth further order and adjudge that the defendant do pay to the plaintiffs their costs of this action up to and including the trial forthwith after taxation, that the plaintiffs pay to the defendant half of his costs of this appeal, said costs to be set off against each other, and that the costs of the said reference shall be paid as the said Master may direct."

It is obvious that the form of this paragraph is not logical—it purports to be what the trial Judge should have said, but contains a clause for the payment of costs over which he could have no kind of control, i.e., the costs of the appeal. But the intention is clear, and the form should give no trouble. This Court makes the proper judgment and purports to dispose of all costs.

By the express provisions of sec. 74 (1) of the Ontario Judicature Act, R.S.O. 1914, ch. 56, "the costs of and incidental to all proceedings shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid" (subject of course to any express statute).

Under this section, it cannot be doubtful that we had the power to deal not only with the costs of the appeal, but also with those of the proceedings antecedent and consequent. The order for costs, whether it is in form, and in whole or in part or otherwise howsoever, is really one order; and it is, in my view, perfectly valid as an order of this Court.

The defendant relies upon Rule 649; but I think that this Rule has no bearing upon the present case. The Rule seems to me clearly to contemplate costs over which the "Judge" has power—the "Judge" is "a Judge of the High Court Division

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of the Supreme Court" (in actions brought in the Supreme Court): Rule 3(*d*)—the costs then covered by this Rule are only such costs as can be disposed of by a Judge of the High Court Division, and do not include costs ordered by the Appellate Division.

As I pointed out in *McIlhargey* v. *Queen* (1911), 2 O.W.N. 781, at p. 782, "The costs provided for by Con. Rule 1132" (now Rule 649) "are those which are or may be mentioned in the judgment as entered 'on entering judgment.' If the Divisional Court sees fit to do so, the order of the Divisional Court may fix the scale—but, unless something is said in the order itself, the costs of such an order must be taxed on the scale appropriate to the proceeding without reference to Con. Rule 1132. *Holmes* v. *Bready* (1898), 18 P.R. 79, is still good law, although some of the reasoning does not apply to such cases as the present." Mr. Justice Middleton, in refusing leave to appeal—*McIlhargey* v. *Queen* (1911), 2 O.W.N. 916, says: "Consolidated Rule 1132 applies only to the taxation of costs up to judgment, and does not apply to the costs of an appeal . . . The Court of Appeal . . . can mould its order so as to do justice. When the order gives costs, and nothing more is said, there is nothing to cut down the costs from those *primâ facie* applicable to such an appeal. There is no jurisdiction in the Taxing Officer to enter upon an inquiry . . . as to the amount involved."

This case seems to have eluded the search of counsel: if well decided, it is conclusive of the appeal. Before I had myself found the case, I had considered the present case anew, and had arrived at the conclusion that the appeal must fail—quite contrary, I may add, to the view I had upon the hearing.

Blake v. *Toronto Brewing and Malting Co.* (1888), 8 C.L.T. Occ. N. 123, has no application—there the costs were not payable forthwith, but in the cause in any event of the action.

The appeal should be dismissed with costs.

LENNOX, J.:—When this action came before this Court by way of appeal from the judgment pronounced at the trial, a reference was directed to the Local Master at North Bay to determine the amount the plaintiffs were entitled to for the conversion and sale of certain chattels belonging to them, and our judgment also contained this provision: "And this Court doth further order and adjudge that the defendant do pay to the plaintiffs

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their costs of this action up to and including the trial forthwith after taxation, that the plaintiffs pay to the defendant half of his costs of this appeal, said costs to be set off against each other, and that the costs of the said reference shall be paid as the said Master may direct."

The Local Master found the plaintiffs entitled to recover damages to the amount of $478.40, and "that the defendant should pay to the plaintiffs their costs of this reference forthwith after taxation thereof."

The Senior Taxing Officer taxed the plaintiffs' costs upon the County Court scale (except the costs of appeal, as to which there is no dispute) and set off Supreme Court costs.

Upon appeal to Mr. Justice Middleton, he ordered and declared as follows:—

"It is ordered that the said appeal be and the same is hereby allowed and the said certificate of the said Senior Taxing Officer be and the same is hereby set aside and vacated.

"And it is further ordered that the bill of costs of the plaintiffs be taxed by the said Senior Taxing Officer on the Supreme Court scale without set-off.

"And it is further ordered that the costs of this motion be paid by the defendant to the plaintiffs forthwith after taxation thereof."

I am of opinion that, except as to the costs of the reference, the decision of the learned Judge is right. In his reasons, and referring to Rule 649, he says: "I think that an order for immediate payment, without waiting to know the amount of damages to be paid, is an order to the contrary."

I think, as far as it goes and as to all costs included in its terms, so long as the order of this Court stands, it is conculsive; and, having reference to the amount then apparently recoverable, and the time fixed for payment, is a clear indication that these costs were to be taxed upon the Supreme Court scale. What our order meant then it means now.

But the order does not include the costs of the reference. It is ordered that the costs of the reference shall be paid as the said Master may direct. The Master merely directed by whom the costs should be paid and the time for payment. This was all that he was directed to do by this Court. A judgment or order

for costs *simpliciter* means costs according to the scale of the Court in which the action should have been brought. This is the effect of the Master's direction.

The learned trial Judge found, and it was confirmed in this Court, that the plaintiffs were at the time of seizure entitled to credit for the amount of a judgment assigned to the defendants, that is, for $414.20. As a result of the plaintiffs' success in this respect, they were found entitled on the reference to $478.40 damages. If they had not been entitled to this credit, their damages would have been only $64.20; so that, whatever way you look at it, the plaintiffs' claim could have been recovered in the District Court.

With deference, I am of opinion that the order appealed from should be varied by adding to the second paragraph: "Except as to the costs of the reference, and that these costs be taxed on the County Court scale with right to set-off."

It is right to add that the terms of our judgment as to the costs of the reference were not referred to when the appeal from taxation was argued. If this point had been taken, it is possible that the learned Judge would have made an exception to the effect of what I have above set out. The costs of the appeal to this Court should not, therefore, be affected by the circumstance that the appellant has secured a slight modification of the order.

Upon the main question I think I should be governed by the principle upon which *Port Elgin Public School Board* v. *Eby* (1895), 17 P.R. 58, was decided. If, when this case was before us upon the first occasion, I had adverted to the possibility that the plaintiffs might in the end recover only an amount within the jurisdiction of the District Court, I would not have concurred in the order we then made as to costs, but, speaking for myself only, of course, we there pronounced upon the facts as they appeared to us in the judgment I then intended, and I am of opinion that I have no right or jurisdiction to alter or attempt to alter it now, because the case has developed in a way I did not then anticipate and did not take into consideration.

Since writing the foregoing, I have had the advantage of seeing the judgment of the Chief Justice, and desire to add that I have not considered the question of the right to appeal, and it is unnecessary to do so now.

The respondents should have the costs of this appeal.

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Ferguson, J.A.

FERGUSON, J.A.:—To construe the trial judgment as varied by the Divisional Court as directing the Master or Referee to investigate and ascertain the amount of the plaintiffs' claim for the purpose of payment, and also as directing the Taxing Officer, under Rules 649 and 651, to investigate and ascertain the amount of the plaintiffs' claim for the purpose of taxing forthwith the costs of the proceedings down to that date, would, I think, be absurd, and therefore, the trial judgment should, in my opinion, be construed as an "order to the contrary" under Rule 649. For these and the reasons given by the learned Judge appealed from, I would dismiss the appeal upon this branch of it; on the other branch I agree that the costs should be taxed in accordance with the Rules.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The order of the Court is, that the costs down to and including the trial should be taxed on the Supreme Court scale, as in the order in appeal is directed; that the costs of the former appeal should be taxed on the same scale; but that the costs subsequent to the trial should be taxed as provided for in Rule 649, as ruled by the Taxing Officer.

No costs of this appeal.

My brother Riddell dissents as to the costs subsequent to the trial, which he thinks should be taxed on the Supreme Court scale.

Order accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Walsh, JJ. March 7, 1917.

1. CRIMINAL LAW (§ IV C—116)—IMPRISONMENT IN DEFAULT OF PAYING FINE—SUMMARY TRIAL.

The restrictions of Code sec. 739 (1b), by which imprisonment "not exceeding three months" may be ordered in default of payment of a fine on summary conviction under Part XV., do not apply to a conviction made on a "summary trial" under Part XVI. for an indictable offence; the imposition of imprisonment in default is a "proceeding" within Code sec. 798, and the effect of sec. 798 is, therefore, to exclude the operation of sec. 739 to such a case.

2. DISORDERLY HOUSE (§ I—10)—IMPRISONMENT WITH HARD LABOUR IN DEFAULT OF FINE.

The magistrate summarily trying a charge for keeping a disorderly house under Code sec. 773 (*f*) and imposing a fine may under sec. 781, sub-sec. (2), order imprisonment up to six months in default of payment, and this imprisonment may under sec. 1057 be ordered to be "with hard labour."

3. CRIMINAL LAW (§ IV A—101)—IMPRISONMENT WITH HARD LABOUR—CR. CODE SEC. 1057.

The "imprisonment" as to which Code sec. 1057 applies to authorize the addition of hard labour, is not limited to that awarded in the first

instance for the offence, but includes also imprisonment in default of paying a fine.

[*R.* v. *Nelson*, 22 Can. Cr. Cas. 391, 17 D.L.R. 305, 7 S.L.R. 92, approved on this point.]

4. CRIMINAL LAW (§ IV C—115)—DISORDERLY HOUSE CASES—PUNISHMENT ON SUMMARY TRIAL.

It is not necessary to impose imprisonment as well as a fine to make sub-sec. (2) of Code sec. 781 applicable; the words "in addition to" and "a further term" in that sub-section are intended to make it clear that even where imprisonment in the first instance, as well as a fine, is imposed, then further imprisonment in default of payment of the fine can be given up to six months.

5. DISORDERLY HOUSE (§ I—15)—OFFENCE OF KEEPING—EVIDENCE.

The intention of Code sec. 225 in defining a common bawdy house as applied to the letting of rooms in a hotel is that it should appear that rooms were habitually let with knowledge that they would be used for purposes of prostitution; the fact of such habitual letting may be proved by direct evidence or may be inferred where the circumstances surrounding the letting on a single occasion for use by a known prostitute would *primâ facie* show the existence of a habit or custom in that regard and no attempt is made at explanation or excuse on the part of the accused.

[*R.* v. *Mercier*, 13 Can. Cr. Cas. 475, referred to.]

Statement.

MOTION to quash a conviction made on summary trial by a police magistrate for keeping a disorderly house.

The motion was dismissed by a majority of the Court, BECK, J., dissenting.

J. B. Barron, for defendant; *W. F. W. Lent*, for the Crown.

Harvey, C.J.

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

Stuart, J.

STUART, J.:—This is a motion on behalf of the defendant to quash a conviction made against him by Mr. Davidson, Police Magistrate for the City of Calgary.

The conviction was as follows:—

"For that he, the said Charles Davidson, night clerk of the King George Hotel at Calgary on the 12th day of January A.D. 1917, and for some time previous thereto did unlawfully keep and maintain a disorderly house, to wit, a bawdy house by keeping and maintaining rooms situate and being at the King George Hotel aforesaid for the purpose of prostitution contrary to sec. 228 of the Criminal Code and I adjudge the said Charles Davidson for his said offence to forfeit and pay the sum of one hundred and ninety-seven dollars and twenty five cents ($197.25) to be paid and applied according to law; and also to pay to the informant the sum of two dollars and seventy five cents ($2.75) for his costs in this behalf; and if the said several sums are not paid forthwith, I adjudge the said Charles Davidson to be imprisoned in the provincial jail

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at the city of Lethbridge in the said province and there to be kept at hard labour for the term of four months unless the said sums and costs and charges of the commitment and of conveying of the said Charles Davidson to the said provincial jail are sooner paid."

The grounds taken against the conviction are as follows:—

1. That the said conviction is against the law, the evidence and the weight of evidence.

2. That there is no legal evidence to support the conviction.

3. That the conviction and penalty adjudged by the said W. S. Davidson is uncertain.

4. That the said police magistrate had no jurisdiction after having found the accused guilty to enforce the payment of the penalty adjudged by directing that in default of payment the accused be imprisoned for four months with hard labour or for any term exceeding three months.

5. That the said police magistrate had no jurisdiction to direct imprisonment with hard labour on default of payment of fine and costs.

6. And upon other grounds appearing in the proceedings.

The first and sixth of the above grounds should have been left out. They mean nothing and serve only to encumber the notice. The first is an echo from a notice of appeal in a civil case and even there it seldom amounts to anything. The third ground was not urged on the argument and evidently has nothing to support it.

It will be convenient to deal with the fourth and fifth grounds first because if either of them is valid we shall be obliged under secs. 797 (2) and 1124 of the code to deal with the evidence in quite a different way than under the second objection. If the conviction is defective on its face we can only amend if "satisfied" ourselves upon a perusal of the depositions that the offence charged, or one of the nature described in the conviction, has been committed.

The fifth objection requires very serious consideration. The first point to be observed is that the trial was held and the conviction made under Part XVI. of the code which deals with summary trials of indictable offences. This being so it is not possible to have recourse to sec. 739 of the Code because that section is in Part XV. relating to summary convictions. There

might conceivably be some ground for applying its provisions to a case of a summary trial for an indictable offence under Part XVI. were it not for two circumstances which make such a course impossible. In the first place, sec. 798 (of Part XVI.) says: "Except as provided in the two last preceding sections neither the provisions of this Act relating to preliminary enquiries before justices nor of Part XV. shall apply to any proceedings under this part."

It seems very clear that a proceeding to enforce a penalty imposed by the magistrate, that is, the imposition of imprisonment in default of payment, is a "proceeding" within the meaning of this section and the exception made of the "two last preceding sections" does not touch the matter here involved. For this reason alone I think we cannot look at sec. 739.

In the second place, sec. 781 deals specifically and in detail with the punishments that may be imposed by the magistrate in the case of some of the offences triable under Part XVI. and the offence charged here is included in these. These provisions are inconsistent with the terms of sec. 739 in several respects and in particular the magistrate is empowered under sec. 781 to impose imprisonment for six months in default of payment of the fine while under sec. 739 only three months can be given in such case, if there is no other specific provision in the Act under which the charge is laid.

Therefore, although imprisonment with hard labour may be imposed under sec. 739 in default of payment of the fine, this section cannot be held to support the conviction here made. In *Rex* v. *Nelson*, 22 Can. Cr. Cas. 301 at 303; 17 D.L.R. 305; 7 S.L.R. 92, the Court does not seem to have been referred to sec. 798.

> "A sentence to imprisonment with hard labour is never obligatory upon any Court and cannot lawfully be imposed except under statutory authority." Russell on Crimes, 7th ed., p. 212.

Inasmuch as sec. 781 [sub-sec. 2] does not itself say anything about hard labour the result is that the only statutory authority to which recourse can possibly be had is sec. 1057 of the Code. That section reads as follows:—

> "Imprisonment in a common gaol or a public prison other than a penitentiary or the Central Prison for the Province of

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Ontario, the Andrew Mercer Ontario Reformatory for females or any reformatory prison for females in the Province of Quebec shall be with or without hard labour in the discretion of the Court or the person passing sentence if the offender is convicted on indictment or under Parts XVI. or XVIII. or in the Province of Saskatchewan or Alberta before a Judge of a Superior Court or in the North-West Territories before a stipendiary magistrate or in the Yukon before a Judge of the Territorial Court.

"2. In other cases such imprisonment may be with hard labour if hard labour is part of the punishment of the offence of which such offender is convicted and if such imprisonment is to be with hard labour the sentence shall so direct."

The Penitentiary Act and the Prisons and Reformatories Act make imprisonment in penitentiaries, the Ontario Central Prison and the reformatories mentioned in sec. 1057 with hard labour in all cases whether the sentence so directs or not.

The result is that where an offender is convicted on *indictment* or under Part XVI. or Part XVIII. or by a Superior Court Judge in Saskatchewan or Alberta, a Judge of the Territorial Court in the Yukon or a stipendiary magistrate in the Territories the imprisonment may be either with or without hard labour in the discretion of the Court so long as the offender is not sentenced to a penitentiary or the prison or reformatories excepted and this apparently without regard to the terms of the statute fixing the punishment. But if the conviction is made by a lower tribunal then hard labour may be imposed only if the statute fixing the punishment says that it may be imposed and the sentence given must in such case specifically mention "hard labour."

But all this leaves open the question whether sec. 1057 upon its proper interpretation refers to imprisonment in default of payment of a fine or merely to imprisonment as the direct punishment for the offence where no fine is imposed at all or, if imposed, is imposed in addition to a term of imprisonment. The question is, does the word "imprisonment" in the section refer to all kinds of imprisonment and therefore even to imprisonment in default of payment of a fine or is it restricted in the way I suggest.

In *Rex* v. *Nelson*, *ubi supra*, Elwood, J., was evidently of opinion that sec. 1057 authorised the imposition of imprisonment with hard labour in default of payment of a fine. I have been

unable to discover any other precedent upon the point involved. I think the view taken in *Rex* v. *Nelson* was correct. The word "imprisonment" in sec. 1057 is used without any limitation and I can see no reason why it should not be held to apply to the imprisonment referred to in sub-sec. 2 of sec. 781, which may be imposed in default of payment of a fine. If the offender chooses not to pay the fine and prefers to go to gaol surely he is suffering punishment for his offence and not merely for non-payment of the fine.

In my opinion, therefore, the fifth objection to the conviction fails.

With regard to the fourth objection it is apparent that it is rested upon the misapprehension that sec. 739 of the Code has some application to a case of summary trial. The provisions of sec. 798 already referred to make it very clear that it has no bearing. This misapprehension seems to underlie the notes to sec. 781 in Crankshaw and also the reference to sec. 739 in *Rex* v. *Nelson* [22 Can. Cr. Cas. at 303].

It is well, I think, also to point out that the magistrate in this case seems to have thought that he could have recourse to sec. 739 (2) as a careful perusal of the conviction in the light of secs. 781 and 739 (2) will shew.

The fourth objection, therefore, also fails.

It may be well to add that there does not seem to me to be anything in sec. 781 (2) which makes it necessary to impose imprisonment in the first instance as well as a fine before imprisonment in default of payment of the fine can be imposed. The use of the words "in addition to" and "a further term" is not I think sufficient to justify such an interpretation. I think they were probably used to make it clear that even where imprisonment in the first instance, as well as a fine, is imposed, then further imprisonment in default of payment may also be imposed but not to provide that there *must* be imprisonment in the first instance before imprisonment in default of payment of the fine can be given. If the latter were the meaning it would be easy enough for a magistrate to impose in the first instance imprisonment merely for one hour or a less time in order to make imprisonment in default of payment of the fine valid.

There being, therefore, no legal objection to the form of the

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conviction it becomes necessary to consider the evidence in the case with a view to determining whether or not there was any evidence upon which the magistrate could properly convict.

The evidence was as follows: One Ernest Roberts, the principal witness for the prosecution, testified that on the night of February 11th, 1917, he and a man named Simpson had been at the "Cabaret" in the Queen's Hotel in Calgary where there was dancing going on. He and Simpson met there two women named de Menthe and Foster. After the dance closed de Menthe called Roberts out and asked for the loan of five dollars. He refused but said if she wanted to earn five dollars it would be all right. She proposed going to a room somewhere and suggested the King George Hotel. The four of them accordingly went there. At de Menthe's suggestion the men went in advance and registered under assumed names. De Menthe had said she "knew Charlie and it would be all right." The accused was night clerk at the King George Hotel. The men asked him for a double room with two beds. To this the accused, so Roberts said, apparently assented and mentioned the number of the room which Roberts thought was 311. Roberts paid then the sum of $2.50 for the room. Taking the key given them they went upstairs, not by the elevator and finding that the key was for room 201 they went to that room.

But while they were talking to the accused at the desk and registering, the two women came into the office of the hotel. The men moved on to go upstairs and the women went to the desk and entered into conversation with the accused. It had been arranged between the men and the women that they should appear to be strangers. Roberts said that he did not hear what passed between the women and the accused but that they conversed as if they were acquainted with each other. This was about 2.30 o'clock on the morning of the 12th. Upon entering room 201 the men found that there was only one bed in it. In some time less than ten minutes de Menthe came to the room and went in. She asked Roberts about whiskey. She asked for some money to get whiskey and Roberts gave her five dollars for that purpose. She then went downstairs and after a time de Menthe returned in company with the woman Foster, the latter carrying a bottle of whiskey wrapped in paper. The party had no corkscrew or knife. Foster said she would go down and get

a knife from "Charlie" and she went downstairs. After she had gone the page boy or elevator boy came to the door and asked, "Where is the fellow who has this room?" De Menthe replied to this saying, "Here he is." Roberts and de Menthe were then sitting side by side on the bed. The page boy said that the clerk "wanted to see you." He saw all three who were then in the room. Roberts went downstairs by the elevator with the boy and spoke to the accused, who said he had made a mistake, that he had no double rooms left and asked if it would be all right. Roberts did not hear the page boy say anything to the accused about who was in the room. While Roberts was downstairs he saw the accused hand a knife to the woman Foster and Foster before going upstairs handed it to Roberts who took it upstairs. Foster followed upstairs again though Roberts did not state that she accompanied him. At any rate all four were soon in the room together again. The whiskey bottle was opened and all of them drank some. Roberts then lay with de Menthe in the bed and Simpson with Foster on the floor and sexual intercourse took place between each couple. After more drinking Simpson and Foster said that they were going to Simpson's room (which did not exist) that they were not going to stay there any longer. Roberts did not in his evidence say that the couple then went out. He stated that before very long he became unconscious. After a time he woke up and came to his senses. He makes no further reference to the three other people, but the inference from what he said is that he found himself alone; his companions had departed. He also found that his money about $38.00 had departed from his pocket book. He went downstairs, saw the accused and told him that he had been robbed. The accused told him to wait till he had sobered up and he could "get them" in the morning. This was perhaps about four o'clock.

A detective, one Turner, testified that he knew both the accused and the woman de Menthe and that the latter had been employed as a manicure girl at the King George Hotel during some part of the time that the accused was employed as night clerk.

The leaf from the hotel register for January 11th was produced. It shews that two person had registered under the name of Davis and Hays for room 201. These are the last names on the sheet. Roberts said he registered in the name of Davis

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but did not see what Simpson wrote. The number of the room 201 is written opposite each name but over the erasure of something else which is not discernible. The two preceding names in the register have the number 311 opposite them also written over something erased. There is no record of any registration by either de Menthe or Foster on the sheet produced. Whether they were already registered at the hotel or not on some previous sheet does not appear. It was not directly shewn that they had not rooms in the hotel themselves.

The question then is whether the foregoing constitutes evidence upon which the magistrate could reasonably convict.

It was objected upon the argument that some of the evidence was not admissible because it consisted in statements made in the absence of the accused. Inasmuch as the admission of inadmissible evidence is not taken in the notice of motion as a ground of objection to the conviction I apprehend that all that was meant by the objection on the argument was that we should, in considering the evidence, exclude all that was not properly admissible, not that the conviction should be quashed because of the improper admission of evidence. This latter question, therefore, we do not need to consider.

In my opinion the conversation between the woman and the witness at the cabaret and on the way to the hotel was with the exception of one remark, properly admitted. The character of the women was a material question in issue. The fact that one of them at a cabaret made a bargain for sexual intercourse and suggested a place of resort is surely relevant upon the question of her character. It tended strongly to prove that she was a common prostitute.

It was not the truth of what she said that was material—indeed she made no allegation of fact except one—but the mere fact that she said certain things which were indicative of her character. Even if the accused had been present there would have been nothing for him to protest against or deny except possibly the suggestion that they go to his hotel. But the material point was not the particular place where they should go, but the fact that the woman suggested that they go *somewhere* and get a room.

The distinction will be made plain by reference to the one remark which I think was inadmissible viz., the remark by

de Menthe that she knew Charlie (*i.e.*, the accused). That is a statement of fact and a very material one. The truth or falsehood of the statement is very important and it related directly to the accused. Being said in the absence of the accused I do not think it was admissible in evidence and we should, therefore, reject and refuse to consider it. But the suggestions and arrangements made by de Menthe indicative of her character stand in a very different position. It is the mere fact that she said certain things that is material, not any facts asserted by her in the conversation, with the one exception mentioned.

There was, in my opinion, abundant evidence from which the magistrate could infer that the women were prostitutes. Of course, the fact that they arranged to get a room together at the King George Hotel should not be held in any way against the accused. Such an attempt might be made in respect of the most respectable hotel.

The question is, was there evidence from which the magistrate might properly infer that the accused knew the character of the women and knew of the fact and purpose of the meeting in room 201 and so knowingly permitted it to take place?

I think there was sufficient evidence from which to infer that the women had no room or rooms of their own in the hotel. If they had why was it necessary for the four to go to the one room where there was only one bed? That the men secured a room may no doubt be said to have been done to deceive the clerk who otherwise, might have objected to Roberts and Simpson, unregistered guests, going upstairs at that hour. But having once secured a room, which turned out to have only one bed in it, there seems to be no reason why one couple could not have gone to the girl's room, if there was one, and there used a bed instead of the floor.

Taking together everything which I have narrated, I think there was evidence from which the magistrate could infer that the accused knew that the four were in company with each other and were in the room together. He saw Foster hand the knife to Roberts. He saw the women who had no room in the hotel go upstairs at 2.30 in the morning shortly after two young men had gone up. He was acquainted at least with one of the women because she had been employed in the hotel. The two women had a conversation with him before going upstairs. One of

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them came down and got a knife from him and gave it to Roberts in his presence. Surely it is asking the magistrate to be too innocent altogether to say that he could not infer that the accused knew what the purpose of the women was in going upstairs. And if he knew their purpose it was also surely proper for the magistrate to infer that he knew the character of the women.

There was in my opinion ample evidence from which to infer that the accused knowingly permitted two prostitutes to go to a single room engaged just a few minutes before by two men, for the purpose of sexual intercourse with those two men.

The only doubt which I have arises from the wording of sec. 225 of the Code which defines a bawdy-house. It says: "A common bawdy house is a house, room, set of rooms or place of any kind kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes."

Both the word "kept" and the word "resorted" seem to me to imply something habitual so as to attach a *character* to the house or room and so that the descriptive adjective "bawdy" may be used in regard to it. If one man and one woman only had been shewn merely to have gone on this one occasion with the permission of the accused to use a room in the hotel for improper purposes and there had been no evidence, as there is none here, as to the reputation of the house or of its being disorderly or a nuisance to neighbours or to the public, I should have found grave difficulty in concluding that a magistrate might infer from the mere fact of a use permitted to one woman even though known to be a prostitute, on one occasion for improper purposes, that there existed a general habit of permitting such a use of the rooms in the hotel. It might very well happen that a clerk in a hotel who had become friendly with a man, a guest or inmate or a regular customer of the hotel, might, on receiving a wink, shut his eyes to his friend's proposed escapade and allow him to take a woman to his room on one occasion without protest, and yet not be guilty at all of habitually allowing any casual guest to do so.

Or the accused in this case who was acquainted with the de Menthe girl as having been employed as a manicure in the hotel some time before might possibly out of friendliness to her, or, perhaps in return for favours received by himself, permit her

to go to the room of a guest in the hotel on one occasion and yet not be inferentially guilty of allowing her habitually to do so. But we have different circumstances here. The accused, so the magistrate might infer, knowingly allowed *two* women known to him to be prostitutes to go to a single room for the purpose of sexual intercourse in that room with two men who had casually walked into the hotel without baggage at 2.30 in the morning. Is there not sufficient in these circumstances to justify the inference if the magistrate saw fit to make it, that the accused was prepared and not only prepared, but accustomed to permit the rooms of the hotel to be used in that way? I think there is.

In *Rex* v. *Mercier*, 13 Can. Cr. Cas. 475, the *habitual* use of a room in a hotel for such a purpose was proven by direct evidence. But it is not necessary that every fact essential to constitute the crime should be proven by direct evidence. It is sufficient if such fact can properly be inferred to exist from all the circumstances of the case. In the absence of any explanation or any attempt at explanation or excuse on the part of the accused, in the absence of any attempt to shew that he was tricked and misled or that he merely made a foolish mistake on one occasion through mistaken ideas of friendship or through temporary laxity in the performance of his duties, I think the magistrate could reasonably infer from the facts proven, if he saw fit to do so, that what was permitted to happen on the night in question was a thing which it was the habit or custom of the accused to permit in a general way.

The way in which the whole thing happened was such that the magistrate might quite properly infer that it was not an isolated instance but rather a matter of course and of custom or habit. Moreover, I think the decision in *Rex* v. *James*, 25 Can. Cr. Cas. 23, 25 D.L.R. 476, 9 A.L.R. 66, went upon the same principle, viz: that the existence of a habit or custom of doing a certain thing may be inferred from the circumstances surrounding the doing and the manner of doing or even of offering to do that thing on a single occasion.

This is sufficient to sustain the conviction and the motion should, therefore, be dismissed with costs.

It was admitted that though the accused was only a night clerk he came within the definition of a "Keeper" given in sec. 228 (2) of the Code.

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Beck, J.
Walsh, J.

BECK, J. (dissenting):—I cannot agree that the room in question was shewn to be "a common bawdy-house" within the meaning of the definition in the Code.

WALSH, J., concurred with Stuart, J. *Conviction sustained.*

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(Decision No. 2.)

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 20, 1917.

1. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—SUMMARY TRIAL FOR INDICTABLE OFFENCE—CR. CODE SEC. 1013.
A city police magistrate summarily trying a charge of keeping a disorderly house without the consent of the accused (Code secs. 774, 776) cannot grant a reserved case under secs. 1013 and 1014 in respect of the conviction nor can the Court of Appeal grant leave to appeal and direct a case to be stated under sec. 1015.

2. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—EXTENDED JURISDICTION—CR. CODE SEC. 777.
Sec. 777 of the Criminal Code, giving extended jurisdiction of summary trial by consent before certain magistrates, applies only to cases which in Ontario would be triable at General Sessions other than cases listed in sec. 773. (*Per* STUART and BECK, JJ.)

[*R.* v. *Hayward*, 6 Can. Cr. Cas. 399, 5 O.L.R. 65; *Ex parte McDonald*, 9 Can. Cr. Cas. 368, followed; but see *R.* v. *Archibald*, 4 Can. Cr. Cas. 159; *R.* v. *Crawford*, 20 Can. Cr. Cas. 53, 6 D.L.R. 380.]

Statement.

MOTION for leave to appeal under sec. 1015 from a city police magistrate's conviction of the accused on a summary trial for keeping a disorderly house. The magistrate had been applied to for a reserved case but had declined to grant same, the conviction having been upheld in *certiorari* proceedings: *R.* v. *Davidson* (No. 1), 35 D.L.R. 82, 28 Can. Cr. Cas. 44.

J. B. Barron, for the applicant (appellant).

W. F. W. Lent, for the Crown (respondent).

Harvey, C.J.

HARVEY, C.J.:—Accused was convicted by the Police Magistrate of Calgary on the 13th day of January, 1917, of keeping a disorderly house.

An application by way of *certiorari* to quash the conviction was made to this Division, which application was dismissed on the 7th March, the reasons being reported in 35 D.L.R. 82. One of the grounds raised was that there was no legal evidence to support the conviction. One of the Judges dissented from the opinion of the majority on this ground.

There is no appeal from the decision given, but if it had been upon a stated case under sec. 1013 of the Code, there would have been an appeal to the Supreme Court of Canada, this Court not

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being unanimous. The accused therefore applied to the Police Magistrate to reserve the same question which had been determined upon the *certiorari* proceedings. The Police Magistrate being fortified in his judgment on this point by the judgment of the majority of this Division declined to have any doubt of the correctness of his opinion and refused to reserve the question. This is an appeal from his refusal.

It is not necessary to consider how far effect should be given to the objection that this application is concluded by the former decision for there appears to be another objection which is fatal and that is that there seems to be no authority for the stated case asked for in the conviction in question.

The conviction is for keeping a bawdy house contrary to the provisions of sec. 228, which makes it an indictable offence. Secs. 1013 and 1014 provide that a stated case may be granted in the case of the judgment of a Court or Judge or a magistrate proceeding under sec. 777 and in no other case.

In *Rex* v. *Crawford* (1912), 20 Can. Cr. Cas. 49, 6 D.L.R. 380, it was unanimously held by this Court that a case such as the present in which no consent was given by the accused did not come under section 777, the jurisdiction under that section being conferred only by consent.

Section 774 declares that on such a charge as the present the jurisdiction of the magistrate is absolute and does not depend on the consent of the accused, and it is quite evident from the record that no consent was given by the accused and that the magistrate was therefore proceeding not under sec. 777 but under sec. 774, and consequently this case does not fall within the provisions of sec. 1013. The case of *Rex* v. *Booth*, decided by the Appellate Division of the Supreme Court of Ontario (1914), 23 Can. Cr. Cas. 224, 31 O.L.R. 539, is directly in point.

The appeal must therefore be dismissed.

STUART, J., concurred with Beck, J. Stuart, J.

BECK, J.:—As reported 35 D.L.R. 82, the defendant moved before this Division by way of *certiorari* to quash the conviction and his motion was dismissed with costs, one Judge out of four dissenting. Beck, J.

There being no appeal to the Supreme Court of Canada, notwithstanding the dissent, from a decision on *certiorari* in a crim-

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inal matter,* counsel for the defendant requested the convicting magistrate to state a case for the opinion of this Court, hoping, whether the question came before this Division on a case stated by the magistrate or by way of appeal from his refusal to state a case, he might again obtain a dissent and thus entitle him to appeal to the Supreme Court of Canada. The magistrate refused to state a case, no doubt properly, in view of the decision of this Division.

The defendant's motion by way of appeal from his decision is now before us, but it is now contended that, in such a case as this, there is no power to state a case.

The charge is one of keeping a disorderly house.

That is an offence triable by a magistrate under Part XVI. of the Code sec. 773 (*f*)—"Magistrate" in this Province meaning (sec. 771) either (1) a Judge of any District Court; or (2) any two justices; or (3) any police magistrate or other functionary or tribunal having the powers of two justices and acting within the limits of his or its jurisdiction.

Sec. 774 says that the jurisdiction of a magistrate is absolute, *i.e.*, it does not depend upon the consent of the person charged, in the case of a person charged with keeping a disorderly house.

But in view of sec. 776 which applies to four Provinces, of which Alberta is one, sec. 774 may be disregarded for sec. 776 enacts that in the Provinces to which it applies, the jurisdiction of the magistrate under this Part XVI. is absolute without the consent of the accused except in cases coming within the provisions of sec. 777.

Section 777 covers all cases which may be tried at a Court of General Sessions, but the offences listed in sec. 773 are, all of them, such cases, hence the exception in 776 is meaningless unless (at least in the four Provinces and two Territories to which that section applies) the provisions of sec. 777 have no application, except to cases triable at General Sessions *other than those listed in sec.* 773; as indeed is the interpretation put upon sec. 777 by some of the Ontario Judges in *R.* v. *Hayward*, 6 Can. Cr. Cas. 399; *Ex p. McDonald*, 9 Can. Cr. Cas. 368, cited in Crankshaw's Crim. Code in the notes to this section; and this seems to be the only interpretation which will make sense of sections, both of which, as well as others in the same part, are so confusing as to justify the sug-

*See R.S.C. 1906, ch. 139, secs. 36 and 39, and *Re McNutt*, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, 10 D.L.R. 834.

gestion that those responsible for the framing of the Criminal Code should redraft the whole of Part XVI.

Sec. 797 gives a right of appeal in cases of this kind, as in cases of summary conviction under Part XV., but only where the conviction is made by *two justices*.

Sec. 798 excludes the application to Part XVI. of the provisions of Part XV., except two sections which are not material for present purposes.

Sec. 1013, which provides for appeal by way of stated case in the case of indictable offences, is, it seems, restricted to cases where the accused has been tried before the Supreme Court or a Judge thereof, or the District Judge's Criminal Court, or a District Court Judge, or a magistrate *acting under sec. 777*.

It is proved before us that the convicting magistrate is a police magistrate coming within the special qualifying provisions of sec. 777 (2), *i.e.*, a police magistrate for the city of Calgary, being a city with a population of not less than 2,500 according to the last decennial census.

The conviction describes him as "Police Magistrate of the City of Calgary, having jurisdiction in and for the City of Calgary and the Province of Alberta," and the subscription of his signature to the conviction is followed by these words. Furthermore the depositions taken before the magistrate are stated to be taken before "W. S. Davidson, a Police Magistrate in the Province of Alberta, having jurisdiction in and for the City of Calgary and Province aforesaid." But the fact that the police magistrate who made the conviction has certain extended powers does not in any way, that I can see, help the defendant. The right of obtaining a stated case under sec. 1013 depends not on the qualification of the magistrate as spoken of in sec. 777, but upon the fact that the proceedings were had under that section.

It is with the greatest regret that I come to the conclusion that in the Province of Alberta there is no appeal from the decision of a magistrate (unless two justices) against a conviction for *any of the offences* enumerated in sec. 773. I can hardly believe that this result was ever intended and can but think that it has happened through an oversight.

Here is a case of a large hotel in the city of Calgary practically stamped as a bawdy house on evidence that a night clerk had

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allowed two young men and two young girls on one occasion to occupy one room in the hotel and on inferences of knowledge; and there is no right of appeal except by way of *certiorari*, and in that case no appeal, even from the decision of a divided Court, to the Supreme Court of Canada.

The application of the defendant will, I regret, have to be refused. I would give no costs. *Leave to appeal refused.*

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WARWICK v. SHEPPARD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ. A. March 5, 1917.

MECHANICS' LIENS (§ III—13)—PRIORITIES—MORTGAGE.

Where a mortgage has been duly registered, advances made thereunder after mechanics' liens on the mortgaged property have arisen, but before their registration, take precedence of the liens. A mortgage having been held to have priority over liens, both upon the land and the improvements, a lien holder cannot take away that priority by shewing that the work and materials increased the selling value of the property.

Statement.

APPEAL by mortgagees from the judgment of an Official Referee, in a mechanic's lien action. Reversed.

The following provisions of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, are applicable to the points raised upon the appeal:—

8.—(1) The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

(2) Where the estate or interest upon which the lien attaches is leasehold the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the claim of lien at the time of registering thereof, verified by affidavit.

(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge.

14.—(1) The lien shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making

such payments or after registration of a claim for such lien as hereinafter provided.

(2) Where there is an agreement for the purchase of land, and the purchase-money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

(3) Except where it is otherwise provided by this Act no person entitled to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lien-holders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro ratâ* according to their several classes and rights.

B. N. Davis, for appellants; *A. L. Fleming*, *G. H. Shaver*, *T. H. Barton*, for lien-holders.

HODGINS, J.A.:—Appeal by mortgagees from the judgment of J. A. C. Cameron, an Official Referee, in a mechanic's lien action, declaring certain lien-holders to have priority on the increased selling value over the mortgagees, to the extent of their liens.

Hodgins, J.A.

The judgment is dated on the 28th November, 1916, and declares that the selling value of the lands in question has been increased by the work done by four lien-holders. Their liens are allowed at $3,935.66, and opposite each lien-holder's name is the amount by which the selling value attributable to the work done by him has been increased. The judgment also finds that the mortgagees are prior to the liens to the extent of $7,462.62, the amount of a mortgage existing before the work began, which the mortgagees paid off on the 4th May, 1914, and that the mortgagees have sold the property for an amount which on the argument was stated to be $45,942, the purchaser agreeing to take the property "subject to the payment of any claims arising between the vendors and the holders of any liens on the property which may be declared by the Court to rank in priority to the mortgage-claim of the said vendors, either as to increased selling value or otherwise."

There is also included in the judgment an order against the mortgagees to pay the amount of the liens, and likewise against the purchaser, in case the mortgagees do not pay.

If the lien-holders are not paid off, a sale is ordered, the pur-

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chaser having been added as a party. The appeal is against the personal orders to pay, and also and chiefly against the priority given upon increased value, the amount of which and its proof are also contested. It is also contended that the mortgage on the property has priority to its full extent under sec. 14 of the Mechanics and Wage-Earners Lien Act, and that the mortgage of $7,462.62 is merged in the present security, so that there is no part of it which can be treated as a prior mortgage under sec. 8, and that, therefore, no priority upon increased selling value can be given. Another argument is that the $7,462.62 was not in fact paid out of the mortgage-moneys, but out of amounts advanced upon collaterals pledged when the mortgage was given. This last is not proved.

The appeal must succeed as to the personal orders for payment against the mortgagees and owners, as such orders are not warranted. The purchaser, who acquired her status *pendente lite*, need not have been added as a party.

The liens which are involved in this appeal are for balances on individual contracts or orders, the major portion of the price represented by these contracts or orders having been paid as the work progressed.

The liens are all in respect of work done after the 19th February, 1915, but their inception dates back to June and July of 1914. They were registered on the 29th April, 1915, 2nd June, 1915, 3rd May, 1915, and 28th August, 1915.

The mortgage for $50,000 is dated the 24th March, 1914, and was registered on the 1st April, 1914.

In addition to the $7,462.62 advanced on this mortgage on the 4th May, 1914, there were paid out on account sums amounting to $20,537.33 up to and including the 22nd May, 1914; so that, to the extent of $27,999.95, there is no doubt of the priority of the $50,000 mortgage. After the liens had arisen by the doing of work and delivery of materials, *i.e.*, in June and July, 1914, but were unregistered, the balance of the moneys was advanced on the mortgage between the 8th December, 1914, and the 26th January, 1915, on which last-mentioned date the final payment was made. There was, therefore, between June and July, 1914, and the earliest registration of any of the liens now in question, a period in which written notice or registration of the liens could

have taken place, in default of which advances under the mortgage would have priority: *Sterling Lumber Co.* v. *Jones* (1916), 36 O.L.R. 153, 29 D.L.R. 288; *Charters* v. *McCracken* (1916), 29 D.L.R. 756.

The result of these cases is to postpone these liens to the $50,000 mortgage to its full extent.

But it is said that the $7,462.62 is a prior mortgage, or that in any case the $50,000 mortgage, to the extent of $27,999.95, can be so described; and that, as the liens represent work done after the 26th January, 1915, sec. 8 applies, and these lien-holders can claim priority upon increased selling value.

Assuming that the $7,462.62 is or was a prior mortgage within sec. 8, or that the $50,000 mortgage, to the extent mentioned, might be so treated, yet, as pointed out in *Cook* v. *Koldoffsky*, 28 D.L.R. 346, where, as here, one is dealing with competing priorities upon the whole property, both land and improvements, by virtue either of liens or mortgage-advances, there is nothing left outside the charge secured by one or the other upon which to found increased selling value. That only arises because there is added by the improvements themselves an element of value in addition to that possessed by the land before they were put upon it. And, therefore, while they do contribute an increased selling value compared with the situation existing when the mortgage represented by the $7,462.62 was the sole incumbrance, or when total advances under the $50,000 mortgage were completed, yet, as the $50,000 mortgage gained priority upon both the land and the improvements themselves for these advances, under the statute, as against the liens, it is impossible to take that priority away again under the guise of increased selling value. The foundation for that is gone when the improvements are themselves, to their full value, subject to the prior charge created by sec. 14. So that, treating the $7,462.62 as in truth a prior charge, the $50,000 mortgage, to the extent of $42,537.38, would have priority to these liens. The increased selling value of the whole improvements is, as evidenced by the sale, $29,942, so that, even if separable from the improvements themselves, there is nothing left for the liens. On the other hand, to treat sec. 8 as applicable to each individual worker and supplier of material, and increased selling value as arising as the day's or week's work is done, and

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then to ascertain priority of each such fragment as against progressive advances on a building loan, is to propose an impossible task and one that is not warranted by either the words or the intention of the statute.

The work here is incapable of division if the true increased selling value is to be ascertained; and it will be so in every case where the work and improvements represent some defined and single object, although composed of different factors.

It may be different when an owner, for instance, adds a wing to his house and at the same time builds a garage, or installs a new system of heating when adding a verandah to his residence. In those events the increased selling value due to each will, no doubt, be separable, but not where the individual work is no improvement by itself unless all is finished, when the combined result then adds, by its very completeness, value to the land on which it stands.

I think the result must be that the appeal of the mortgagees should be allowed, with one set of costs to be paid by the lienholders in proportion to their several amounts. The judgment of the 28th November, 1916, should be set aside, and in its place there should be substituted a judgment declaring that the mortgage for $50,000 has priority over these liens.

MEREDITH, C.J.O., and MACLAREN and FERGUSON, JJ.A., concurred. MAGEE, J.A., agreed in the result.

Appeal allowed.

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REX v. BARB.

Alberta Supreme Court, Hyndman, J. March 15, 1917.

INTOXICATING LIQUORS (§ III G—89) — KEEPING FOR SALE — REBUTTING STATUTORY PRESUMPTION FROM FINDING IN QUANTITY.

The statutory presumption of keeping liquor for sale which arises under the Alberta Liquor Act from possession of a large quantity at a private house, may be rebutted by the testimony of the accused denying that he kept for sale; and where there was no evidence of frequenting of the place by others and nothing to throw discredit upon the testimony of the accused, the magistrate is bound to accept his evidence in disproof of the statutory presumption and cannot legally convict in the face of such rebuttal where the case for the prosecution depends on the statutory presumption alone. The Court on *certiorari* will look at the evidence and set aside a summary conviction under such circumstances as not supported by any evidence upon which the magistrate could find the accused guilty.

[*R.* v. *Emery*, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, and *R.* v. *Covert*, 28 Can. Cr. Cas. 25, applied.]

Statement.

MOTION by way of *certiorari* to quash a conviction against the defendant made by James Rae, police magistrate of the

Province of Alberta, on the 9th day of February, 1917, at Medicine Hat, for that the said defendant, between the 7th day of December, 1916, and the 12th day of January, 1917, not being a vendor, did unlawfully have or keep intoxicating liquor for the purpose of sale, barter or traffic thereof at the city of Medicine Hat, Alberta, contrary to the Liquor Act of Alberta, A.D. 1916, whereby the said defendant was adjudged to pay a fine of $100, and, in default, to two months' imprisonment in the guard room at Lethbridge.

Statement.

The grounds relied on by the applicant were:—(1) That the convicting police magistrate improperly held that there was sufficient evidence given by and on behalf of the informant to establish a *primâ facie* case under the provisions of the Liquor Act, and thus put the accused on his defence; (2) that there was no evidence before the magistrate of the offence charged or of any offence.

R. R. Evans, for the Crown; *W. P. Dundon*, for applicant.

HYNDMAN, J.:—Counsel for the Crown took the preliminary objection to the proceedings that the notice of motion was defective inasmuch as it was not directed to the Clerk of the Court at Calgary, being the Court in which the application was to be heard, and that a notice to the Clerk of the District Court at Medicine Hat was insufficient. I do not think that this objection is tenable, inasmuch as in the ordinary course the magistrate's duties would be to forward the papers and documents to the District Court at Medicine Hat. As a matter of fact, the papers, etc., never reached the Clerk of the District Court at Medicine Hat, but were forwarded here direct by the magistrate; therefore I cannot see what force the objection can possibly have.

Hyndman, J.

R. v. *Emery*, 27 Can. Cr. Cas. 116, is authority establishing that upon *certiorari* a Judge of the Supreme Court of Alberta is entitled to look at the evidence given before the convicting justice in order to ascertain whether it is sufficient to sustain the conviction, and that, if it is not sufficient, the conviction should be quashed, that is not to enquire into whether the inferior tribunal has reached the proper conclusion on the evidence which points both ways, but whether there was any evidence upon which the tribunal could and did find.

The material facts in this case are that the defendant, between the dates alleged in the information, received from outside the

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province three or four shipments of assorted liquors, a large proportion of which was whiskey, and that the value of the liquor would be about $99; that it was received by him at his private dwelling-house in Medicine Hat, which was occupied only by himself, his wife and family, and at the date of his trial he had about forty bottles in the house. So far as the Crown's case was concerned, the only evidence against him was the fact of his having received this liquor at his residence, being his private dwelling-house within the meaning of the Act, and there is no evidence that he sold any liquor to any person whomsoever.

Section 24 of the Liquor Act enacts as follows:—

"No person within the Province of Alberta, by himself, his clerk, servant or agent, shall have, keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, except as authorized by this Act."

Section 55 enacts as follows:—

"The fact of any person, not being a vendor, keeping up any sign, writing, printing or other mark, in or near to his house or premises, or having such house fitted up with a bar or other place containing bottles or casks displayed so as to induce a reasonable belief that liquor may be lawfully purchased in such house or premises, or that liquor is sold or served therein, or that there is on such premises more liquor than is reasonably required for such person and his family, exceeding one quart of spirits and two gallons of malt liquor shall be deemed *primâ facie* evidence of the unlawful sale and keeping for sale and having and keeping of liquor by such person."

It will be noticed, therefore, that it is no offence to have liquor in one's private dwelling-house, but that sec. 55 raises a presumption that, if the quantity on such premises is more than is reasonably required for such person and his family, exceeding one quart of spirits, etc., it shall be deemed *primâ facie* evidence of unlawful sale and keeping for sale and having and keeping of liquor by such person.

This presumption is sought to be met by the evidence of the defendant, who says that he never sold liquor in Medicine Hat, and one of the Crown witnesses testified that the accused's wife stated to him that they never sold any liquor there. On my first view of these statements, it occurred to me that this was

somewhat equivocal and might still leave unanswered the presumption that he did keep it for sale.

The evidence was taken by the magistrate in longhand, and may not be full and complete and as exactly as given in Court, and I think, therefore, that a liberal interpretation should be given to the defendant's statements. The fact that he had the liquor between the 7th of December and the 11th of January and that he never sold any up to the date of the trial convinces me that this ought to be considered sufficient evidence that he did not have it for sale. What might be in his mind or what he might avow as his future intention would be of little value to the Court. Section 5 would seem to cover this point when it says that "such person shall be obliged to prove that he did not commit the offence with which he is charged." The presumption of law raised by the Act is met by the evidence that he never sold any liquor in Medicine Hat.

Rex v. *Covert*, 28 Can. Cr. Cas. 25, seems to me to be entirely applicable to this case. Beck, J., at page 37, says:—

> "We are bound to presume the accused was innocent until proved guilty. He gave all the available evidence, and that evidence, if true, explained away the inference or presumption against him. It will be objected, of course, that the magistrate may have disbelieved entirely the evidence on behalf of the accused, and that it was open to him to do so; but, in my opinion, it cannot be said without limitation that a Judge can refuse to accept evidence. I think he cannot if the following conditions are fulfilled: (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 upon him; and (5) that there is nothing in his demeanour while in Court during the trial to suggest untruthfulness. To permit a trial Judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence."

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In the case before me, I find that the statement of the accused is not unreasonable or improbable; is not contradicted; that his credibility was not attacked, and that nothing appears in the course of the evidence as disclosed to throw discredit upon him, nor was there anything in his demeanour as disclosed which would suggest untruthfulness.

It seems to me to be the case of an ordinary citizen, in his own private dwelling-house, having more liquor than the quantity considered reasonable under the Act, coming into Court and rebutting the presumption by directly stating that he did not sell liquor.

I can, however, conceive of circumstances where, although the Crown is unable to prove actual sale, they might offer circumstantial evidence, for instance, that numbers of persons resorted there on numerous occasions without adequate excuse, nightly carousal, or an unsatisfactory explanation by the accused, etc., but none of these conditions appear in the case in question.

I think, therefore, that there is not sufficient evidence upon which to convict, and the conviction will, therefore, be quashed, with the usual protection ordered to the magistrate.

Conviction quashed.

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MINOR v. GRAND TRUNK R. Co.

Ontario Supreme Court, Riddell and Lennox, JJ., Ferguson, JA., and Rose, J. February 26, 1917.

RAILWAYS (§ III—45)—HIGHWAY CROSSING—RATE OF SPEED—NOT "THICKLY PEOPLED"—NEGLIGENCE.

The locality in which an accident occurred by a collision with a railway train not being "thickly peopled," sec. 275 of the Railway Act (R.S.C. 1906, ch. 37) does not apply.

Statement.

APPEAL by defendant from the judgment of Britton, J. in an action for damages for personal injury sustained by the plaintiff and for the destruction of his motor truck by reason of the defendants' negligence, as the plaintiff alleged. Reversed.

The judgment appealed from is as follows:—

Britton, J.

BRITTON, J.:—The plaintiff was the owner of a motor truck car which he used in his business as a carter at Port Colborne. On the 27th October, 1915, the plaintiff, being in possession of the truck car and lawfully upon the highway, was obliged to cross the defendants' line of railway, and, in so crossing, the car was struck by the engine of a train of the defendants, the plaintiff was thrown to the ground and injured, and his truck was completely destroyed.

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Britton, J.

The plaintiff charges negligence of the defendants in running the train which did the damage. The action is for the recovery of the damages sustained.

Questions were submitted to and answered by the jury as follows:—

(1) Were the defendants guilty of any negligence which occasioned the damage to the plaintiff? A. Yes.

(2) If so, what is the negligence you find? A. According to the evidence we find that the train was going at too high rate of speed at the time of the accident.

(3) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

(4) Damages? A. $1,000.

Upon the answer to the second question, and upon the evidence, the defendants ask for a dismissal of the action.

I am of opinion that there was evidence that the speed was, under the circumstances, in approaching the crossing over which the plaintiff was moving, excessive. If any evidence is given that ought reasonably to be considered of excessive speed and that the accident was occasioned thereby, the case could not be properly withdrawn from the jury.

There will be judgment for the plaintiff for $1,000 damages, with costs.

D. L. McCarthy, K.C. for appellants; *W. M. German*, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—On the 27th October, 1915, the plaintiff was driving his motor truck across the Grand Trunk Railway tracks in the village of Port Colborne, when the truck was struck by the engine of the railway company's passenger train. The truck was destroyed and the plaintiff injured.

He brought this action, alleging that the collision was due to the negligence of the defendants. The charges of negligence in the statement of claim are as follows: (1) the train "was running at a much higher rate of speed than is allowed by the statute in such case made and provided;" and (2) failure and neglect "to blow a whistle or ring a bell."

[The Judge then set out the questions left to the jury and their answers, as above.]

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Judgment was directed to be entered on the findings for the plaintiff—the defendants appeal.

Much evidence was given on the question of ringing the bell and blowing the whistle—it is of the usual character; a jury would be justified in finding either for or against the defendants upon this alleged ground of negligence—and the plaintiff does not complain.

It cannot be necessary again to decide that (speaking generally), where more than one ground of negligence is left to a jury and the jury finds only one, it thereby negatives the others; there is nothing in this case to take it out of the general rule; and we must hold that the jury has negatived all negligence charged except excessive speed.

The speed is given by the witnesses variously at "from 15 to 20 miles per hour" (plaintiff's witness), "not over 10," "about 8," "about 10" (defendants' witnesses). In view of the fact that the learned trial Judge charged the jury that the defendants were limited by the law to a speed of 10 miles per hour, and in view of the positions taken at the trial, it must be taken that the jury considered that the rate of 10 miles per hour had been exceeded. If then the learned trial Judge was right in his law, this verdict must stand.

It is admitted on all hands that the Parliament of Canada has full power to regulate the speed of trains—that body, in view of the increased and increasing demand for rapid and more rapid travel, has not seen fit to limit the speed of trains except in particular places—and a train cannot be said to be negligently or improperly run in respect of speed unless it is transgressing the statute.

The statutory provision is as follows (R.S.C. 1906, ch. 37, sec. 275): "No train shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than 10 miles an hour, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission is given by some regulation or order of the Board."

It is hard to see how there can be any doubt of the meaning of this enactment. It plainly says to a railway company, "The law does not prevent you running your trains at any other place at any speed you please, but in a thickly peopled portion of a

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city, town or village, if you wish to run at a greater speed than 10 miles an hour, you must fence your track, etc." It seems equally plain that the primary object of this enactment is not the protection of persons crossing the track on a highway—fencing, etc., could not help them. But there can be no doubt that such persons have a right in such places to rely upon the trains not exceeding the statutory limit.

Mr. German frankly admits that the accident did not take place in a thickly peopled part of the village; and, therefore, the local knowledge of the jurors cannot be appealed to, as it was by Mr. Justice Idington in *Andreas* v. *Canadian Pacific R.W. Co.* (1905), 37 S.C.R. 1, at pp. 19, 20.

The place not being thickly peopled, the jury was not at liberty to find that the speed was excessive: *Andreas* v. *Canadian Pacific R.W. Co., supra; Zufelt* v. *Canadian Pacific R.W. Co.*, 23 O.L.R. 602, 12 Can. Ry. Cas. 420; *Parent* v. *The King* (1910), 13 Can. Ex. C.R. 93; and *cf. Grand Trunk R.W. Co.* v. *McKay*, 34 S.C.R. 81; *Grand Trunk R.W. Co.* v. *Hainer*, 36 S.C.R. 180.

The fact (if it be a fact) that the track was not fenced is wholly immaterial—the fencing or protection mentioned in this section is necessary only where the place is a "thickly peopled portion of any city, town or village," which this admittedly is not.

The appeal must be allowed and the action dismissed, both with costs. *Appeal allowed.*

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LEA v. CITY OF MEDICINE HAT.

Alberta Supreme Court, Appellate Division, Harvey, C. J., Stuart, Beck and Walsh, JJ. May 1, 1917.

1. APPEAL (§ III F—98)—EXTENSION OF TIME—DISCRETION.
Under the Alberta Rules a Judge has the discretion to extend the time of appeal in any case it may seem just.

2. DISCOVERY (§ IV—20)—EMPLOYEES—OFFICER OF CORPORATION.
An employee or officer of a corporation, examined for discovery, cannot be compelled to give information acquired by him outside of his employment; the fact that an official has no personal knowledge of matters upon which information is desired is no ground for substituting another who has no knowledge acquired in a way which would make it available for the plaintiff on discovery.

Statement.

APPEAL from the judgment of Scott, J., on an application for discovery. Reversed.

I. C. Rand, for respondent; *S. G. Bannon*, for appellant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's action is for payment for services rendered to the defendant in connection with the construc-

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tion of certain power and water works. The defendant has counterclaimed for damages by reason of negligence in connection with said construction.

Particulars of the negligence are given in the counterclaim and further particulars of the negligence and of the damages have been furnished under order. An order has been made for the examination for discovery on behalf of the plaintiff of three of the defendants present and seven of its past employees, one Taylor, its water and power superintendent, being specified in the order as its officer whose examination may be read at the trial on behalf of the plaintiff.

Rule 234 provides that "A Judge may order any party to an action or any person who is or has been employed by any party to an action and who appears to have some knowledge touching the questions in issue acquired by virtue of such employment" to be examined for discovery.

Then r. 250 provides that "any party to an action or issue may, at the trial, use in evidence as against any opposite party any part of the examination of such opposite party, or in case such opposite party is a corporation, of the examination of any officer thereof selected to submit to an examination to be so used." Sub-sec. (2) provides that "such selection shall be made by the corporation, or by a Judge if the corporation refuses or fails to select any, or what the Judge considers the proper officer or officers, having regard to the questions involved."

The plaintiff, pursuant to the order, examined Taylor who was unable to give all the information desired by the plaintiff. Counsel for the defendant stated on the examination that there was no one in the defendant's employ at present who could give all the information, but that he would obtain what the plaintiff was entitled to. Plaintiff's counsel objected that that did not give him the right to cross-examine. One Pyper, one of the other two present employees ordered to be examined, was also examined. It appears that some years ago he was employed by the defendant as one of its assistant engineers, that during the progress of the work in question he was employed by the plaintiff as his resident engineer and that after the completion of the work he returned to the city's employ as assistant engineer and has since become chief engineer. One of the past employees, who is ordered

to be examined, is the person who was chief engineer during the work and who now resides in New Brunswick.

On the examination of Pyper the plaintiff proposed to go into the facts connected with the construction during the time Pyper was plaintiff's employee. Defendant's counsel objected and upon his advice the witness refused to answer the question.

An application was made to the local Judge for an order to compel Pyper to answer the questions and also that he be substituted for Taylor as the officer whose examination might be used against the defendant. The first part of this application was refused and the second part granted.

Notice of appeal was given by the defendant to a Judge in Chambers against that part of the order substituting Pyper for Taylor.

When the appeal came on to be heard, objection was taken that notice had not been given in time. The notice given also gave notice of an application to extend the time. The application came before Scott, J., who extended the time and heard the appeal and dismissed it. The defendant now appeals from that decision and the plaintiff appeals from the Judge's extension of the time for appealing.

In considering the preliminary appeal from the extension of time it is worth while to consider the sequence of events. The services rendered by the plaintiff for which he claims compensation of about $16,000 in addition to $17,000 paid him were rendered between the summer of 1912 and the summer of 1914. The action was begun in November, 1915. The defence was filed in March, 1916, and the order for examination was made in August, 1916.

The examinations were held in December, 1916, and the order appealed from was made on March 13, 1917. The notice of appeal to a Judge in Chambers was given on March 29, or 16 days after the decision.

R. 313 provides that notice of an appeal from a local Judge shall be served within four days after the order is made, while under r. 321 notice of appeal to this Division is to be given within 20 days after the decision appealed from. It is stated and not questioned that the reason the notice of appeal was not given within four days was because the defendant's solicitor

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thought he had the usual time of 20 days for appeal. The plaintiff's counsel contends that such a mistake as that is no ground for extending the time and refers to *Re Coles and Ravenshear*, [1907] 1 K.B. 1. I am of opinion that that case cannot be deemed an authority here in view of the difference of the rules and the character of the appeal. In that case the appeal was from a Divisional Court and, as the Master of the Rolls pointed out, the case had been fully heard on the merits and the decision must be presumed to be correct.

The mistake was the same as in the present case but, under the English Rule, the appeal could not be brought after the specified time "except by special leave of the Court of Appeal." We have no such rule and this is a decision of a local Judge whose jurisdiction is given under the rules.

R. 556, however, provides that a Judge may enlarge or abridge the time in any case upon such terms as may be just. In the case cited the Judges stated that, but for the prior decisions by which they felt bound, even on the rule as it stood they would extend the time, but the decisions followed seem to treat the matter as one requiring special circumstances to justify the extension of time.

I am of opinion, therefore, that under our rules in such a case as this it is for the Judge to exercise his discretion, having regard only to what would be just. There is no suggestion that the plaintiff is in any way prejudiced by the extension of the time further than by the few days delay, and the expedition shewn by the defendant in getting this appeal through contrasts very favourably with the speed with which the plaintiff has prosecuted his rights. I would, therefore, dismiss the plaintiff's appeal with costs.

This brings us then to the merits of the order appealed from. In *Nichols & Shepard Co.* v. *Skedanuk*, 6 D.L.R. 115, 5 A.L.R. 110, the right of examination of an officer under the then rule was under consideration, and the two purposes of the examination for information of fact and for admissions to be used against the opposite party were pointed out. Since then the rules have been put in their present form so that that distinction is clearly made and the privilege for the first purpose has been much extended while that for the second has been more clearly defined and per-

haps to some extent restricted. The matter has, since the change of the rule, been again considered by this Court in two cases last year: *McLean* v. *C.P.R.*, 28 D.L.R. 550, and *Medicine Hat Wheat Co.* v. *Norris*, 29 D.L.R. 379. But in both these cases, r. 234 alone required to be considered.

Plaintiff's counsel, is quite frank in saying that what he wishes to accomplish is to obtain from Pyper the information he has, which he acquired while employed as plaintiff's engineer. This has been refused him on the application already made, but he appears to be of opinion that if he can examine him as the mouthpiece of the defendant he can get from him information which he cannot get while examining him simply as an employee. I do not consider whether this is so or not. It was pointed out in the *Skedanuk* case that in some cases on examination a person might be required to give information acquired from others for the purpose of the examination. That the same rule will apply to an officer of a corporation under the new rules seems probable from what was said in the other two cases cited.

It is to be observed, however, that the right to examine parties and officers or other employees is expressly given only by r. 234. R. 250 only refers to the right to use at trial examinations taken presumably under r. 234. It would appear clear that r. 234 in terms authorizes the defendant to cross-examine Pyper for discovery as a former employee of the plaintiff upon the facts upon which the plaintiff maintains his right to cross-examine him while the plaintiff adds to this the claim of right to use such cross-examination as admissions against the defendant. It would undoubtedly be a most anomalous situation if these rights existed contemporaneously.

Under the English practice the purposes of the discovery are the same but the method of obtaining the evidence is ordinarily by interrogatories.

In *Welsbach Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.*, [1900] 2 Ch. 1, it was held that an officer of a company answering for the company could not be compelled to answer as to knowledge obtained outside of the company's employment. That principle appears to be implied in our r. 234 which permits examination of employees who have information acquired by virtue of their employment. There is a present

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judgment against the plaintiff that he cannot get the information he desires against Pyper as a simple employee of the defendant by reason of the fact that the information was not acquired by virtue of his employment by the defendant. It seems clear that under the authority of the case cited no officer of the defendant could be required to inform himself from Pyper and communicate such information. It would seem to follow necessarily, and certainly it is clear from the dicta in the case cited, which are very instructive, that Pyper on being examined as the mouthpiece of the defendant could not be compelled to give information acquired by him outside of his employment by the defendant.

Collins, L.J., at p. 14, says:—

> The question is, does the answer come within the category of admission? If it does, it can be read against the party who makes it with all the suggestions, sinister or otherwise, as to the extent of the admission or the qualification sought to be put upon it, and that is precisely the reason why, when some one who is not the company, has to answer for the company the admission must be guarded with proper restrictions. A corporate body cannot answer for itself and it is necessary that some individual should answer for it. His function is to give the answer of the company. Some restrictions must therefore be put upon the knowledge which he is to apply in answering the questions put to him. Where is the line to be drawn? It seems to me that it was drawn logically and practically by Brett, L.J., in *Bolckow Vaughan & Co. v. Fisher*, 10 Q.B.D. 161, when he said that the person who is called upon to answer is not bound to answer as to what he has learnt accidentally and not in the ordinary course of business. It is the function of the Judge, with the assistance of counsel, when selecting the person who is to answer for the company to see that he is a person who, in the ordinary course of his business for the company, will be able to give the proper information which, when given, will bind the company, just as if the company itself were able to take an oath, but with that limitation. His answer, then, is the answer of the company and can be read against the company just as such an answer could be read against any individual. But, it is said that information obtained by means of interrogatories might be exceedingly valuable. No doubt it might be, but it might be entirely outside the function of interrogatories and outside the power of the Court to obtain information in that way. The party who wishes to obtain the information can, if he chooses, subpœna the person who can give it, and if his evidence is relevant, it will be admitted at the trial. But, as my brother Rigby has pointed out, it is no part of the duty of the plaintiff to assist the defendant in getting up evidence in support of their case.

The application of these last remarks to the present case is quite apparent. The plaintiff may be in doubt as to the wisdom of calling Pyper as his witness as being now in the defendant's employ. It is clear, however, that as the issue is one of negligence, some of which must rest on him personally, it is probable

that portions of his evidence at least would be in the plaintiff's favour, and if he can have the privilege of cross-examining him in advance and selecting only such portions of the evidence as are in his favour and of putting them in as admissions binding on the defendant, he will have a great advantage in addition to knowing in advance how strong a case can be made out against him, but as Collins, L.J., said, that is not the function of an examination for discovery, but is assisting the plaintiff in getting up evidence.

Whether the superintendent named to represent the defendant was selected by the defendant or named by the Judge does not appear, and whether if named by the Judge there would be power to substitute another need not be considered, for there would appear to be no official of the defendant in the absence of the person who acted as city engineer, during the progress of the work, more suited to make this discovery. The fact that he has not personal knowledge of matters upon which the plaintiff desires information is no ground for permitting the plaintiff to examine an official who has no such knowledge acquired in a way which could make it available for the plaintiff on discovery.

I am of opinion, therefore, that the defendant's appeal should be allowed with costs and that the order appealed from should be set aside. The defendant should have the costs of both applications below payable to him in the cause in any event.

Appeal allowed.

REX v. PEOPLE'S WINE AND SPIRIT BROKERS.

Alberta Supreme Court, Appellate Division, Harvey C.J., Stuart, Beck, and Walsh, JJ. February 22, 1917.

INTOXICATING LIQUORS (§ III G—86)—AGENT TO TRANSMIT BUYER'S ORDER —COMMISSION FROM SELLER.

A person acting in Alberta as agent for others wishing to transmit orders for liquors and the price of same to persons outside of the province for shipment direct to the buyers, does not thereby become liable to conviction for unlawfully "selling" liquor in Alberta, although he is remunerated out of the price with the concurrence of the buyer by a commission allowed him by the liquor dealer to whom the order is sent; "selling" implies a transference of the property in the thing sold unless the statute creating the offence gives it a more extended meaning.

[*R.* v. *Wright* (1915), 24 Can. Cr. Cas. 321, 33 O.L.R. 237, distinguished.]

Statement.

MOTION by way of *certiorari* to quash a conviction of the Police Magistrate of Calgary on a charge that the defendants "did unlawfully sell intoxicating liquor contrary to section 23 of the Liquor Act."

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W. F. W. Lent, for Crown.

J. B. Barron, for defendant.

The judgment of the Court was delivered by

HARVEY, C.J.:—The facts are that the defendants had an arrangement with a liquor company in the Province of Saskatchewan whereby it would make a discount on the price on any orders sent to it by the defendants.

The defendants had a place of business in Calgary where they advertised to act as agents for prospective purchasers. When a person wished to purchase liquors they had him sign a document appointing them his agents to buy and authorizing them to take, by way of commission for their services, the amount which the Saskatchewan company allowed as commission. An order was given in this way and the price paid and the liquor was subsequently received by the purchaser from the express company as directed in the order.

The magistrate was of opinion that the defendants were in fact agents for the Saskatchewan company, and that what took place when the order was given was a sale within the meaning of the section. The offence is one of "selling."

In *Rex* v. *C.P.R.*, [1911] A.C. 328, it was held that under the Act in question their lands were not sold when an agreement of sale was entered into but only when the sale was completed and the property had passed from the vendors.

In *Abbott* v. *Ridgeway Park Ltd.* (1915), 8 A.L.R. 314, this Court held that within the meaning of the Act in question there the lands were "sold" when an agreement for sale was entered into because the Act said "sold under an agreement for sale."

Murray's New English Dictionary defines the word "sell" as meaning, in its chief current sense, "To give up or hand over (something) to another person for money (or something that is reckoned as money)" and it defines "buy" as a correlative to sell as meaning "to get possession of by giving an equivalent, usually in money; to obtain by paying a price."

It is to be observed that the transference of the thing bought or sold appears to be the primary consideration.

In the Sales of Goods Ordinance (ch. 39 C.O. 1898) in the interpretation clause it is provided that "contract of sale"

includes an agreement to sell as well as "a sale" indicating that an agreement to sell is not a sale.

Then sec. 3, 554, which is not an interpretation of words as used in the Ordinance but of the law, provides that "an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

In *Titmus* v. *Littlewood*, [1916] 1 K.B. 732, the Act in question provides that "a person shall not sell or expose for sale by retail any intoxicating liquor" except at a place for which he holds a license.

The accused had taken an order for the sale of liquor at a place other than that for which he held a license, and he was convicted of selling at the place where he took the order. The conviction was quashed. Lord Reading, C.J., at p. 736 says:

"We ought not to construe the word "sell" as meaning an 'agreement for sale' unless there are other words in the statute which lead to that conclusion. In my judgment there are no such words. The word sale must therefore be construed in the legal sense of 'sale' as distinguished from 'agreement for sale.'"

Sankey, J., at p. 737, says:

"In my judgment the words which are plain do not refer to an executory agreement for sale, but to an actual sale, and as we are construing a section which provides a penalty, I do not think we ought to stretch its plain language so as to include a meaning which the words do not bear."

And Low, J., at p. 738, says: "It appears to me we must give to the word 'sell' its ordinary meaning, and not go out of our way to extend it."

Reliance was placed by the Crown on *Rex* v. *Wright* (1915), 24 Can. Cr. Cas. 321, 33 O.L.R. 237, in which the Ontario Appellate Division held that the taking of an order as in the present case was a sale within the Ontario Act, but that depended on the words of the Act as is plainly shewn by the words of Latchford, J., at p. 326, "The taking of an order is not a sale within the strict technical meaning of the word, but the Act calls it a 'sale.'"

It is necessary to consider whether there is anything in the terms of our Act to warrant our giving the word "sell" any other than its ordinary meaning.

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The section (23) provides that "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 upon any device sell or barter or offer to sell or barter, or, in consideration of the purchase or transfer of any property or thing, or for any other consideration, or at the time of the transfer of any property or thing, give to any other person any liquor except as authorized by this Act."

Some of the offences specified, *e.g.*, the exposing and keeping for sale and giving, seem to involve the necessity of the liquor being in actual possession ready for delivery and therefore furnish no reason for thinking that the selling or bartering or offering to sell or barter might involve any other conditions.

The first proviso to the section which authorizes a druggist to keep and sell, quite clearly is limited in the same way to liquor in possession.

Then when we look at some of the sections relating to evidence we find in sec. 49 that to prove "the sale or disposal, giving, purchasing, or receiving, or consumption of liquor," it is not necessary to shew that any money actually passed or any liquor was actually consumed if the justice is satisfied that "a transaction in the nature of a sale or other disposal, giving, purchasing or receiving actually took place" and proof of consumption or intended consumption is evidence of sale. It is to be observed that in this section the word "sale" is used as meaning "disposal" which would scarcely include an agreement for sale.

Section 54 provides that when a person is prosecuted for selling, keeping, etc., evidence that he had the liquor in his possession will cast on him the burthen of proving his innocence.

By sec. 55 it is provided that the keeping up of signs or "having premises fitted up with a bar or other place containing bottles or casks displayed so as to induce a reasonable belief that liquor may be lawfully purchased on the premises," or the fact that there is more liquor on the premises than is reasonably required for the person and his family shall be *primâ facie* evidence of unlawful sale and keeping.

In all these sections the offences of selling and keeping for sale are classed together and there is nothing that is declared to be evidence that would be applicable to any sale except one which could be completed by the actual delivery of the liquor sold.

A consideration therefore of the different provisions of the Act seems rather to indicate an intention to limit the meaning of "selling" to its ordinary and proper meaning, rather than to extend it to the loose meaning which would include an agreement for sale.

Importance is sought to be attached to sec. 72, which declares the intention of the Act to be the prohibition of "transactions in liquor which take place wholly within the Province of Alberta," and to restrict the consumption of liquor within the Province but not to affect *bonâ fide* transactions in liquor between a person in the province and one outside.

It appears to me that the real meaning of this section is against the Crown's contention rather than in its favour. As far as the transaction within the province was concerned it was harmless, for no liquor whatever could have been consumed by virtue of it. It was only by reason of it being extended to persons outside the province that any liquor could be obtained and the transaction therefore which could militate against the purpose of the Act was not one wholly within the province.

I am, consequently, of opinion that the facts of this case do not constitute a sale within the meaning of section 23 and that, therefore, no offence, as charged, was committed, and I would quash the conviction with the usual protection to the Magistrate.

Conviction quashed.

Re TOWNSHIP OF GOSFIELD SOUTH AND TOWNSHIP OF GOSFIELD NORTH.

Ontario Supreme Court, Appellate Division, Meredith, C. J. O., Maclaren, Magee, Hodgins and Ferguson, JJ. A. March 5, 1917.

DRAINS AND SEWERS (§ I—1)—CONSTRUCTION—NEW AND EXISTING DRAINS.

Under sec. 3 of the Municipal Drainage Act, R.S.O. 1914, ch. 198, the construction of a drain may be authorized even though it follows in the main the course of an existing drain.

Statement.

AN appeal by the Corporation of the Township of Gosfield South and certain land-owners from a judgment of the Drainage Referee affirming the report of Alexander Baird, an Ontario land surveyor, recommending the construction of a drain commencing at and forming a junction with what was known as old No. 5 drain in the township of Gosfield North, and extending westerly along the town-line to the middle branch of an existing drain called No. 47.

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RE TOWNSHIP OF GOSFIELD SOUTH AND TOWNSHIP OF GOSFIELD NORTH.

The following provisions of the Municipal Drainage Act, R.S.O. 1914, ch. 198, are applicable to the questions raised by the appeal:—

Section 3.—(1) Upon the petition of the majority in number of . . . the owners of the lands to be benefited in any area as described in such petition within any township . . . to the municipal council thereof, for the drainage of the area as described in the petition by means of drainage work, that is to say, the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving of any stream, creek or watercourse, the lowering of the waters of any lake or pond, or by any or all of such means as may be set forth in the petition, the council may procure an . . . Ontario land surveyor to make an examination of the area to be drained, the stream, creek, or watercourse to be deepened, straightened, widened, cleared of obstructions or otherwise improved, or the lake or pond, the waters of which are to be lowered, according to the prayer of the petition, and to prepare a report, plans, specifications and estimates of the drainage work, and to make an assessment of the lands and roads within said area to be benefited and of any other lands and roads liable to be assessed as hereinafter provided, stating as nearly as may be, in his opinion, the proportion of the cost of the work to be paid by every road and lot or portion of lot for benefit, and for outlet liability and relief from injuring liability. . . .

Section 75 (1), as substituted by 6 Geo. V. ch. 43, sec. 5: (1) The council of any municipality, liable for contribution to a drainage work in connection with which conditions have changed or circumstances have arisen such as to justify a variation of the original assessment in respect of the drainage work, may apply to the Referee upon an application, of which notice has been given to the head of every other municipality interested, for permission to procure the report of an engineer or surveyor varying such original assessment, and in the event of such permission being given such council may procure the report of an engineer or surveyor as aforesaid, and pass a by-law adopting the same, but in case all the lands and roads assessed or intended to be assessed lie within the limits of one municipality, the council of such municipality may procure and adopt such report without such permission.

Section 77 (1), as amended by 6 Geo. V. ch. 43, sec. 6: (1) Wherever, for the better maintenance of any drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment, or to prevent damage to any lands or roads, it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or to construct a tile drain under the bed of the whole or any portion of such drainage work as ancillary thereto, or otherwise improve, extend, or alter the work, or to cover the whole or any part of it, the council of the municipality or of any of the municipalities whose duty it is to maintain such drainage work, may, without the petition required by section 3, but on the report of an engineer or surveyor appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, alteration, or covering specified in the report, and the engineer or surveyor shall for such change of course, new outlet, tile drain, improvement, extension, alteration or covering, have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act.

J. H. Rodd, for appellants; *R. L. Brackin*, for respondents.

The judgment of the Court was read by

MEREDITH, C. J. O.:—This is an appeal by the Corporation of the Township of Gosfield South and certain land-owners from the judgment of the Drainage Referee, dated the 24th November, 1916. Meredith, C.J.O.

The proceedings taken by the council of the respondent corporation were founded upon a petition by certain land-owners requesting that "the area of land within the said township" (*i.e.*, Gosfield North) "and being described as follows, that is to say, the lots 264, 265, 266, and part of the north half of lot 267, and the south-east quarter of lot 267 south of Talbot road, lots 7, 8, 9, 10 and gores 11 and 12 in the 6th concession of said township, may be drained by means of a drain on the 6th concession road from the road drain south of Talbot road lots west to the centre branch of old No. 47."

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Meredith, C.J.O.

This petition is dated the 8th April, 1916, but when it was received by the council does not appear.

The clerk of the municipality instructed Mr. Alexander Baird, an Ontario land surveyor, to report upon the petition, which he did on the 23rd June following.

In his report Mr. Baird states that "to give relief from flooding and to enable the proper use and efficient drainage of the lands described in the petition and other lands in its vicinity" a drain commencing at and forming a junction with what is known as old No. 5 drain in the township of Gosfield North, and extending westerly along the town-line to the middle branch of an existing drain called No. 47, which runs along the road allowance between lots 6 and 7, was much required, and he strongly recommended its construction.

The drain the construction of which Mr. Baird recommended follows, in the main, the course of an existing drain which had been constructed under the provisions of the Municipal Drainage Act, departing from its course only for the purpose of connecting it at its easterly end with another drain, which had also been constructed under the same Act.

The appellants take the position that it was not competent for Mr. Baird to make use of the existing drain as part of the drain the construction of which he recommended, or, as it was termed in the argument, to "absorb it;" and that, even if it were competent for him to do this, the proceedings should have been taken under sec. 77 of the Municipal Drainage Act, R.S.O. 1914, ch. 198; that what the engineer has recommended to be done is what that section provides may be done; and that the engineer acted without jurisdiction because he was not appointed by the council to examine and report upon the existing drain, and because, by sec. 5 of 6 Geo. V. ch. 43, the permission of the Drainage Referee was necessary to authorise any change to be made in the assessments in respect of the existing drains, and what the engineer has done is to change these assessments without the requisite permission having been obtained.

I see no reason why the construction of a drain may not be authorised, even though it follows in the main the course of an existing drain. If it were otherwise, the existence of a small and shallow drain which answered the purpose for which it was origin-

ally constructed, but, owing to changed conditions, had become wholly inadequate, would, or at all events might, altogether prevent the construction in the most convenient position of a larger drain. And, indeed, if such were the law, the adoption of a more comprehensive scheme of drainage, for which the use of what was occupied by the existing drain was essential, would be impossible. I see no reason for so limiting the comprehensive words of sec. 3, under which the respondents have proceeded, or why the work, the construction of which the engineer has recommended, is not a "drainage work" within the meaning of that section.

In my opinion, sec. 77 was designed to afford an alternative mode of effecting the improvement of an existing drain, and to dispense, in the cases with which the section deals, with the necessity of the petition for which sec. 3 provides. The reasonableness of such a provision and the necessity for it are obvious. The result of the existence of the conditions mentioned in sec. 77 might injuriously affect only a few of the persons who were charged with the cost of the construction and maintenance of the drain, and in such a case it would not be likely that a majority of them could be got to petition for the needed improvement. See as to this the observations of Garrow, J.A., in *Township of Dover* v. *Township of Chatham*, 15 O.W.R. 156, 161. However that may be, there is nothing in sec. 77 which, in my opinion, excludes the right to proceed under sec. 3.

Nor does this view of the law work any injustice. If an existing drain is made use of for the purpose of the new work, the value of it would, of course, be credited to the persons assessed for it in the proportions in which they were assessed.

None of the cases referred to by counsel for the appellants supports the proposition for which he contended, viz., that the proceeding should have been taken under sec. 77.

It may be conceded that, if what is desired is simply a variation in the amount of the assessments that were originally made, the proceeding to obtain it should be taken under sec. 75, and in accordance with its provisions, and that where sec. 5 of 6 Geo. V. ch. 43 applies, the permission of the Drainage Referee is a prerequisite; but that is not this case. What is sought is not a variation of the assessments; and, as I understand the evidence and the Referee's reasons for his judgment, none has been made.

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RE TOWNSHIP OF GOSFIELD SOUTH AND TOWNSHIP OF GOSFIELD NORTH.

Meredith, C.J.O.

I say "where sec. 5 applies," because, in my judgment, if the petition was received by the council before the 27th April, 1916, that section has no application; and, for all that appears, it was received before that day.

All that was decided in the *Dover and Chatham* case, *supra*, was that, in the circumstances of that case, what was proposed to be done might be done under sec. 75, and that a petition was not necessary.

All that was decided by the Referee in *Gibson* v. *West Luther*, 20 O.W.R. 405, was that sec. 77 did not apply to a scheme altogether different from the original scheme—and to that extent is perhaps against the appellants' contention—and that there was no power under that section to alter the fixed proportions of the original assessment.

It was also argued that the engineer had in this case in effect varied the original assessments; but that is not borne out by the evidence. What he did was to allow $1,500 as the value of the existing drain, and his intention was to allow for this to the persons who had been assessed for the cost of its construction; but, in the view of the Referee, he had made an error in his calculations, and the error was corrected by the Referee.

There remains to be considered the question whether the agreement between the two corporations was a bar to the assessment upon the lands in South Gosfield of any part of the cost of the works. As to this I entirely agree with the view of the Referee that there is nothing in the agreement which goes that far, even if the Corporation of the Township of Gosfield North could effectually tie its hands in the way it is argued it has done, which I gravely doubt.

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

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S. C.

REX v. PIECO.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. December 23, 1916.

SEDUCTION (§ II—7) — PREVIOUSLY CHASTE CHARACTER — EVIDENCE TO PROVE PRIOR UNCHASTITY—CR. CODE SECS. 210, 211.

On the trial of a charge under Cr. Code sec. 211 for seducing a girl between fourteen and sixteen, of previously chaste character, testimony is admissible on behalf of the accused to prove prior specific acts of illicit intercourse between the girl and another man.

Statement.

CASE reserved by the Judge of the District Court at Medicine Hat as follows:—

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Statement.

"Andre Pieco was charged before me on the 6th day of July, 1916, for that he, the said Andre Pieco, at Redcliff, in the Province of Alberta, on or about the 1st day of May, 1916, did unlawfully seduce Beatrice Wilkie, a girl of previously chaste character, then being above the age of fourteen years and under the age of sixteen years.

"He was further charged for that he, the said Andre Pieco, at Redcliff, on or about the first day of May, 1916, did have illicit connection with Beatrice Wilkie, a girl of previously chaste character, then being above the age of fourteen years and under the age of sixteen years.

"Both of the said charges were under sec. 211 of the Criminal Code.

"I convicted the accused on the two charges and sentenced him to imprisonment for a period of four months.

"At the request of counsel for the accused, at the close of the trial, I consented to submit the following questions for the opinion of the Appellate Division. I attach, as part of this case, a copy of the evidence and proceedings.

"(1) Was I right in holding, upon the evidence and proceedings, that the said Beatrice Wilkie was proven to be above the age of fourteen years and under the age of sixteen years at the time of the alleged seduction?

"(2) Was I right in holding, upon the said evidence and proceedings, that there was corroboration of the evidence of the said Beatrice Wilkie as required by sec. 1002 of the Criminal Code?

"(3) Was I right in refusing the evidence of Victor Salvador as to specific acts of intercourse with the prosecutrix?"

S. G. Bannan, for accused; *R. E. Evans*, for the Crown.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The only direct evidence as to the age of the girl Beatrice Wilkie was that of her mother Dora Wilkie who stated that she was fifteen years old on 1st May, 1916. It is true that, upon cross-examination, she appeared to be unable to state with certainty the year in which the girl was born, but, in my view, it is not unreasonable that the mother, although unable to remember the year of the girl's birth might be absolutely certain of her age.

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In *Reg* v. *Nichols*, 10 Cox 476, the defendant was charged with having attempted to carnally know a girl under the age of twelve years. Her mother testified that the girl was "ten years old last March" but, on cross-examination, she stated that she knew neither the year nor the month of the girl's birth. This was supplemented, however, by the evidence of the girl's elder sister who stated that the girl was ten years old on 2nd September, 1866, and that she knew that only from an entry made by her father in the bible. The bible was not produced nor was the father called as a witness. The Court of Criminal Appeal held that there was some evidence as to the age of the girl and affirmed the conviction.

In the present case I am of opinion that the trial Judge might reasonably have held upon the evidence I have referred to that the girl Beatrice Wilkie was between fourteen and sixteen years old at the time of the commission of the offence charged and I would therefore answer the first question in the affirmative.

Sec. 1002 of the Code provides that a person accused of offences under sec. 211 or certain other sections shall not be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

Where corroboration of a witness is required at common law it is not requisite that it shall directly implicate the accused. This section therefore imposes an additional condition as to the effect of such evidence which must be complied with. See *Rex* v. *Willis*, 12 Cr. App. R. 16.

The only evidence adduced for the Crown in addition to that of the girl was that of her mother and stepfather with whom she lived. Her stepfather states that four or five months previous to the trial he met the accused and told him that, unless he left the girl alone and quit shewing her any attention he would get into trouble and that accused said he was not bothering the girl and had shewn her no attention; that one night during the winter months the girl, after saying good night, went to her room; about ten minutes afterwards upon going to her room he found that she had left it through the window; that he at once went to the front door and saw her across the street talking to the accused and that upon hailing her she returned to the house.

The mother states that the first time she saw the accused was

in March, 1916, when she went with her husband to the house where he boarded to inquire about her daughter who had disappeared; that she asked him if he knew where her daughter was, but that he could not understand her, that, upon her husband explaining what she meant, the accused told her that the girl had gone to Calgary.

There is no direct evidence that the accused and the girl were ever seen together except on the occasion I have referred to when she left her room by the window, nor is it shewn that the accused ever had even an opportunity to commit the offence charged. It is true that her mother states that the keeper of the boarding house in which the accused lived informed her that her daughter had been at that house with him on more than one occasion, but that is only hearsay evidence and is therefore not entitled to any weight.

A letter was produced at the trial which the girl states was written and signed by the accused, but she states that in order to deceive her mother she had erased his signature and substituted that of one Harrison who her mother appears to have preferred as a suitor. There is, however, no other evidence that the letter was written or signed by the accused, and, even if it had been proved that it was written by him, there is nothing in it from which it could be inferred that his intentions were otherwise than honourable.

The evidence also shews that a silk dress was found in her possession which she stated had been given to her by the accused as a wedding dress, but there is no other proof that she had obtained it from him.

It appears that the girl left her home several times without her parents' consent; that on the occasion I have referred to when she went to Calgary she took $20 of her mother's money for the purpose. She admits that she met Harrison on the train on her way there and after reaching there she was for some time in his company driving around with him in a taxicab, and that on another occasion she went to Medicine Hat and met him there.

It is apparent that both the girl's parents were strongly opposed to the accused as a suitor to their daughter and to his paying her attention, but the fact that he may have continued to pay her attention, notwithstanding her parents' opposition, would not be a

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Scott, J.

reasonable ground for assuming that his intentions towards her were disbonourable.

I cannot find in the evidence of either the father or mother anything which in any way implicates the accused, and I would therefore answer the second question in the negative.

The witness Victor Salvator was called for the purpose of proving a specific act of illicit intercourse with her, but the trial Judge refused to admit such evidence.

By sec. 211 the burthen of proving previous unchastity on the part of the girl upon whom the offence charged was committed is cast upon the accused. The most direct proof of this would be evidence that, before the commission of the offence charged, she had illicit intercourse with another or others and I therefore cannot understand upon what principle such evidence should be rejected. The cases relied upon by counsel for the Crown in support of the rejection of such evidence are cases where the charges were for indecent assault or rape, but, in such cases, the previous chastity of the persons upon whom the offences were committed is not an element of the offence, and evidence of unchastity would properly be refused, as a person accused of such an offence may be convicted notwithstanding the fact that the prosecutrix may be a common prostitute.

I would therefore answer the third question in the negative and, in view of my answer to the second question, I would direct that the conviction be quashed and the accused discharged.

Conviction quashed.

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S. C.

Re TOWN OF ALLISTON AND TOWN OF TRENTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell and Lennox, JJ., and Ferguson, J.A. February 13, 1917.

MUNICIPAL CORPORATIONS (§ II C—60)—BONUS TO INDUSTRY—BUSINESS "ESTABLISHED ELSEWHERE IN ONTARIO"—BY-LAW—VALIDITY.

It is not legal for a municipality to bonus an industry already existing elsewhere in Ontario. Whether a particular business is one "established elsewhere in Ontario," within the meaning of sec. 396 (*c*) of the Municipal Act (R.S.O., 1914, ch. 192) is a question of fact.

Statement.

APPEAL by the Corporation of the Town of Trenton from an order of HODGINS, J.A., 34 D.L.R. 294. Affirmed.

I. F. Hellmuth, K.C., for appellants; *W. A. J. Bell*, K.C., for respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (at the conclusion of the argument):—As my brother Ferguson has pointed out, municipal councils have

not an inherent right to aid industries at the cost of the municipality. They have only that power which the Legislature by statute has conferred upon them.

The Legislature has conferred upon municipal councils the power of promoting manufactures, and some other industries, in their, or in an adjacent, municipality by aiding them in the manner provided for in sec. 396 of the Municipal Act; such aid, whatever its form may be, being named, by the enactment, a "bonus."

The general power conferred by this section is, however, curtailed by several of its sub-sections; and the sole question upon which the parties to this appeal now differ, and which they desire to have determined, is whether the by-law in question is within the curtailing provisions of clause (*c*), which is in these words: "No by-law shall be passed granting a bonus in respect of a business established elsewhere in Ontario, or which has been removed to the municipality from another municipality in Ontario, whether the business is to be carried on by the same person or by a person deriving title or claiming through or under him or otherwise or by such person in partnership with another person or by a joint stock company or otherwise."

And that question is in this case entirely one of fact: whether the business to be carried on in Trenton, which the by-law in question is intended to promote and aid, includes the business which has been carried on in Alliston.

I can come to no other conclusion upon that question of fact, than that it does; that the business which was carried on in Alliston is to be withdrawn from Alliston and carried on as part, at least, of the business to be carried on in Trenton, in accordance with provisions of the by-law in question.

All the business of the Benedict Syracuse company in this Province has been done through the Alliston concern; it was for that purpose only that this concern was established; and it was established under an agreement with the Syracuse company that it should be so done.

The powers conferred upon the Benedict Proctor concern were of the widest character, including all that the proposed establishment at Trenton is to do. The Alliston establishment has been treated and advertised by the Syracuse company as one of their factories, and in the books of the Alliston establishment it is

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recorded that it was considered by all concerned in it to be in a satisfactory and prosperous condition when the Trenton bait was held out and taken. Now all that is to come to an end—gloss it over as you will—because of the Trenton bonus.

That being so, it seems to me that the case is well within the curtailing effect of clause (c); it is in the teeth of that legislation, which is of a wide character—"whether the business is to be carried on by the same person . . . or otherwise"—the business is the criterion.

It may be that the Syracuse company intend to extend their business in Ontario, to do business, in character as well as quantity, different and greater than they have done at "our factory" in Alliston, and it may well be that they may carry on such extended business in Trenton, promoted and aided by a "bonus by-law." But, if they include the business to be done in Alliston with that to be done in Trenton, so that the bonus covers each inseparably, the whole by-law is vitiated. That they intend to do; they intend to do all their business in this Province through the Trenton establishment, and withdraw altogether from Alliston that business which hitherto has been done through the Alliston establishment solely.

It is public rights only that are concerned; the Syracuse company may carry on business at Trenton or anywhere, and may cease to carry on business at Alliston or anywhere else, but the public interests will not permit a municipality to give public benefits to them as an inducement to leave one municipality and go to another in this Province.

I agree with Hodgins, J.A., in his ruling that the by-law is invalid, and so would dismiss the appeal.

RIDDELL, J.:—I agree. I thought at first that possibly some question of law might arise, but I am satisfied now that the question is one of fact. Upon the evidence, and particularly upon the letters read to us by Mr. Bell, there seems to be no doubt that the business which has been bonused by Trenton is the same business that is carried on in Alliston.

LENNOX, J., and FERGUSON, J.A., concurred.

Appeal dismissed.

REX v. COLLIER.

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Nova Scotia Supreme Court, Graham, C.J., and Longley, Drysdale, Harris and Chisholm, JJ. March 10, 1917.

CERTIORARI (§ I A—5) — STATUTE TAKING AWAY REMEDY — MAGISTRATE'S FINDING OF FACT ON WHICH JURISDICTION DEPENDS.

Although *certiorari* is taken away by statute in respect of offences against the Nova Scotia Temperance Act, 1910, it is open to the Court to review on *certiorari* the jurisdiction of the magistrate; but where the jurisdiction to make an order for the destruction of liquors seized depends upon the person arrested and brought before him being in fact the "occupant" of the premises where the liquor was found, the Court will not interfere if there was some evidence, whether direct or circumstantial, upon which the magistrate could have found him so to be.

[*R.* v. *Walsh*, 29 N.S.R. 531, and *R.* v. *Hoare*, 24 Can. Cr. Cas. 279, 49 N.S.R. 119, referred to.]

Statement.

APPLICATION for a writ of *certiorari* to remove into the Supreme Court a certain record of conviction or order made on the 22nd day of January, 1917, by Donald C. Sinclair, Esq., Stipendiary Magistrate in and for the town of New Glasgow, in the county of Pictou, whereby Leonie Collier of New Glasgow, on the prosecution of R. C. Soy, was convicted of having unlawfully kept for sale intoxicating liquor contrary to the provisions of the Nova Scotia Temperance Act, and amendments thereto, within the space of three months, then last past, to wit, between the 1st day of November, 1916, and the 21st day of December, 1916, "said offence being an offence subsequent to a first offence" against said Act and amendments thereto, and was adjudged to be confined in the common jail at Pictou in the county of Pictou for the term of three months.

The application was made on the grounds among others that there was no evidence whatever to support the conviction, that the date of the previous conviction was not stated and because the information was incorrect and misleading.

The application was made in the first instance to Harris, J., and was referred by him to the Full Court.

W. J. O'Hearn, K.C., in support of application.

J. J. Power, K.C., for the Crown, *contra*.

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—This is an application for a writ of *certiorari* in a case under the Nova Scotia Temperance Act.

The learned counsel for the applicant, no doubt in view of a certain decision of this Court (*certiorari* having been taken away by the statute) refusing to review the magistrate's conviction even if there was no evidence against the accused, put his case in another way.

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It has always been held that although *certiorari* has been taken away the Court would, nevertheless, grant the writ if the magistrate was proceeding without jurisdiction—jurisdiction over the person or jurisdiction over the subject-matter.

The Nova Scotia Temperance Act contains provisions for searching premises in which it is supposed intoxicating liquor is illegally kept for sale, and after a trial by magistrate and conviction, the destroying of the liquor so found as well as the imposing of a penalty takes place. That in the ordinary course would involve notice, say service of process on, or the arrest of, the owner of the intoxicating liquor, the person keeping it for sale.

But this legislation goes far beyond that.

Here the liquor may be destroyed and the arrest of another person than the owner, namely, "the occupant" of the premises, and that occupant is made liable constructively to bear the penalty or imprisonment.

There is first the Act of 1910, sec. 46, amended by the Act of 1911, sec. 14. Sec. 14 is as follows:—

> "14. Sub-sec. (4) of sec. 46, of said chapter 2 is hereby repealed, and the following sub-section substituted therefor:
>
> "(4). If on any such search any liquor is found kept on such premises the occupant of the premises shall, until the contrary is proved, be deemed to have kept such liquor for the purpose of sale contrary to the provisions of Part I. of this Act and may be arrested by any of the said officers having the search warrant aforesaid and their assistants."

There is also the Act of 1912, ch. 57, sec. 4:—

> "4. (1) The occupant of any house, shop, room or other place in which any keeping for sale, sale or barter in liquors in contravention of any of the provisions of the Nova Scotia Temperance Act, has taken place, shall be personally liable to the penalty or imprisonment prescribed with respect to such keeping for sale, sale or barter, made or done in contravention of any such provision, notwithstanding such keeping for sale, sale or barter was made by some other person who cannot be proved to have so acted under or by direction of such occupant.
>
> "(2) Proof of the fact of such keeping for sale, sale or barter made or done by any person in the employ of such occupant or who is suffered to be or remain in or upon the premises

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of such occupant, or to act in any way for such occupant, shall be presumptive evidence that such keeping for sale, sale or barter, took place with the authority and by the direction of such occupant, and the burden of proof that such keeping for sale, sale or barter took place without the authority or direction of such occupant, shall be upon the defendant, and if such proof is furnished the same shall be a good defence in respect to sub-sec. (1) of this section."

Now, it is contended that in such a case, where there is to be destruction of the liquor, a sort of proceeding *in rem*, combined with a proceeding for a penalty or imprisonment inflicted constructively (it may be upon someone else than the owner who, in the ordinary course, would be the person keeping for sale), before the magistrate can be said to be seized with jurisdiction it must be shewn at least that the person brought up before the magistrate is "the occupant" (whatever that means), and he relies on the case of *Hawes* v. *Hart*, 6 R. & G. 442. Therefore that that question is a matter for review by this Court on *certiorari* notwithstanding the writ of *certiorari* is taken away.

That seems to me to be a reasonable view of this legislation, and *Hawes* v. *Hart*, 6 R. & G. 442, is applicable.

But whatever view is taken of these various provisions, I have read the evidence over more than once, and I cannot say that there was no evidence, direct or circumstantial, upon which the magistrate could not have found as he did. There may be collusion by which a person who has been once convicted and is in danger of the heavier sentence connected with a second conviction, changes relations with another member of the same household and that person collusively becomes tenant and "the occupant." That could have happened here where one had been tenant a short time before and was now house-keeper, and the other was now tenant. These circumstances are for the magistrate.

The application should be dismissed with costs.

DRYSDALE and CHISHOLM, JJ., concurred.

Drysdale, J.
Chisholm, J.

LONGLEY, J.:—This is an application for *certiorari*, and it has been referred to this Court by Mr. Justice Harris. By the decisions in *R.* v. *Walsh*, 29 N.S.R. 531, and *R.* v. *Hoare*, 24 Can. Cr. Cas. 279, 49 N.S.R. 119, it has been decided that this Court has no power on such a motion to consider the evidence at all in regard to the conviction except to see that a scintilla of evidence is ad-

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duced. In this case a view of the evidence shews there was more than a scintilla, and, therefore, this cannot be reviewed at this stage at all. It is also competent on a *certiorari* motion to consider first whether the stipendiary magistrate had jurisdiction in the matter; whether it arose within the town where it was alleged or whether the party before him was the correct party. All these matters will have to be decided in favour of the present conviction. There is no question of jurisdiction in the town. The only thing is in regard to the right person being apprehended in this instance, and if we take into consideration the fact that the defendant was, until very recently, the occupant of this building and was fined for selling liquor in it, and the change was made just before this action was brought, and the evidence of Emile Hundy, I have no doubt the conviction was properly made, and I have no hesitation in giving judgment refusing the *certiorari*.

Harris, J.

HARRIS, J.:—I agree that the application should be dismissed.

Conviction affirmed.

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OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK. OTTAWA SEPARATE SCHOOL TRUSTEES v. BANK OF OTTAWA. OTTAWA SEPARATE SCHOOL TRUSTEES v. MURPHY.

Ontario Supreme Court, Middleton, J. March 19, 1917.

ACTION (§ II B—45)—*Consolidation of Actions—Joinder of Parties—Attorney-General—Ratepayers—Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (h)—Rules 66-69, 134, 320.*]—These three actions followed the determination by the Privy Council of three previous actions. In *Mackell* v. *Ottawa Separate School Trustees*, the judgment of the Appellate Division, 24 D.L.R. 475, was affirmed by the Judicial Committee, which held that the regulations of the Ontario Department of Education governing separate schools were valid: *Ottawa Separate School Trustees* v. *Mackell*, [1917] A.C. 62 (32 D.L.R. 1). In *Ottawa Separate School Trustees* v. *City of Ottawa* and *Ottawa Separate School Trustees* v. *Quebec Bank*, the judgment of the Appellate Division, 30 D.L.R. 770, 36 O.L.R. 485, was varied by the Judicial Committee and the Act of the Ontario Legislature appointing a Commission to manage the Ottawa Roman Catholic separate schools in place of the trustees, 5 Geo. V. ch. 45, sec. 3, was declared *ultra vires* and invalid, and liberty was reserved to the appellants (the trustees) to apply to the Supreme Court of Ontario for relief in

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accordance with this declaration: *Ottawa Separate School Trustees* v. *Ottawa Corporation*, [1917] A.C. 76, 32 D.L.R. 10.

The trustees did not apply in the former actions, but brought these three new actions, the third of... being against Murphy and others, the members of the Commission appointed under the statute which was declared *ultra vires*, to recover $84,000 paid to the Commission from separate school taxes collected by the Corporation of the City of Ottawa. The first action was to recover $107,000 paid by the Quebec Bank to the Commission, being moneys which stood to the credit of the trustees when the Commission took over the management of the schools, and some portion of which was used by the Commission in carrying on the schools pending the litigation. The second action was against the Bank of Ottawa for a similar demand. The banks, in paying over the money to the Commission, had the authority of the Provincial Executive and an undertaking for indemnity.

The Attorney-General for Ontario desired to intervene in the present litigation; and Mackell and others, the ratepayers who were successful in their action, desired to be represented in the new actions to see that the money of the ratepayers was not sacrificed.

Three motions were now made: (1) by the Commission and Mackell *et al.*, in the old action of *Ottawa Separate School Trustees* v. *Quebec Bank* and in the new action of the trustees against the same bank, for an order staying all proceedings in the second action until an application should be made pursuant to the leave reserved by the Judicial Committee or for an order adding as parties those interested in the fund; (2) a motion by the Quebec Bank for an order adding as defendants in the first action the Commission or the individual members and the Attorney-General; (3) a similar motion by the Bank of Ottawa in the second action.

G. F. Henderson, K.C., for the Quebec Bank.

H. S. White, for the Bank of Ottawa.

A. C. McMaster, for the trustees.

McGregor Young, K.C., for the Attorney-General.

MIDDLETON, J.:—This litigation is the aftermath of two actions: *Mackell et al.* v. *The Separate School Board* (as I shall for brevity designate the plaintiff), and *The Separate School Board* v. *The Quebec Bank and The Commission and The City of Ottawa* (consolidated).

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This litigation resulted in two judgments of the Privy Council, on the 2nd November, 1916. The Privy Council in the *Mackell* action affirmed the Canadian Courts, and held that the regulations of the Department governing separate schools were valid. The formal order is an affirmance of the judgment of Mr. Justice Lennox, which, in addition to declaring the validity of the regulations in question, declared that the Separate School Board had not been conducting the schools according to law, and enjoined the continued violation of the regulations and the employing and paying of teachers who had not proper qualifications.

The second judgment declared invalid an Act appointing a Commission to manage the schools in the place of the Board, which, pending the litigation, was continuing to act in the way enjoined and failing to employ qualified teachers and conduct the schools under the regulations.

The Privy Council, in reversing the Courts below and declaring this legislation invalid, contented itself with simply declaring that the Act in question is *ultra vires* of the Legislature, and "that liberty ought to be reserved to the appellants to apply to the said Supreme Court for relief in accordance with this declaration." In their reasons their Lordships add that they "do not anticipate that it will be necessary for the plaintiffs to avail themselves of this right."

The situation developed under these judgments is far from simple. The Board has not availed itself of the leave reserved, and has made no application in the action, but has instituted three new actions.

Certain money, about $107,000, was, at the time the Commission was appointed to supersede the Board, standing to its credit in the Quebec Bank. The Commission received this amount and used some portion of it in the carrying on of the schools pending the litigation.

The first of the new actions is by the Board against the Quebec Bank for this $107,000.

Part of this money was withdrawn from the Quebec Bank and deposited in the Bank of Ottawa to the credit of the Commission. This amounts to $37,000, and the second action is against the Bank of Ottawa for this sum.

The sum of $84,000 was collected by the Corporation of the

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City of Ottawa for separate school taxes, and in one of the earlier actions this was, under an order of Court, paid into Court by the city corporation and paid out of Court to the Commission. The third action is against the individual members of the Commission to recover this sum.

The banks, in paying over the money, acted on an indemnity given them by the Province, and the Commission in all that they did acted on the authority of the Government, and the Government desires to indemnify them.

Two serious questions are raised; and, in the view of the Government and of Mackell and his associates (who have the injunction granted by Mr. Justice Lennox), these ought now to be determined. First, it is said that the Board was merely the trustee for the schools, and that money properly expended—even by the improperly appointed Commission—out of the school rates for the support of the schools ought to be allowed, and neither the banks, the members of the Commission, nor the Government, ought to be compelled to pay again to the Board the money which has been used in the school maintenance.

Then it is said, or rather suggested, that money which has come to the hands of the Board has been used for the payment of money for purposes within the terms of the injunction granted by Mr. Justice Lennox.

The banks holding this indemnity do not desire to become partisans in this litigation, and seek to be relieved from the responsibilities.

The Attorney-General desires to intervene in the litigation in such a way as to have an assured status so that he may assert the views of the Government that may ultimately have to pay.

Mackell *et al.*, having secured the injunction, desire to be present so that they may see that the money of the ratepayers whose cause they have championed is not in the end sacrificed by the money being paid in an illegal way.

What was contemplated by the Privy Council was an application to the Court in the litigation then pending, in which both the Attorney-General and Mackell *et al.* had a status, and in which they would have been heard.

The attitude of the plaintiff is, that it has the right to the relief it now seeks in the new series of actions as now constituted,

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and that the Court has no power to interfere by adding parties or otherwise so as to confer any status upon the Attorney-General or the former plaintiffs, and that the questions which it is now sought to litigate are foreign to the suits in question.

The precise motions now made are:—

(1) A motion on behalf of the Commission and of Mackell *et al.*, in the old action by the Board against the Quebec Bank and the Commission, and in the new action of the Board against the Quebec Bank alone, for an order staying all proceedings in the second action until an application is made pursuant to the leave reserved by the Privy Council, or for an order adding as parties those interested in the fund in question.

(2) A motion by the Quebec Bank for an order adding as defendants the Commission (or the individual members) and the Attorney-General.

(3) A similar motion by the Bank of Ottawa.

I am quite satisfied that the ends of justice require that the rights of all parties in respect to all questions which arise by reason of the finding of the Privy Council that the legislation appointing the Commission was *ultra vires* should be determined in one action, and that any attempt to resolve the difficult questions which arise by what was done by this Commission in its attempt to maintain the schools in question during the time which elapsed from its action under the instructions of the Crown until that action was declared invalid, by any series of actions, each dealing with but a fragment of the whole and without any concrete view of the situation as a whole, and without any opportunity for all parties to be heard, and so to be bound by the decision, must result in confusion and disaster.

I have further come to the conclusion that the Rules and practice are sufficient to prevent this unsatisfactory result, and that no cases stand in the way of an order which will enable all the matters to be dealt with at a single trial.

Before the decision of the Lords in *Smurthwaite* v. *Hannay*, [1894] A.C. 494, the Rules that then existed as to the joinder of parties had received a wide and liberal construction, but by that decision there was a reversion to the older and more technical view that there should be no attempt to carry any reform in practice or procedure beyond the very letter of the reforming

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legislation. In England this retrograde movement was promptly met by a further amendment of the law, which was at once adopted here, and in our recent Rules the matter is carried still further.

The fundamental rule is found in the Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (*h*), which directs that in the administration of justice the Court shall so deal with matters brought before it that, "as far as possible, all matters . . . in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

This does not mean that there may be an indiscriminate joinder of parties and of causes of action, but it does indicate the spirit in which the matter in hand must be approached.

Under the Rules (Rule 66) plaintiffs may join in one action when the right to relief which they severally claim arises out of the same transaction or occurrence or series of transactions or occurrences, if in separate actions there would be some common question of law or fact. This Rule corresponds with the present English Rule.

Rule 67 goes beyond the corresponding English Rule, and permits the joinder of defendants in one action where the same transaction or occurrence or series of transactions or occurrences give a plaintiff a cause of action against one or more defendants. By Rule 68 it is provided that it shall not be necessary that every defendant shall be interested as to all the relief claimed or as to all the causes of actions joined; and by Rule 69 a plaintiff is permitted to unite in the same action several causes of action.

So far the Rules are permissive, and enable a plaintiff actuated by the desire to secure a final determination of his rights to do so; but there are sufficient provisions to enable the Court to compel him to submit to the adoption of this course even when inclined to indulge in multiciplicity of suits, either to harass his opponents or to secure to himself some advantage, real or imaginary, by so separating the issues and matters to be tried as to prevent the Court at one time dealing with the whole matter in such a way as to determine the rights of all.

Rule 134 enables the Court to add as parties to the action not only "any person who ought to have been joined," i.e., a person whose presence is essential to enable the Court to deal with the

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matter in hand, but, also, any person "whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action."

By Rule 320, "Actions may be consolidated by order of the Court"—a power much wider than that conferred by the former Rule, which only permitted consolidation "in the manner prior to the Ontario Judicature Act, 1881, in use in the Superior Courts of Common Law."

In considering the Rules and the cases, the gradual emancipation of the Courts from the thraldom of ancient technical rules and practice must not be forgotten. When the Judicature Act of 1881 was passed, it did not attempt to provide a complete code of procedure. In addition to numerous references to the existing practice at law or in equity, continued as to certain matters in the absence of any provision in the incomplete code of Rules then adopted, the former practice in the Courts consolidated was continued (see sec. 52 of the Act of 1881, and Rules 2, 3, and 4 of 1881).

The revision of 1888 was a great advance. The 493 Rules of 1881 became 1264. The attempt was made to frame a complete code of practice. Although the Rules contain many references to the former practice, the former practice ceased to be the guide when there was no provision, and all matters not provided for by the Rules were directed to be governed not by the former practice but by analogy to the provisions found in the Rules.

In *Byrne* v. *Brown* (1889), 22 Q.B.D. 657, the Court of Appeal in England laid down the principle that should govern, Lord Esher saying: "One of the chief objects of the Judicature Act was to secure that, whenever the Court can see that in the transaction brought before it the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry will be the same, and the Court then has power to bring in the new parties and to adjudicate in one proceeding upon the rights of all parties before it. Another great object was to diminish the cost of litigation. That being so, the Court ought to give the

largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned." This view was accepted by Bowen and Fry, L.JJ.

I cannot find that in any case of authority this has been in any way qualified. There are, no doubt, many cases in which the Court has refused to add parties, but in such cases it will be found that the reason for the refusal does not conflict with the principle laid down.

There are cases in which the real matter in issue can be fully tried and determined as between the plaintiff and defendant, and the only interest of the party who seeks to intervene or who is sought to be added is an obligation on his part to indemnify the defendant. In such cases the third party Rules afford an adequate remedy. The defendant can in this way obtain his indemnity, and the third party is enabled to defend the defendant against the plaintiff's claim. *Barton* v. *London and North Western R.W. Co.* (1888), 38 Ch. D. 145, is an example of cases of this kind.

Then there are cases in which, by reason of the nature of the contract, or of the liability, the plaintiff has the right to select his remedy. He may sue either A. or B. He chooses to sue A. A. cannot compel him to join B. or to sue B. alone. *McCheane* v. *Gyles* (No. 2), [1902] 1 Ch. 911, will serve as an example.

When the liability is joint, the defendant has the right to compel the plaintiff to add the other joint contractor: *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; *McArthur* v. *Hood* (1885), 1 Cab. & El. 550.

And even in cases not falling within this Rule the Court can, when the interests of justice so demand, compel the plaintiff against his will to add a defendant so as to enable justice to be done: *Montgomery* v. *Foy Morgan & Co.*, [1895] 2 Q.B. 321.

A mere indirect and commercial interest in the question involved in the action is not a sufficient reason for adding a party: *Moser* v. *Marsden*, [1892] 1 Ch. 487.

Acting upon the principle indicated, the proper order is to direct the consolidation of the three actions now pending, and to direct them to proceed as one action, in which the School Board shall be plaintiff, and the banks, the Commission (in their individual names), the Attorney-General, and Mackell *et al.* as representing

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the class, shall be defendants, and the statements of claim already delivered shall stand unless the plaintiff elects to deliver a new statement of claim.

The question of costs occasioned by the addition of these parties against the plaintiff's desire is reserved to be dealt with at the trial, so that justice may be done—due regard being had to all circumstances that may then appear.

The defendants must then evolve the issues for trial, not only as between the plaintiff and the defendants, but as between themselves, as they may be advised.

I would suggest to the defendants that they agree to an order allowing such questions to be raised without formal third party proceedings so as to have the record closed with as little delay to the plaintiff as practicable.

Costs in the cause.

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NEAL v. KELLINGTON AND MILNE.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. March 10, 1917.

SCHOOLS (§ III A—55)—*Liability of school trustees—Wrongful disbursements—Court costs—Resolution—Alteration of minutes—Participants.*]—Appeal by defendant Milne from the judgment of the District Court at Weyburn, in favour of plaintiff school trustee, in an action for the repayment of funds wrongfully disbursed by former school trustees. Reversed.

W. J. Perkins, for appellant; *J. N. Fish*, K.C., for respondent.

BROWN, J.:—The plaintiff is the official trustee of the McColl School District No. 2569, having been appointed as such on August 23, 1915. The defendants at the time of the matters complained of herein were trustees of the said school district, the defendant Milne being chairman of the Board of Trustees and the defendant Kellington being the secretary-treasurer. At the annual meeting of the school district held in January, 1915, there being a vacancy on the School Board two parties, Wilmot Johnson and Arthur North, were nominated as candidates. During the course of the election the defendant, Kellington, challenged the votes of two of the voters named Lyall and Kurth. Both of these parties, upon being challenged, made the declaration

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provided for by the School Act in force at that time and their votes were accepted and as a result Johnson was elected trustee. North, the defeated candidate, laid an information against Lyall and Kurth charging them with subscribing to a false declaration, and as a result they were both convicted by the magistrate. On appeal to the Judge of the District Court these convictions were quashed and North was ordered to pay the costs. These costs, amounting in all to $370.65, were paid out of the funds of the school district by the defendant Kellington on August 26, 1915. The plaintiff brought this action against the defendants for repayment of these costs and the District Court Judge at Weyburn, who tried the action, gave judgment against both defendants. The defendant Milne now appeals from that decision.

The defendant Kellington claims that he paid these moneys by virtue of a resolution which was passed by the Board on June 18, 1915, at a meeting when he and Milne were alone present; the two of them being sufficient to constitute a quorum. This resolution, as it appears in the minutes, is as follows:—

> Moved by Jas. Milne, that the secretary treasurer pay all Court costs (North, Lyall, Kurth) any time they are called for or when he sees fit.

The defendant Milne on the other hand states that no such resolution as that above referred to was passed at the meeting of June 18 or at any other meeting, and that he in no way was a party to the payment of the said costs. He states that the resolution which was passed at that meeting was one which authorized the secretary-treasurer to pay all "small bills" when called for. The minute book of the secretary-treasurer, which was put in evidence, shews that the minutes were always written by lead pencil.

An examination of the resolution in question shews that where the words "Court costs" now appear in said resolution some other words had originally been written in; that the words first written have been completely erased by a knife or other instrument and that over the erased part have been written other words difficult to decipher, but part of which appear to be the words "of Court" and that these words again have been altered to read as in the present form "Court costs." The words "North, Lyall, Kurth" are interlined and are written with the same condition of pencil as the words "Court costs." All the words of

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the resolution preceding and following the words "Court costs" are written by a pencil which was evidently in different condition from the pencil which wrote the words "Court costs."

Having examined Kellington's evidence carefully, I find it so full of contradictions and impossibilities that I can place no confidence whatever in it, and that, coupled with the other suspicious circumstances to which I have already referred, leads me where I would not hesitate to find that Milne was not a party to the payment out of these moneys unless I am precluded from so finding by the judgment of the trial Judge. An examination of that judgment shews that the trial Judge was largely influenced by what he observed from the minute books. He says:—

> Where the words "Court costs" now appear there was an erasure of some other words which on close examination would appear to have been "costs of Court." Not the slightest trace can be found of the words "small bills." This does not bear out the contention of Milne that the words erased were "small bills."

I do not find any suggestion in his judgment that Milne did not impress him as a truthful witness or that he refused to believe Milne for any other real reason than that referred to in the above quoted passage, and with all due deference I do not think the Judge was correct in his inference. It is true there is no trace of the words "small bills" but it is also apparent that the original words were entirely eradicated.

On the whole, therefore, I am of opinion that I am not precluded by the judgment of the trial Judge from reaching the conclusion as above indicated, and I would therefore allow the appeal with costs, and dismiss the action as against Milne with costs.

McKAY, J., concurred with BROWN, J.

NEWLANDS, J. (dissenting):—There is no question but that the funds in question were applied for a purpose not authorized by the School Act, the only question is, was the defendant Milne, the appellant herein, liable for such misappropriation?

An examination of the minute book leads me to the same conclusion, and for this reason as well as the other reasons given by the trial Judge in his opinion, I agree with him and think the appeal should be dismissed with costs.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. June 5, 1917.

INSURANCE (§IV B—170)—BEQUEST OF—"WRITING IDENTIFYING POLICIES."

A bequest to the testator's wife, in trust, of "the first $75,000 collected on account of policies of life insurance," is ineffective, for not "identifying the policies by number or otherwise," as required by the Life Insurance Act, R.S.B.C. 1911, ch. 115, sec. 7. (32 D.L.R. 301, affirmed by equally divided Court).

[See *Re Cole*, 29 D.L.R. 492, 36 O.L.R. 173.]

Statement.

APPEAL by plaintiff from the judgment of Macdonald, J., 32 D.L.R. 301. Affirmed; Court divided.

S. S. Taylor, K.C., for appellant; *Joseph Martin*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In my opinion the will, assuming it to be such a writing as is contemplated by the Act, does not "identify the policy by its number or otherwise." That being so, it is unnecessary to say more than that the appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:—On the first point raised I agree with the view taken by the Judge below that "any writing" should be deemed to include a will. With all due respect, however, I think, on the second point, that the ever widening course of the decisions in Ontario warrants the view that the identification of the policies "by number, or otherwise" is sufficient to satisfy the statute. It is not desirable to attempt here a complete review of the Ontario decisions, but I regard my view of this case as the logical result of the judgment in *Re Cheesborough* (1897), 30 O.R. 639, which decided that the identification was sufficient "when all the policies are given"—in that case there were five, in different companies, in only two of which were the beneficiaries designated. The same principle is carried out in later cases, *e.g.*, *Re Harkness* (1904), 8 O.L.R. 720; *Re Cochrane* (1908), 16 O.L.R. 328 (approving the *Cheesborough* case); *MacLaren* v. *MacLaren* (1907), 15 O.L.R. 142 (a decision of Anglin, J., on the special and peculiar case of four identical policies); and *Re Watters* (1909), 13 O.W.R. 385, which holds that, if there is only one policy in existence at the death of a testator, it is sufficiently identified by merely the "very general" reference to "the insurance moneys on my life at my decease" without even using the word "policy." And it is clear beyond question that part of a policy may be charged with

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a trust—*e.g.*, $2,500 in favour of a wife out of a sole policy for $5,000.

It is but a short, easy, and logical step from these cases where all the policies or only one policy are or is dealt with, in whole or in part, to this case where a certain amount is, so to speak, charged in gross upon all the policies till the statutory trust in favour of the beneficiary is satisfied by the payment of that charge "according to the intent so expressed or declared," as the statute puts it (sec. 7), and that intent may well be that the charge should be paid out of the first sum or sums collected up to the specified limit from one or more policies, whereupon the rest of the policies are freed from said trust, but, to quote the statute, so long as "the object of the trust remains" all the policies would remain charged to that extent. To illustrate the point—if at the time of the present declaration in the will there were ten policies in existence, but all had since lapsed save one, there could then be no doubt about the identification whatever—it would be a certainty. And if two only remained for $50,000 each, there would still be a certainty for both would have to be resorted to in order to complete the trust. So, in my opinion, there can be no real lack of identification where all are made liable to a contribution wholly or in part, from which liability they may be freed by payments from one or more of the whole group charged: in such case there is from the outset the certainty that all are liable and none is discharged till payment of the whole specified amount is made to the beneficiary. Again, by illustration—if the insured had four policies in four different companies for $5,000, $10,000, $15,000 and $20,000, respectively, they could be jointly charged for a whole sum of $25,000 just as effectually as they could be severally charged for a part thereof. And it is easy to imagine circumstances in which a careful and prudent policyholder would seek to guard against any failure of the intended trust by making a joint charge of $20,000 upon four policies aggregating $50,000, instead of a several charge of $5,000 upon each of them: as time goes by he may have reason to doubt the financial standing of one or more of them; or the forfeiture, or non-contestable, or other clauses might not be so favourable in all; or he might wish to guard against the consequences of any oversight in payment of premiums; or delay in payment by any company which might for a special reason wish to contest pay-

ment thereby causing expensive litigation as well as postponement of the intended benefit, which is almost invariably urgently needed. Therefore, I am of the opinion that the Court should hesitate long before depriving his widow and children of the result of his foresight and business acumen in minimizing and distributing the risk of any failure of the intended trust by making a joint instead of a several charge. There is absolutely no distinction in principle and cases ought to be decided upon principle and not upon attempts to change principles to meet new and ever varying facts. I regard the words here employed—"The first $75,000 collected on account of policies of life assurance"—as equivalent to "all my policies of life insurance," for the testator was unquestionably speaking of his own insurance, and "my policies" means "all my policies" just as "my goods and chattels" means "all my goods and chattels" unless further words of limitation are employed.

As Anglin, J., said in *MacLaren* v. *MacLaren*, *supra*, p. 146:—

> That this statute was passed to secure benefits to wives and children, and should receive such construction as will tend to effectuate that purpose, may be admitted. The Courts have gone far to place upon the statute a liberal construction in favour of beneficiaries of the preferred class.

And though the special facts in that case prevented him from deciding in favour of the intended beneficiaries (for reasons which, if I may say so, seem to me to be sound), yet I see nothing in the facts of the case at bar which in principle should prevent me from holding the opinion above expressed, and, therefore, I am of opinion that the appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—The trial Judge has gone very fully into this case, and before us the argument really narrowed down to the question of identification, and I am in agreement with the views of the trial Judge in that respect.

The appeal should be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal calls for the consideration of the provisions of the Life Insurance Policies Act (R.S.B.C. 1911, ch. 115). The appeal is from the judgment of Macdonald, J., who held that the appellants (the widow and infant children) were not entitled to the claimed sum of $75,000 out of the moneys received by the respondents under policies of life insurance upon the life of the late William Robert Arnold, in that the declaration in writing as contained in the will did not conform to the require-

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ments of the Life Insurance Policies Act and was ineffective. With great respect to the Judge I am entirely unable to accept that view. It is admitted that the respondents have collected upwards of $200,000 in respect of moneys payable under policies of insurance upon the life of the late William Robert Arnold. Similar statute law exists in the Province of Ontario and the trial Judge has somewhat exhaustively dealt with the decisions in the Courts of Ontario. The legislation was undoubtedly enacted for the benefit of the wife and children and, in my opinion, the Courts should always lean towards this well-demonstrated spirit and intention of the legislature—not of course in so doing violating any principles of law. It has been contended that the requirements of the statute are not fulfilled if the declaration or instrument in writing is contained in a will. I cannot agree with this view. See Bain, J., *National Trust* v. *Hughes* (1902), 14 Man. L.R. 41, at 50; *Orange* v. *Pickford*, 4 Drew 363 (62 E.R. 140); *Taylor* v. *Meade*, 4 DeG. J. & S. 597 (46 E.R. 1050).

The declaration or instrument in writing in the present case was contained in the last will of the late William Robert Arnold and reads as follows:—

> The first $75,000 collected on account of policies of life insurance I give to my dear wife Laura Blanche Arnold with the reservation that the same be placed in a savings account in the Standard Bank of Canada, Vancouver, B.C., with the right to draw the sum of $20,000 with which to purchase or erect a home (which home is to be hers absolutely and free from any trust), and the sum of $200 per month and interest on the savings account for living expenses and the maintenance of my infant children.

This was, in my opinion, a sufficient declaration or instrument in writing to satisfy the provisions of the statute—*i.e.*, "by any writing identifying the policy by its numbers or otherwise has made or may hereafter make a declaration that the policy is for the benefit of his wife or his wife and children" (sec. 7): *McKibbon* v. *Feegan* (1893), 21 A.R. Ont. 87.

See also *Re Harkness* (1904), 8 O.L.R. 720.

Riddell, J., in *Re Baeder and Canadian Order of Chosen Friends* (1915-16), 28 D.L.R. 424, at 432, 434, 36 O.L.R. 30, gives a most interesting history of the decisions on the subject of declarations, in the Province of Ontario, having relation to beneficiaries of insurance.

Turning to the precise matter we have for decision, it appears to me to be simple in the extreme. All the insurance of the testator is dealt with in the declaration as contained in the will;

the fund is identified; the policies are all the policies upon the life of the testator that are dealt with in the writing. Is it difficult to identify or find these policies? It is highly unreasonable to so construe the statute law as to render it nugatory, void and of no effect, and ask for the number of the policies or other particular identification when the declaration, in its effect, covers all policies; that a portion of the moneys only are to go to the wife matters not, the whole might have been given, but, save as to the $75,000, the creditors of the estate are entitled to the moneys. When it is considered that it was the plain intention of the legislature to make provision, whereby the husband could, even as against his creditors, protect his wife and children from penury, it would be frittering away the benefit intended, to so construe the statute law as to render it almost impossible under certain conditions to obtain the benefit clearly intended by the legislature. It is not difficult to call into mind situations and circumstances when the husband would be unable to have the policies at hand, or would know the numbers thereof, or even remember the names of the companies; and can it for a moment be considered that the intention of the legislature was that the language used should in such a case, without this information available, render it impossible for the husband to comply with the statute? The answer must be, that the spirit and intention of the legislature was to enable the husband to make the declaration in any reasonable and rational way, and the language is "by any writing identifying the policy by its number or *otherwise has made or may hereafter make a declaration that the policy is for the benefit of his wife or of his wife and children* (Sec. 7).

The husband in the present case in the writing as contained in the will declared "the first $75,000 collected on account of policies of life insurance I give, etc."—can there be any uncertainty here? It is $75,000 out of money collected in by the executors in respect of "policies of life insurance." This must mean out of moneys payable in respect of *all* policies of life insurance, the provision being, of course, that the first moneys are to go to his wife. Therefore, in my opinion, the declaration as contained in the will was an effective declaration, and by operation of law, that is to say, under the provisions of the Life Insurance Policies Act, the appellants are entitled to the $75,000.

It follows that, in my opinion, the appeal should be allowed.

Appeal dismissed.

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FURNESS-WITHY & CO. Ltd. v. AHLIN.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley and Chisholm, JJ. April 21, 1917.

WHARVES (§ I—3)—DEFECTIVE SUPPORTING PILES—COLLAPSE—DAMAGE TO CARGO—LIABILITY.

The collapse of a wharf due to the defective condition of the supporting piles when by the exercise of reasonable care the defect could have been discovered and remedied, will render the wharf owner liable for the damage resulting therefrom to a cargo unloaded and stored thereon, though the superstructure itself was in good condition.

Statement.

APPEAL from the judgment of Ritchie, E.J., in favour of plaintiff, with costs, in an action to recover an amount claimed for discharging, storing, and salving the cargo of defendant's ship, and dismissing defendant's counterclaim for damages for loss of cargo through the collapse of plaintiff's wharf. Reversed.

W. A. Henry K.C., for appellant; *H. Mellish* K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—The counterclaim sets up a case of liability against the plaintiffs for negligence resulting in an injury to the cargo just discharged from the steamship "Camino" into the company's warehouse or shed upon their wharf at Halifax. The "Camino," with a cargo of flour in bags on her voyage from California, was, through an accident on the Atlantic, brought into Halifax for repairs, and had to discharge and store her cargo. A contract for this purpose was entered into with the plaintiffs, who are steamship agents and warehousemen and wharf owners at this port.

I quote from the correspondence. On February 15, 1915, the plaintiffs wrote as follows to Mr. Roche, the agent of the ship:—

S.S. "Camino."

We beg to confirm our conversation in reference to handling cargo ex above steamer. We agree to discharge and pile cargo in the Furness shed for 46c. per ton of 2,000 lbs. We also agree to replace cargo on above steamer at same rate, stevedoring to be under the direction of and to the satisfaction of the master of steamer. We will give you the entire use of our wharf shed. Such cargo as is discharged shall pay 80c. per ton of 2,000 lbs. provided goods do not remain in the shed longer than one month. For each additional month charge will be 40c. per ton extra. Steamer will be required to pay dockage as per schedule.

On the 16th the defendant, the master of the ship, replied as follows:—

Your favour of the 15th inst., addressed to Wm. Roche, and setting forth your proposal for the discharge at your wharf of the cargo or part thereof, now in the S.S. "Camino," and the storage of the same in your warehouse, with the return and loading of said cargo into the S.S. "Camino," has been handed to me for consideration.

I hereby accept your proposal amounting to 46c. per ton of 2,000 lbs. for discharging and piling of cargo into your warehouse, with a similar charge of 46c. per ton for reloading into the "Camino," and a storage charge of 80c. per ton for the first month's storage or fraction thereof; with an additional charge of 40c. per ton in case storage should extend into the second month.

It is understood, however, that the discharge, storage and reloading is to be done under my direction and to my satisfaction.

I understand that the dockage charge for the steamer will not exceed the schedule rate of $19 per day for the time that the steamer is moored alongside of your wharf.

It is further understood that your wharf is safe and capable of carrying 3,500 tons of general cargo.

If this understanding is satisfactory, I will place the "Camino" at your wharf this afternoon or early to-morrow, depending upon weather conditions.

On the same date the plaintiffs replied to this letter as follows:—

We confirm arrangements for discharging, reloading and storing cargo S.S. "Camino" as set forth in your memo. of Feb. 16th, 1915, with the exception of clause reading as follows:—"It is further understood that your wharf is safe and capable of carrying 3,500 tons general cargo." We will, if necessary, deliver you certificate from competent engineer, stating that our wharf is capable of carrying 500 lbs. per square foot of floor space. The dimensions of the shed are about 400 ft. by 70 ft., which would give shed a carrying capacity of about 7,000 tons. This certificate would be issued in accordance with a recent examination made.

The certificate referred to was apparently a report of Mr. Hamilton Lindsay, of the N. S. Construction Co. of Halifax, dated December 3, 1914. Apparently, it had been obtained in connection with a previous cargo discharged from the steamship "Sandefjord" on the same wharf, but as a fact was not furnished to the master of the "Camino." It is as follows:—

The Furness-Withy Company. Halifax, N.S., December 3, 1914.

As requested we beg to report as follows on the deck of your wharf at your property on Upper Water St., Halifax.

Upon examination we find caps of 12 in. x 12 in. hemlock running transversely to the central axis of your wharf, being supported at 8 ft. intervals on vertical piles evidently driven to hard bottom as the floor shews no settlement. On top of these caps and running parallel to the central axis of your pier are 9 in. x 9 in. joists of spruce and hemlock at 3 ft. centres, having a clear span of approximately 8 ft., supported on 12 in. x 12 in. aforementioned caps. All the above-mentioned caps and joists we find in good condition. Hence $\frac{b \times d^2 \times c}{6}$ for central load. We find that a panel of say 9 x 9 or 81 sq. ft. safe for a distributed loading of 448 lbs. per sq. ft.

As to the supporting piles, when examining your wharf deck recently the tide was at half flow and we were unable to see the condition of them, but we understand you have had this portion of your wharf examined and reported on by divers and others.—Respectfully submitted, The N.S. Construction Co., Limited. H. LINDSAY.

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It will be noticed that on the trial the whole attack is made in respect to the supporting piles of the wharf mentioned in the last paragraph of the report; nothing turns upon the condition of the superstructure.

The "Camino" went into the dock and by February 25 plaintiffs finished removing and storing the cargo, except a small portion in another building, in the warehouse or shed on the wharf.

On the 27th, between 11 and 12 o'clock noon, the wharf under the shed collapsed letting the bags of flour drop into the waters of the harbour. Some of the flour was afterwards recovered and sent on to its destination.

As I have come to a different conclusion from that of the trial Judge, I find it necessary to state my reasons with some detail.

The wharf itself is 560 ft. in length, by 80 ft. in width. The portion covered by the shed is 400 ft. by 70 ft., with about 60 ft. at the outer end, and a space of 5 ft. on each side of the shed.

Captain Harrison, an employee of the company, says:—

Q. The piling is spaced how far apart? A. It is about 8 ft. 6 in. from centre to centre. I think the other way they are closer; I think they are 8 ft. 6 in. by 6 ft.

In respect to the dimensions of the area collapsed, he says:—

Q. You saw the place where the wharf collapsed? A. Yes. Q. Where was it? A. I would imagine that it commenced from 50 to 60 ft. from the inner or west end of the shed. It extended from 70 to 75 ft. seaward and from 45 to 50 ft. into the shed. I did not measure it. Q. That made a rectangular piece that collapsed? A. Yes. Q. What was the nature of that break? A. It was just a collapse. Q. Was it broken clean off? A. Yes, clean and square, as if taken off by an axe.

In dealing with the testimony, the Judge reports as follows:—

I assume that this case will come before the Court, and (subject to what I say later in regard to Mr. Jefferson Davis) it is fair that I should inform the Court that there was nothing in the manner or demeanour of any of the witnesses which calls for any adverse comment from me. So far as Mr. Davis is concerned, I am far from saying that he would attempt to intentionally mislead the Court. He is a man of attractive personality, but it did occur to me, when he was giving his evidence, that his temperament might be such as to rather carry him away, and as to some portions of his evidence I think he was clearly mistaken.

So that one is free to deal with the testimony as if given by credible witnesses making allowance for the qualification he mentions.

Fortunately, at the time of this collapse, the late George E. Francklyn, Lloyds' agent at this port, called a survey as to the conditions, and the surveyors, I should think, were very com-

petent men for the purpose. There was Hamilton Lindsay, the vice-president and managing director of the N.S. Construction Co., a construction engineer. And, by the way, he was the man that the company had obtained the report from in respect to the condition of the wharf when the "Sandefjord" was about to discharge cargo some 3 months before. Then there were James Gould, a practical wharf builder and repairer in this city, and Arthur Dyer, a civil engineer, who had experience in construction work and also was at the time of the trial supervising the construction of the new Furness-Withy wharf.

I attach a great deal of importance to the testimony of these 3 witnesses.

The evidence clearly shows that the collapse of the wharf was due to the failure of one or more of the piles to support it. In fact, they broke. It is, I think, also clear that this failure and breaking was directly due to some of the supporting piles having been weakened by worms (limnoria) which had eaten them in part away. I shall refer to the evidence presently. No finding in the judgment is to the contrary, and I think that fact is tacitly admitted and treated as if excused. The Judge says:—

> There is danger about every wharf, because, as soon as the supporting piles are driven, the worms attack them. The failure of one pile may cause a collapse. Mr. Lindsay was asked his opinion as to the cause of the collapse. His answer was: "The failure of one or more of the piles to support it."
>
> The plaintiffs were no doubt fully alive to the danger of worms; it was to their own interest to guard against that danger so far as they could. The question is whether or not, having regard to the danger, they used reasonable care as prudent men in the maintenance of the wharf.

The piles found broken appeared to have been broken at the part infected by the worms. The wharf, if the piles had been in good condition, would carry a weight of 500 lbs. to the square foot. Mr. Thayer, who estimated the actual average weight, stated that it would be about 311 lbs. to the square foot and says there was no point where it was over 400 lbs. at the time of the collapse.

I do not wish to make too much of the phrase *res ipsa loquitur* but I do think the burden of proof was upon the company.

It will not do to say that the fact of this locality being infested by worms and of these piles being infected by their action was equally open to the discovery of all. The master of a strange ship coming to this port has not the time to go under the dock and

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to send divers down, for the attack of the worms is made just below the surface of the water at low tide or at the mud bottom and the tide is not always low and the mud is below that requiring a diver. Besides the piles are to some extent covered with mussels and sea weed.

The company cannot claim that this was a case of inevitable accident, or that the defect in the piles was a latent defect so far as they were concerned. It was either known to the company, or should have been known to them, if they had used proper care in examination and in renewing the piles which had been ravaged by the worms.

Of course some of the broken piles which were found in the debris may have been the original piles of the construction replaced owing to the ravages by worms by later piles placed alongside of them without the earlier ones being removed. But there were witnesses, particularly the surveyors, who would not be misled by these, and the company would not be slow to account for all the breakage in that way if it could do so.

The only other witness for the ship-master is Jefferson Davis, who had come to Halifax in the interest of the cargo, but having no personal interest, and I should say a very competent person, from his evidence. Now, an attack has been made on his testimony but, except in one respect, I think he is amply corroborated by the other testimony. Being interested in the cargo he no doubt took more interest in the conditions after the collapse in making his examination and does give us some figures. All of this could have been observed by the company's employees; the number of piles among the wreckage still moored at the wharf as the photographs show; the number of broken piles; the extent of the area ravaged by the worms, and so on. I cannot understand why he would falsely exaggerate these details which he gave. He was liable to have to confront the witnesses called by the company and to have them called back if he made misstatements in those details. Besides, he is corroborated by Mr. Thayer, and the witnesses for the company could all have been called back to contradict his testimony. The only conflict worth speaking of is in regard to the replacing of piles under the area covered by the shed, not being the outside bearing piles. We shall see what the company employees say about that shed area. And at most the difference

could be attributed to an error of judgment from examination of the piles, namely, as to those which had been renewed or replaced.

Coming to the company's case, it appears to me that the main inquiry is as to what examinations were made from time to time by the company to detect the ravages from worms to these piles; and, second, to what extent were renewals of worm-eaten piles made.

One thing must be remembered, that while one cannot say that the whole foundation must be wholly uniformly renewed every 10 years or shorter period, the person who only replaces piles from time to time in a locality infested with worms takes a risk.

The company gives some testimony as to the periodical examination of the piles. The divers were not called. But Mosher testifies that he examined the piles every year. He says he examined the wharf, including the piles, in the summer of 1914, with Clarke, the carpenter.

There was another examination in December, 1914, when the "Sandefjord" came in and was discharging cargo there. It was made by Captain Harrison and the carpenter. It was at this time that Hamilton Lindsay was called in, after it had commenced. I have already called attention to the fact that his report as to the condition of the supporting piles refers to the examination of others rather than himself. It appears to me that the examinations were not equal to the danger which had to be met. As to renewals of piles, this wharf was built by the company in 1899. The piles were of native hemlock, not of wood creosoted to resist the action of worms. It appears that the lifetime of such a pile in such a locality in Halifax harbour is about 10 years.

If there was any question about that fact, Mosher, the company's wharf repairer, and witness, would have been a very competent witness to have spoken to modify it.

If 10 years is the life of a pile, the company in the course of 15 years would, at least, be expected to have renewed all of the piling under this wharf.

There is no evidence to that effect. As a fact, a majority had not been replaced.

It has called as witnesses, besides the managing director Mr. Furness, Captain Harrison, the marine superintendent of the company; its wharfinger, Thomas B. Cuthbert; its carpenter,

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Thomas Clarke, and the wharfbuilder and repairer who was employed for such work, Fred Mosher.

There is evidence of repairs to the superstructure from wear and tear, from accident as by collision and so on, but what I have been unable to discover in the evidence is, how many new bearing piles were put under that shed during the space of time, say, 7 years, that is the period between the first 5 years after it was constructed during which no piles of any kind were put there and up to 3 years before the trial, during which latter period the creosoted pine piles were used and which are not the piles that were eaten or broken. Books of account would ordinarily show what number of piles were purchased during that period. But we have to get on without such detail, and have mere estimates or guesses. The piles required as the result of the collision by the "Artemis" are not eliminated.

The company has sought to interpose between an adequate cause for what happened and its liability the agency of a third person, or, rather, another cause. It was by the amendment pleaded as "unknown cause" and put forward in the evidence as the vibration from blasting at the terminals. But that is far fetched. It was not established at the trial sufficiently to warrant a finding to that effect. And I do not accept it as the cause.

Passing to the law applicable to the facts in such a case I only propose to cite one or two authorities. In respect to the degree of care to be required from warehousemen, Blackburn, J., as he then was, in the case of *Searle* v. *Laverick*, L.R. 9 Q.B. 122, at 126, says:—

> The obligation to take reasonable care of the thing entrusted to a bailee of this class (warehousemen, etc.) involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state so that the thing therein deposited may be reasonably safe in it.

I also refer to *The Moorcock*, 14 P.D. 64; *Brabant* v. *King*, [1895] A.C. 632 at 641. I also wish to quote from an American case, *Garfield* v. *Rockland*, 184 Mass., at 62. There the Court says:—

> The general rules of law which are applicable in cases of this character are the same in England and in this country, and are the same at common law and in Admiralty. They are as well stated in the case of *Nickerson* v. *Tirrell*, 127 Mass. 236, 239, as perhaps in any case: "The owner or occupant of a dock is liable in damages to a person who by his invitation, expressed or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable

care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care, if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby."

In *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 93, the case of a ship entering a dock and sustaining injury by reason of a mud bank, Lord Cranworth said, p. 122:—

If the knowledge of the existence of the mud bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them.

In my opinion the appeal must be allowed and the defendant will have judgment against the plaintiff on the counterclaim for damages for the injury to the cargo to be ascertained by a reference, with costs.

Russell and Chisholm, JJ., concurred.

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Chisholm, J.

Longley, J. (dissenting):—The plaintiff is now suing for amount due for discharging, reloading, storage of cargo, and salvage of cargo, $7,000.14. The defendant claims the loss of cargo which amounts in the vicinity of $45,000. In such a case damages would be recoverable on account of gross neglect or negligence on the part of the plaintiffs. Reading from Ritchie, J., on the subject, he says:—

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I think I ought not to draw any strong inference against the plaintiffs from the knowledge of the collapse of the wharf. The plaintiffs as wharfingers are not to be held to an extraordinary degree of care, but they are to be held to that reasonable care which a prudent owner would take of his own goods.

And again:

The plaintiffs, no doubt, were aware of the danger of worms, as it was to their own interests to guard against that danger as far as they could. The question is whether or not, having regard to the danger, they used reasonable care as prudent men in the maintenance of the wharf. The evidence of Capt. Harrison and other witnesses called by the plaintiffs has convinced me that they did use such care.

In any case, any negligence on the part of wharf owners the jury has found there was some negligence or some want of care, and upon this has been founded any attempt to recover damages. In this case the defendants have not established sufficiently to obtain the verdict from the Judge. I think it is reasonably clear that it is impossible to award damages from the want of such a verdict, and it does not seem to me that the evidence in this case is such that it makes the decision of the Judge unfair or unreasonable. I therefore dismiss the appeal. *Appeal allowed.*

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GRATTON SEPARATE SCHOOL v. REGINA PUBLIC SCHOOL.

Saskatchewan Supreme Court, Elwood, J. April 3, 1917.

SCHOOLS (§IV—74)—SEPARATE SCHOOLS—COMPANY TAXES—NOTICE.

A separate school district is not entitled to share in school taxes collected from companies if the notice requirements under secs. 93, 93*a* and 93*b* of the School Assessment Act (Sask.) have not been complied with; under sec. 93*a* such notice must be given before the completion of the roll.

[*Regina Public School* v. *Gratton Separate School*, 21 D.L.R. 162, 50 Can. S.C.R. 589, referred to.]

Statement.

ISSUE to determine the rights to taxes levied on companies for school purposes.

A. R. Tingley, K.C., for plaintiff; *G. H. Barr*, K.C., for defendant.

Elwood, J.

ELWOOD, J.:—By an order of Lamont, J., made in Chambers and dated February 8, 1917, it was directed that an issue to determine the rights of the plaintiff and defendant in respect of moneys collected by the City of Regina, being taxes levied on the assessment of the property of certain corporations for school purposes, be tried by way of special case to be stated, and pursuant to the said order the case as stated for the opinion of the Court is as follows:—

1. The City of Regina is a city municipality within the provisions of the City Act, being ch. 15 of the Statutes of Saskatchewan, 1915, and amendments thereto.

2. The defendant is a "public school district" within the provisions of the School Act, being ch. 23 of the Statutes of Saskatchewan, 1915, and amendments thereto; is a "town district" within the provisions of the School Assessment Act, being ch. 25 of the Statutes of Saskatchewan, 1915, and amendments thereto; and is situate within the limits of the said city.

3. The plaintiff is a "separate school district" within the provisions of the said School Act and amendments; is a separate school district established in the defendant school district within the provisions of the said Act and amendments; is a "town district" within the provisions of the said School Assessment Act and amendments; and is a Roman Catholic separate school district.

4. All the property of all the companies mentioned in Schedule A, hereto annexed, was entered, rated and assessed on the assessment roll of the said city for the year 1916 for the schools of the defendant district.

5. No appeal has been taken against such entering, rating and assessing.

6. The said city had, by by-law, adopted the special provisions of the said City Act by which the taxes for the year 1916 were to be based upon an assessment made in the year 1915, and the said assessment roll of the said city for the year 1916 was completed within the provisions of sub-sec. 1 of sec. 454 of the said City Act, on December 31, 1915; and the time for appealing therefrom to the Court of Revision expired February 13, 1916.

7. The taxes levied by the said city in respect of the said assessment mentioned in par. 4 hereof, have been, or are being collected by the said city; the same have not nor has any portion thereof been paid over to the plaintiff

or the defendant. The same are not claimed by the said city or by any person or corporation except the plaintiff (in part) and the defendant (as to the whole) and exhibits B and C hereto annexed are copies of the claims made to the said taxes by the plaintiff and the defendant respectively.

8. Each of the companies mentioned in the said Schedule A was served, between February 16 and June 18, 1916, by the plaintiff, with the notice provided by sec. 93 of the said School Assessment Act.

9. Each of the companies mentioned in group numbered 2 of the said schedule A gave notice to the clerk of the said city between February 16 and November 29, 1916, in the form of which ex. D hereto annexed is a copy or in form to the same effect.

10. Each of the companies mentioned in group numbered 3 of the said schedule A filed with the clerk of the said city between February 16 and November 29, 1916, a statutory declaration in the form of which ex. E hereto annexed is a copy.

11. Each of the companies mentioned in group numbered 4 of the said schedule A gave notice to the clerk of the said city between February 16 and November 29, 1916, that did not refer to the entering, rating or assessment of the company's property, but directed that the taxes paid by the company be applied for the purposes of the schools of the defendant only.

12. Each of the companies mentioned in group numbered 5 of the said schedule A, gave notice to or filed a declaration with the clerk of the said city in special form and exhibits F, G and H, hereto annexed, are copies of two notices given to and a statutory declaration filed with the clerk of the said city by Canada Permanent Mortgage; exhibits I and J hereto annexed are copies of a notice given to and a statutory declaration filed with the clerk of the said city by The Mutual Life Assurance Co. of Canada; and ex. K hereto annexed is a copy of a notice given to the clerk of the said city by Regina Trading Co., Ltd.

13. None of the companies mentioned in any of the groups numbered 1 to 5 inclusive of the said schedule A, has given any notice in respect of its assessment or taxes to or filed any statutory declaration in respect of its assessment or taxes with the clerk of the said city, other than as stated in paras. 9, 10, 11 and 12 hereof.

14. The total amount of taxes collected for school purposes by the said city, as mentioned in par. 6 hereof, exceeds the sum of $30,000.

The questions for the opinion of the Court are:—(1) Are secs. 43 and 44 of the said School Assessment Act, or either of them, *ultra vires* the Saskatchewan legislature? (2) Is the plaintiff entitled to a proportion of the taxes collected or to be collected by the said city for school purposes, for the year 1916, from any of the said companies? (3) If so, what proportion? (4) And if so, from what companies?

It will be noted that reference is made to secs. 43 and 44 of the School Assessment Act. This appears to be a mistake. The School Assessment Act of 1915 did not come into force until January 1, 1916, and the assessment under which the taxes in dispute were collected was completed on December 31, 1915.

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The sections of the School Assessment Act of 1909, as amended, and applicable to the matters under consideration are the following:—

93. A company may by notice in that behalf to be given to the clerk or secretary-treasurer of any municipality wherein a separate school district is either wholly or in part situated, and to the secretary of the Board of any public school district in which a separate school has been established and to the secretary of the Board of such separate school district require any part of the real property of which such company is either the owner and occupant or, not being such owner, is the tenant or occupant or in actual possession of, and any part of the personal property, if any, of such company liable to assessment to be entered, rated and assessed for the purposes of said separate school and the proper assessor shall thereupon enter said company as a separate school supporter in the assessment roll in respect of the property specially designated in that behalf, in or by said notice and so much of the property as shall be so designated shall be assessed accordingly in the name of the company for the purposes of the separate school and not for public school purposes, but all other property of the company shall be separately entered and assessed in the name of the company as for public school purposes.

Provided always that the share or portion of the property of any company entered, rated or assessed in any municipality or in any school district for separate school purposes, under the provisions of this section, shall bear the same ratio and proportion to the whole property of the company assessable within the municipality or school district as the amount or proportion of the shares or stock of the company, so far as the same are paid or partly paid up, held and possessed by persons who are Protestants or Roman Catholics, as the case may be, bears to the whole amount of such paid or partly paid-up shares or stock of the company.

(2) Any such notice given in pursuance of a resolution in that behalf of the directors of the company shall for all purposes be deemed to be sufficient, and every such notice so given shall be taken as continuing and in force, and to be acted upon unless and until the same is withdrawn, varied or cancelled by any notice subsequently given pursuant to any resolution of the company or of its directors.

(3) Every such notice so given to such clerk or secretary-treasurer shall remain with, and be kept by him on file in his office and shall, at all convenient hours, be open to inspection and examination by any person entitled to examine or inspect the assessment roll and the assessor shall in each year before the completion and return of the assessment roll, search for, and examine all notices which may be on file in the office of the clerk or secretary-treasurer, and shall thereupon in respect of said notices, if any, follow and conform thereto and to the provisions of this Act in that behalf.

(4) False statements made in any such notice shall not relieve the company from rates. Any company fraudulently giving such notice or making false statements therein shall be liable to a penalty not exceeding $100. Any person giving for a company such a statement fraudulently or wilfully inserting in any such notice a false statement shall be guilty of an offence and liable on summary conviction to a like penalty.

93a. In the event of any company failing to give a notice as provided in sec. 93 hereof, the Board of trustees of the separate school district may give

to the company a notice in writing in the following form or to the like effect, that is to say:—

The Board of trustees of separate school district No. of Saskatchewan, hereby give notice that unless and until your company gives a notice as provided by sec. 93 of The School Assessment Act, the school taxes payable by your company in respect of assessable property lying within the limits of the school district No. of Saskatchewan (naming the public school district in relation to which the separate school is established) will be divided between the said public school district and the said separate school district in shares corresponding with the total assessed value of assessable property assessed to persons other than corporations for public school purposes and the total assessed value of the assessable property assessed to persons other than corporations for separate school purposes respectively.

This notice is given in pursuance of sec. 93*a* of the School Assessment Act as amended.

(2) Unless and until any company to which notice has been given as aforesaid gives a notice as provided in sec. 93 hereof the whole of the assessable property of such company lying within the limits of the public school district shall be entered, rated and assessed upon the assessment roll for the public school district and all taxes so assessed shall be collected as taxes payable for the said public school district, and when so collected such taxes shall be divided between the said public school district and the said separate school district in the proportions and manner and according to the provisions set out in the notice in the next preceding sub-section mentioned.

(3) Service of a notice under the foregoing provisions upon a company may be effected by serving the same upon any officer or agent of the company upon whom service of a writ of summons issued out of the Supreme Court for Saskatchewan may be lawfully served for the company.

93*b*. A company may notify the council of the municipality in writing on or before the first day of May in any year, or, where the Council has adopted the provisions of sec. 347*b* of the City Act, on or before the first day of December in the year in which the assessment is made, that it is practically impossible owing to the number of its shareholders and their wide distribution in point of residence, to ascertain the proportions of the stock of the company held by Protestants and Roman Catholics respectively.

(2) Such notice shall be accompanied by a statutory declaration of the president, vice-president or secretary of the company, or some person having the management of its affairs in Saskatchewan, who can testify to the facts, giving such particulars as are set forth in clauses (*a*) to (*g*) inclusive of sec. 8 of the Foreign Companies' Act, and showing in addition the approximate amount of stock held outside of Canada, together with such particulars as may be available.

(3) Subject to the provisions of sub-sec. 8 hereunder, any company which has filed a notice as above directed shall be relieved from compliance with the terms of the said sec. 93.

(4) Any company, which is relieved as above from the provisions of sec. 93, may, by notice in that behalf to the clerk or secretary-treasurer of the municipality, to be served on or before the first day of May in any year, or where the council has adopted the provisions of sec. 347*b* of the City Act on or before the first day of December in the year in which the assessment is made, require that its property liable to taxation shall be entered, rated and assessed

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for public school purposes or for separate school purposes, or partly for one and partly for the other in such proportions as the company may decide.

(5) A company, the whole of whose shareholders are Roman Catholics or Protestants as the case may be, may within the period limited in the first and fourth subsections of this section, file a statement to that effect with the clerk or secretary-treasurer of the municipality, verified by a statutory declaration of the president, vice-president or secretary of the company or some person having the management of its affairs in Saskatchewan who can testify to the facts, and in such case the provisions of sec. 93 shall not apply to the said company, and the taxes of the said company shall be assessed, levied and collected wholly for the separate school or the public school as the case may be.

(6) Every notice given under this section and every statement filed thereunder shall be taken as continuing and in force and to be acted upon unless and until the same is withdrawn, varied or cancelled by any notice subsequently given or statement filed in the manner herein directed.

(7) Every notice given or statement filed under this section shall be kept by the clerk or secretary-treasurer of the municipality on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect the assessment roll, and the assessor shall each year before the completion and return of the assessment roll, search for and examine all notices which may be on file in the office of the clerk or secretary-treasurer, and shall conform thereto in making his assessment.

(8) In case any company takes action under the first, second and third sub-sections hereof, but does not comply with sub-sec. (4), the notice given under the first sub-section shall not avail, but the company shall remain subject to the provisions of secs. 93 and 93*a*.

In *Regina Public School* v. *Gratton Separate School*, 21 D.L.R. 162, 50 Can. S.C.R. 589, it was held that the separate school district was not entitled to any part of the taxes of a company which had not given a notice under sec. 93 of the above Act.

I am of the opinion that since the sec. 93*b* was passed the effect is that any company which has not given the notice required by sec. 93 or has not complied with the provisions of sec. 93*b* is liable to be compelled to give a notice under sec. 93*a* and that the results provided by 93*a* for non-compliance follow. I think this is quite apparent from a perusal of sub-secs. 3 and 8 of sec. 93*b*.

In the case stated for the opinion of the Court it will be noticed that the assessment roll was completed with the exception of anything requiring to be done by way of appeal on December 31, 1915; that none of the companies gave any notice prior to then, and that the notice given by the Separate School Board was given after December 31, 1915, and after the date upon which all notices of appeal from the assessment were required to be lodged. It was, therefore, impossible for any of the companies to comply with the notice.

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It will be observed that sec. 93 provides that the notice to be given on behalf of the company shall require the property of the company liable to assessment to be *entered, rated and assessed* in the manner to be designated by the notice; and it further provides that the proper *assessor* shall thereupon enter said company in the *assessment roll, etc.*

Sec. 93*a* (2) provides, unless and until any company to which notice has been given as aforesaid gives a notice as provided in sec. 93, the whole of the assessable property of such company, etc., shall be entered, *rated and assessed upon the assessment* roll for the public school district, etc.

These sections contemplate that where a notice is given under sec. 93, the assessor shall rate and assess the company upon the assessment roll in the manner indicated in the notice; and so also where a company complies with the notice given under sec. 93*a*.

I am of the opinion that the clear effect of these sections, is that the notice provided for by sec. 93*a* must be given at a time when it would be possible for the company to comply with that notice. If it is given after the assessment is completed, it would be impossible to comply with it with respect to that assessment. It would be impossible for the company to give any notice upon which the assessor could make any entry upon the completed assessment roll. I think the use in sub-sec. 2 of sec. 93*a* of the words "shall be entered, rated and assessed" indicates that this notice must be given before the completion of the roll. If it had been intended that the notice might be given at any time then, it would seem to me, that the words would have been "shall be or shall remain entered, rated and assessed" etc.

It will be noticed that sec. 93*b* provides that the provisions of sec. 93 shall not apply to any company which complies with the provisions of 93*b*, sub-secs. 1, 2 and 4, or sub-sec. 5; and in the case under consideration it would mean that, in order to escape the provisions of sec. 93, the companies would, on or before December 1, 1915, have had to comply either with subsecs. 1, 2 and 4 or with sub-sec. 5 of 93*b*. Notice under 93*a* could be given before December 1, and in that event the company would be relieved from complying therewith by complying with 93*b*, sub-secs. 1, 2 and 4, or 93*b*, sub-sec. 5.

After December 1 the company which has received notice

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either before or after December 1, and which has not complied with 93*b* must give the notice required by 93, or else the results provided by 93*a* for failure to comply follow.

The fixing of December 1 was no doubt for a purpose; the purpose may not be altogether clear, but it seems to me probable that it was so that after December 1, and before the completion of the roll, the Separate School District would be in a position to know what companies were liable to receive notice under sec. 93*a*, and would have time to give such notice so that the same might be complied with before December 31.

If it were intended that notice under 93*a* could be given at any time after the completion of the roll, so as to affect the completed roll, the language of the Act should have been clear and unequivocal.

In view of the conclusion I have come to, and following what is expressed by Davies, J., and Duff, J., in *Regina Public School* v. *Gratton Separate School*, 50 Can. S.C.R. 589 at 604, 617, 21 D.L.R. 162 at 171, it is unnecessary that I should express any opinion on the first question submitted for the consideration of the Court.

My answer to the second question, in view of the conclusions I have come to, is that the plaintiff is not entitled to any part of the taxes collected or to be collected by the said city for school purposes for the year 1916 from any of the said companies.

The plaintiff must pay the defendant's costs of this action.

Judgment for defendant.

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British Columbia, Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, J.J.A. April 5, 1917.

INTOXICATING LIQUORS (§ III F—83) — PROHIBITED HOURS—UNAUTHORIZED SALE BY SERVANT.

The provision of the B.C. Liquor License Act, sec. 81, sub-sec. 118, making the licensee liable to conviction for unlawful sales by his servants, does not apply to the offence of selling during prohibited hours in contravention of the Liquor License Act Amendment Act, 1916, ch. 37 (B.C.); the liability under sec. 3 of the latter Act is upon the "person violating" it, and the penalty applies only when the accused has personally committed the offence or has authorized or connived at it.

Statement.

APPEAL from the judgment of Hunter, C.J.B.C., given on March 20, 1917, quashing a summary conviction on a case stated by the Police Magistrate of Vancouver. The charge was for selling intoxicating liquor during prohibited hours.

Maitland, for the Crown; *J. J. Russell*, for accused.

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MACDONALD, C.J.A.:—The defendant was charged with the offence of selling liquor during prohibited hours contrary to the Liquor License Act Amendment Act, 1916, being chap. 37.

According to the statement contained in the case, the defendant was the holder, as trustee for the creditors of the "Main Hotel," of a retail liquor license. It is also stated that the offence complained of was committed by the night porter of the said hotel. The learned Chief Justice Hunter, from whose judgment the appeal is taken, set aside the conviction and the Crown has appealed to this Court. The first question submitted is as to whether the defendant was in law the licensee of the premises at the time in question. It was contended by his counsel Mr. Russell, that a license could not lawfully be issued to a trustee for creditors.

Now the Liquor License Act does not apply to the granting of licenses in municipalities. The licenses are granted by the Municipal Licensing Board and they are governed in the case of the city of Vancouver, wherein the license in question was granted, by the City's Act of Incorporation and its Liquor By-Law No. 5. The facts before the Board are not before us. There is nothing before us to shew that the license was illegally issued to the defendant. It is possible that he came under the provisions of clause 24 of said by-law sub-sec. (*d*); and for aught we know, the license was transferred to him properly under that clause and subsequently renewed in his name as trustee.

I think, therefore, we must assume in the absence of evidence to the contrary that the Board acted in accordance with law. I would, therefore, answer the first question in the affirmative, that is to say, that the defendant was the licensee. The answers to the other questions depend upon the construction to be placed upon sec. 3 of said ch. 37 read in conjunction with the Liquor License Act in which it is incorporated. That section declares that the Act shall remain in force during the continuance of the war and no longer and while in force "shall supersede any provision to the contrary in the said Act or Amendments (the Liquor License Act)." The Liquor License Act, as amended in 1913, ch. 40, sub-sec. 118 of sec. 81, enacts that:—

> "Every offence against the provisions of this Act committed by the employee, servant, agent or workman of any person holding any license for the sale of liquor or by any person

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unlawfully selling liquor shall be deemed to be the offence of the person holding such license or of the person so unlawfully selling liquor as the case may be and said person shall be answerable for and shall be punished for such offence."

This deals with two classes of principals, (1) a licensee who is made answerable for the fault of his servant and, (2) any other person unlawfully selling liquor, for instance, an unlicensed person, who is also made answerable for the fault of his servant. Now said ch. 37, sec. 3, extends the prohibited hours for selling liquor beyond those mentioned in the Liquor License Act and declares that "violation of any of the provisions of this section shall be an offence for which *the person violating* shall be liable on summary conviction to the penalty provided in sec. 73 of said ch. 142 (Liquor License Act) as re-enacted by sec. 5 of ch. 40 of the Statutes of 1913." It will be noticed that this does not render the licensee punishable for an infraction by his servant or employee.

Now, as the law stood before the enactment of said ch. 37, the licensee was punishable, though innocent himself, for the infraction of the law by his servant. With the wisdom or justice of that legislation the Court is not concerned. When a penalty is imposed by statute in clear terms, it must be enforced without regard to what the Court may think of its wisdom or justice. It is only when the Legislature has not made its meaning clear and when its language is capable of more than one interpretation that the Court is called upon to consider the consequences which would flow from one or the other interpretation and if one interpretation leads to absurdity or manifest injustice while the other does not, the latter interpretation is to be preferred. The said sub-sec. 118 standing alone and apart from said ch. 37 is perfectly plain. It holds the licensee responsible for the breach of the law by his servants. That is the clearly declared intention of the Legislature. On the other hand, said ch. 37 standing alone just as clearly as I think imposes the penalty for breach of its provisions on the licensee for his own breach only, that is to say when he personally commits or authorises it or connives at it. A breach of the statute by his servant, or by some one on his premises, would render that person alone liable to punishment. The two sections, viz., said sec. 3 and said sub-sec. 118, are not consistent with each other and the question then arises, does said

sub-sec. 118 fall within the category of "any provision to the contrary" mentioned in sec. 3. If it can, then sec. 3 supersedes sub-sec. 118. I think it does. Sec. 3 covers the ground formerly covered by said sub-sec. 118. It fixes new prohibited hours, and to that extent is clearly to the contrary of sub-sec. 118. It also declares what persons shall be punished for breach of its provisions and therein it also differs from said sub-sec. 118, and I think must be held to be a "provision to the contrary" of that subsection. In other words, the Legislature has provided a new section dealing with that subject matter, which during the period of the war is to supersede the old section.

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I would, therefore, answer all the questions, except the first, in the negative.

MARTIN, J.A., concurred with MACDONALD, C.J.A.

Martin, J.A.

McPHILLIPS, J.A.:—In my opinion the learned Chief Justice of British Columbia (Hunter, C.J.B.C.) arrived at the right conclusion and the conviction was rightly quashed. It is clear that the Legislature in enacting the Liquor License Act Amendment Act 1916 established a new provision with regard to the sale of liquor during prohibited hours, "during the continuance of the present war" (sec. 2, c. 37, 1916).

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The period of prohibition was extended to eleven of the clock on Monday morning as against seven o'clock, and on week days the closing hour admitting of sale in the night was made ten o'clock as against eleven o'clock and in the morning not until eleven o'clock can any sales be made as against seven o'clock which previously was the hour (sec. 73 (1) as amended by sec. 5, c. 40-1913 and sec. 3 (1) c. 37-1916).

Further, where previously it was permissible to supply liquors to guests in the dining rooms of hotels and restaurants with regular *bonâ fide* meals during the prohibited hours, now the prohibition extends from supplying liquors to guests of hotel, cafe and restaurant during the prohibited hours. Bearing in mind these extended provisions and inhibitions it is only reasonable to assume that the Legislature took into consideration in so extending the law so repressive in nature and so drastic in effect and so much against previous custom in the Province, that the rigour of sec.118 as amended by sec. 9 of the Liquor License Act Amendment Act 1913 should be withdrawn, *i.e.*, that the offence of the employee, servant, agent or workman of any person holding the license should

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be the offence of the person holding the license; and, as might well have been expected, we see the provision in sec. 2 of the Liquor License Act Amendment Act 1916 that three sections (secs. 3, 4, 5) of the latter Act whilst incorporated with the Liquor License Act (c. 142 R.S.B.C. 1911) are only to remain during the continuance of the war and until peace is declared and no longer, it being further provided that while in force *shall supersede any provision* to the contrary in the principal Act or amendments or by-law in force in any municipality in the province.

Therefore this legislation is to the conclusion of other provisions—where at least special provision is made in the Liquor License Act Amendment Act 1916. Turning then to sec 2 (2) of this last mentioned Act we find this provision: "(2) *Violation of any of the provisions of this section shall be an offence for which the person violating shall be liable* on summary conviction to the penalty in sec. 73 of said ch. 142 as re-enacted by sec. 5 of ch. 40 of the Statutes of 1913." It is plain that the violation is the violation of the provisions of sec. 2 (c. 37-1916) and the penalty for the violation is only to be imposed against "the person violating." The reason for the limitation is apparent and accords with common sense—when the drastic and far reaching provisions are considered. It would be against natural justice that the *employer* (when possibly and most likely trusted employees have gone to the war and having to put up with indifferent and untrained servants) should be imperilled in his liberty by the casual error of an employee; this would be an intolerable condition. Undoubtedly the law must be obeyed and I do not wish it to be thought that I would condone infraction of the law; but it is against the principles of natural justice to imprison one subject for an offence committed by another and of which offence there is no knowledge or complicity. Hotel-keepers, restaurant-keepers and cafe proprietors carry on establishments of public necessity; they are legal places of resort (in fact as to the hotels bound to supply accommodation); let them be well inspected and well supervised; but until Parliament has in intractable language imposed upon the Court the obligation of imposing liability upon other than the actual offender, the Court should lean toward the liberty of the subject. I would answer the questions in the way they have been answered by my brother the Chief Justice.

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Manitoba King's Bench, Mathers, C.J.K.B. March 24, 1917.

1. COMPANIES (§ VI E—340)—SUMMARY PROCEDURE UNDER WINDING-UP ACT —ACTION.

The summary procedure provided by sec. 123 of the Winding-up Act (R.S.C. 1906, ch. 144), with respect to misfeasance or breach of trust by directors, is in addition to, not in substitution for, other rights of action.

2. COMPANIES (§ IV G—130)—LIABILITY OF DIRECTORS—ILLEGAL PAYMENTS —DIVIDEND—REMUNERATION TO DIRECTORS.

Directors, whether *de facto* or *de jure*, who knowingly, or without the use of ordinary prudence, sanction the payment of dividend in diminution of capital, or the illegal remuneration to directors for their services, or any *ultra vires* or illegal payments, are guilty of misfeasance and breach of trust, and are jointly and severally liable.

Statement.

ACTION by the Northern Trust Co., as liquidator of the Stirling Mortgage Investment Co., and that company as plaintiffs against A. K. Butchart, P. A. Ford and C. W. Trick, three of its directors. It is alleged that the defendants were guilty of breaches of trust and misfeasance, in that they so recklessly, extravagantly, negligently, and improperly managed the affairs of the company, that it lost a large sum of money; which the plaintiffs now seek to recover.

C. P. Fullerton, K.C., and *J. P. Foley*, K.C., for plaintiffs; *W. L. McLaws*, and *E. G. Trick*, for defendant Dr. Trick; *W. Thornburn* and *V. A. Darrach*, for defendant Ford (defendant Butchart being unrepresented.

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MATHERS, C.J.K.B.:—It is particularly charged (1) that the defendants were guilty of breaches of trust and misfeasance in that they paid dividends out of the capital of the company, contrary to what is now sec. 34 of the Companies Act; (2) that they illegally paid to the defendants Butchart and Ford, directors of the company, remuneration for their services as president and secretary-treasurer, respectively, without such payments being authorised by by-law confirmed by the shareholders, contrary to the Companies Act; (3) that a large sum of money was by them illegally paid to the Globe Securities Co., as commissions upon the sale of the company's shares, and (4) that they, purporting to act as directors of the company, purchased from certain shareholders the shares of the company, and paid for such shares out of the funds of the company.

It is charged that all these acts were breaches of trust and acts of misfeasance and a declaration is sought that the defendants are jointly and severally liable to contribute to the assets of the

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company the several sums mentioned. Interlocutory judgment has been signed against the defendant Butchart, and as to him nothing remains but to assess the damages. The case went to trial as against the defendants Ford and Trick only.

A preliminary objection was raised on behalf of the defendants to the jurisdiction of this Court. The point urged, as I understand it, was that the jurisdiction to proceed against directors for misfeasance and breach of trust is derived from sec. 123 of the Winding-Up Act; that for the purpose of the summary procedure provided by that section this Court has jurisdiction, because it is, by the Act itself, created a Dominion Court for the purpose of enforcing its provisions; but apart from the powers conferred by the Winding-Up Act itself, this Court has no jurisdiction, and cannot, therefore, entertain an action against the defendants for offences created by that Act. The weakness of the argument lies in the assumption that sec. 123 creates new rights instead of merely providing a summary remedy for the vindication of rights which exist independently of sec. 123. In *Bentinck* v. *Fenn* (1887), L.R. 12 A.C. 652 at 669, Lord Macnaghten says of the English section, the equivalent of sec. 123:—

> The 165th section of the Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section, might have been vindicated either at law or in equity.

In *N. Australian Territory Co.: Archer's* case, L.R. [1892] 1 Ch. 322, Lord Lindley, L.J., says, at p. 334:—

> Now it has been settled by various decisions and particularly by the case in the House of Lords of *Bentinck* v. *Fenn*, that sec. 165 does not impose new liabilities; it only provides a summary method of doing by an order in the winding-up that which might be done by means of an action at law or a suit in Chancery.

See also *Owen Sound Lumber Co.*, 25 D.L.R. 812, 34 O.L.R. 528. Many instances might be cited of actions entertained for relief similar to that sought in this action, but I will mention only three: *Land Credit Co. of Ireland* v. *Lord Fermoy*, L.R. 8 Eq. 7; *Stavert* v. *Lovitt*, 42 N.S.R. 449; *Leeds Estate* v. *Shepherd*, 36 Ch. D. 787. Indeed, the opinion was at one time entertained that the summary procedure under the Act could not be resorted to in a case where there was really a question to be tried, but only to plain and straight-forward cases where there was no point of law to be determined. See per Master of the Rolls in *Royal Hotel Co.*,

L.R. 4 Eq., 244 at 249, and per Malins, V.C., in *Stringer's* case, L.R. 4 Ch. 475. In the latter case in appeal it was finally decided that the summary jurisdiction under the Act was wide enough to cover any case in which a bill could be filed.

There was before the winding-up a right of action vested in the company for all, or any of the causes mentioned in sec. 123, and the company might have maintained in the Court an action therefor. After the winding-up, the liquidator might have proceeded summarily under this section. He also had the right to proceed by action, either in the name of the company or by sec. 23 in his own name. He has chosen with the sanction of the Court to sue i the names of both, but the fact that he has done so does not affect the jurisdiction of this Court to entertain the action. In my opinion the objection fails.

The Company was incorporated by letters patent issued under the Joint Stock Company Act of this province on June 4, 1912. The nominal capital was stated to be $500,000, divided into 10,000 shares of a par value of $50 each. Its corporate powers are extensive and include carrying on the business of a loan company, the purchase of agreements for the sale of land, and buying and selling real estate. The incorporators named in the letters patent were Mark Wells, Pearl Morgan, W. A. Mackie, A. K. Butchart, and W. R. Wells, each of whom was stated to have subscribed for one share upon which nothing at all had been paid, and they were named as the first directors of the company.

The minute book of the company contains what purports to be minutes of a meeting of shareholders held June 13, 1912. All the incorporators are named as being present, and a resolution is recorded appointing A. K. Butchart, Mark Wells and W. A. Mackie directors of the company. Another resolution purports to adopt by-laws and still another, that all stock be sold through the Globe Securities Co., which was to receive $5 per share for stock sold at a 10% premium and $7.50 per share for stock sold at a 20% premium or over. As to how this latter resolution got into the minutes, I shall have something to say later.

On the next page are what purport to be minutes of a directors' meeting held by the newly appointed directors, W. A. Mackie, A. K. Butchart and Mark Wells. It is here stated that A. K. Butchart was appointed president and manager, and Mark Wells,

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vice-president. By another resolution it was resolved to purchase from The Globe Securities Co., Ltd., all its furniture, books, lists, lease of office, automobile and goodwill for $5,000 fully paid-up stock.

A return filed with the provincial secretary, stated that The Globe Securities Co. had a capital of $5,000, of which A. K. Butchart held $4,600, and that he was president, secretary and treasurer, the other directors being W. A. Mackie and one M. Brownlee, whose address is given as Woodstock, Ont. There is nothing to indicate what its powers were, or that it had any business, and the circumstances all indicate that it was but another name for A. K. Butchart.

The minutes above referred to were not entered until May 1913, and were then written up and pasted in the book by the defendant Ford, partially from the dictation of the defendant Butchart, and partially from what purports to be minutes of these meetings entered in another book. The minutes as written up by the defendant Ford are in all respects the same as those from which they are evidently copied, except that the resolution that all the stock be sold through the Globe Securities Co. is new and does not appear in the minutes as originally entered. What purports to be the company's by-laws are written in the same book as these original minutes. By-law No. 17 says that

> a bank account shall be kept in the name of the company at a bank or banks to be selected by the president, and all cheques, drafts and other negotiable paper shall be signed by the president or managing director.

This by-law was, according to the minutes, amended on June 4, 1913, by adding the words "and secretary or treasurer," and again, January 14, 1914, by adding "or secretary-treasurer and one director."

The minute book also contains what purports to be two meetings of directors held on June 4, 1913, and one of shareholders, and also of directors held on January 14, 1914. None of these alleged meetings were held, but, as in the other case, the minutes were written up and pasted in the book by the defendant Ford on instructions from the defendant Butchart.

By the minutes of the first meeting of directors of June 4, 1913, W. A. Mackie resigned, and the defendants Ford and Trick, together with 3 others, purport to have been elected directors. Another meeting of directors purports to have been held half an

hour later, attended by the 3 defendants and Mark Wells. At this meeting the defendant Ford was appointed secretary-treasurer and an executive, to have the full powers of the Board, was appointed, consisting of the 3 defendants. Mark Wells resigned and the defendant Trick was appointed vice-president. According to the minutes a shareholders' meeting was held on January 14, 1914, and the 3 defendants were re-elected directors. At a subsequent directors' meeting they were re-appointed to the offices previously held, *i.e.*, Butchart, president and managing director; Trick, first vice-president; and Ford, secretary-treasurer. These latter minutes contain a resolution fixing the salary of the manager at $2,400 and the secretary's at $1,800 per annum, and the directors' fees at $5 per meeting. By another resolution an executive was appointed consisting of the defendant Trick, chairman; Giles and Ford.

No other meeting of either directors or of shareholders is recorded, nor was any held until January 14, 1915. This was a real meeting of shareholders, and steps were at once taken which resulted in the company being wound-up.

The defendant Butchart left Winnipeg and went to Toronto on a stock-selling mission in January 1914, leaving Ford in charge, and has never returned.

From its incorporation until June 1913, the defendant Butchart seems to have managed the affairs of the company in his own peculiar way. With the exception of the directors' meeting of June 12, 1912, if such a meeting was in fact held, the directors were never consulted. Nevertheless, a dividend at the rate of 12% was paid in November 1912, and another in May 1913. These dividends were not declared by the directors, nor were they, so far as appears, consulted. The company had earned no profits. Its operations from its inception to December 31, 1914, resulted in a loss of $12,659,57. Mr. Butchart, however, was not embarrassed by the fact that there were no profits for the payment of dividends. His policy was to sell the company's stock, and in order to give it a fictitious value as an investment it was necessary to create the impression that the company was on a dividend-paying basis. Strange as it may appear, he did succeed in deluding many people into this belief, because he actually received from the sale of shares in the company $45,685, of which $5,065 was a

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premium upon the par value. A few small investments were made, aggregating $7,171.76, and the balance of the capital stock paid in with the exception of $1,204.44 on hand, when the winding-up order was made, had been dissipated in paying dividends, salaries to Butchart and Ford, commissions on sale of shares to The Globe Securities, refunds to dissatisfied shareholders and sundry expenses.

It will be convenient to discuss in the first place the law bearing upon the defendant's liability generally under the several heads of claim, and then to deal with the case as made against each of the defendants individually.

In the first place, what is the position of a director who is a party to the payment of a dividend out of capital? Sec. 34 of the Companies Act says that directors "shall not declare or pay any dividend when the company is insolvent or any dividend the payment of which renders the company insolvent or diminishes the capital stock thereof." The section goes on to show how a director who becomes aware of the declaration of such a dividend may exonerate himself from liability by prompt protest inscribed on the minutes and by giving public notice. But if this section were not in the statute, the payment of a dividend out of capital would be *ultra vires* and could not legally be made, even with the sanction of the shareholders, much less without their sanction. In *Macdougall* v. *Jersey Imperial Hotel Co.*, 2 H. & M., 528, at 535, (71 E.R. 568 at 571), the shareholders had by resolution authorised the payment of interest on capital, which was in effect a dividend, when there were no profits. One of them filed a bill to restrain the company from acting on the resolution. Wood, V.C., said:—

> On grounds of public policy and on every principle not only of honesty as regards the public generally, but of the interests of this company itself, I feel bound to prevent this proceeding. This is not in accordance with the contract entered into with the legislature on behalf of the public, whereby it was determined that the shareholders should be liable to a certain defined amount and no more, to the creditors of the company; and not in accordance with the contract between the parties whereby each shareholder was protected against creditors to the extent of the contributive liability of all the others.

In *Re Alexander Palace Co.*, 21 Ch.D. 149, Kay, J., said the above quoted passage "lays down the law with perfect precision." And he held directors who had paid a dividend out of capital, under the guise of interest, jointly and severally liable to repay the amount to the liquidator.

In *Stavert* v. *Lovitt*, 42 N.S.R. 449, the full Court of Nova Scotia held that the directors of a bank liable to repay a dividend, declared and paid with a knowledge of the fact that the bank's capital had been swallowed up by bad debts. That was a decision under the Banking Act, which prohibits the impairment of capital by the payment of a dividend thereon as sec. 34 of the Companies Act does.

Then we have *Re National Funds Assur. Co.* (1878), 10 Ch.D. 118, and *Re Exchange Banking Co., Flitcroft's* case, 21 Ch.D. 519, in both of which it was held that payment of a dividend out of capital was a breach of trust, which rendered the directors jointly and severally liable.

See also *Crawford* v. *Bathurst*, 37 O.L.R. 611, and *Colonial Assurance Co.* v. *Smith*, 12 D.L.R. 113, 23 Man. L.R. 243.

In *Re Oxford Benefit Building Society*, 35 Ch.D. 502, the articles of association forbade the payment of dividends except out of "realised profits." The directors, however, for years paid dividends out of estimated profits that might never become realised profits, with the result that they were held liable for the amounts so improperly paid away. It was argued on their behalf that they had acted in good faith, but Kay, J., said he could hardly understand what was meant by *bona fides* in such an argument. There was nothing obscure about the articles, and it seemed to him incredible that any man of business could suppose that what they did was a division of realised profits. He then quotes with approval the language of the Master of the Rolls in *Re National Funds Assur. Co.*, 10 Ch.D. 118 at 128, that "it is impossible in a Court of Justice to call a particular act a *bonâ fide* act simply because a man says he did not intend to commit a fraud."

These authorities sufficiently establish the liability of a director, who, with a knowledge of the facts, pays or sanctions the payment of a dividend out of capital. For such a director there is no escape. Even a director who is aware of the intention of his fellows to make such an illegal application of the company's funds is also liable, unless he takes the steps necessary to exonerate himself from liability. By sec. 34 he may do that by inscribing a protest upon the minutes, and by giving public notice. Until this means of exonerating himself was supplied by statute his position was more difficult. He could then only relieve himself by doing everything

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in his power to prevent the unlawful proceeding, even going so far as to begin an action, if he could not prevent it in any other way: *Joint Stock Discount Co.* v. *Brown*, L.R. 8 Eq. 376, at 402, 403.

I have so far dealt only with the position of a director who either knowingly pays or sanctions the payment of a dividend by which capital is impaired or who knows that such a dividend has been declared by his fellow directors and will be paid in due course unless prevented.

There remains to consider the case of a director who concurs in the payment of such a dividend in the honest belief that the company had profits out of which it might properly be paid or who at least was ignorant of the fact that it was being paid out of capital.

Sec. 34 does not cover such a case, and the general law must be looked to.

In the first place directors are bound to use fair and reasonable diligence in the management of the company's affairs, and to act honestly, but they are not bound to do more: *Re Forest of Dean Coal Mining Co.*, 10 Ch.D. 450, 452. They are not liable for the fraudulent conduct of their fellow directors or the company's officials as to transactions in which they took no part, if they have no reason to suspect them. *Re Denham*, 25 Ch.D. 752. A director who is imposed upon by fraudulent balance sheets showing a profit out of which a dividend may be properly paid prepared by his fellow directors and certified by the auditors cannot be held liable upon the footing of gross negligence because he trusted his fellow directors and the auditors, and did not attend any of their meetings or look into the books for himself. Directors are not bound to examine entries in the company's books. "It is sufficient if directors appoint a person of good repute and competent skill to audit the accounts and have no ground for suspecting that anything is wrong." Per Chitty, J. Id. at 766.

In the case *Re Cardiff Savings Bank, Marquis of Bute's* case, [1892] 2 Ch. 100, it was held that the Marquis of Bute who, although president of the bank, attended none of the directors' meetings, and took no part in the management, could not be held responsible because the rules of the bank had been disregarded. Said Stirling, J.:

It may be that he neglected as he certainly omitted to attend the meetings to which he was summoned. But neglect or omission to attend meetings is

not, in my opinion, the same thing as neglect or omission of a duty which ought to be performed at those meetings;

and then he adds:

If, indeed, he had had knowledge or notice either that no meetings of trustees or managers were being held, or that a duty which ought to be discharged at those meetings was not being performed, it might be right to hold that he was guilty of neglect or omission of the duty.

In *Re County Marine Ins. Co., Rance's* case, L.R. 6 Ch. 104, the proposition was laid down that where directors declare a dividend or bonus without proper investigation or professional assistance, and it is afterwards called in question, the burden lies on them to shew that it was fairly paid out of profits. The law was declared in almost the same language in *Stavert* v. *Lovitt*, 42 N.S.R. 449. In *Rance's* case the directors had laid before the shareholders a cash account of receipts and expenditure; but no profit and loss account was either prepared or presented; and the shareholders authorised the payment of a bonus, which the directors credited upon unpaid shares. The company had at the time no profits available for the payment of either dividend or bonus. Upon the subsequent winding-up of the company, the liquidator made an application to compel one of the directors to refund the amount of bonus credited to him. Lord Romilly, before whom the matter first came, found that the declaration of the bonus was improper, but thought the directors had acted *bonâ fide*, and dismissed the summons. This decision was reversed on appeal, James, L.J., described the payment of this bonus without any balance sheet or profit and loss account or anything else which afforded any clue whatever to the profits which had been made as "one of the most startling and improper proceedings" that ever came under his notice. He goes on to say that "it would have been different if there had been, as there ought to have been in the ordinary course of business, a balance sheet *bonâ fide* made out with proper assistance, so as to ascertain the true state of the company." And he adds: "If that had been done I am of opinion that it would not be right of this Court to sit as a Court of Appeal to decide upon such a state of facts so made out. If directors, by placing unfounded reliance upon the representation of their servants or actuaries, had arrived at the conclusion that they had made a divisible profit, this Court ought not, I say, to sit as a Court of Appeal from that conclusion, although it might afterwards be satisfactorily proved that there were very great errors

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in the account, which would not have occurred if they had been made out with greater strictness, or with more scrutinising care. But no such account at all was made out. A mere cash account or balance sheet in such a company as this presented, in order to determine whether there had been a profit made, and for the purpose of declaring a bonus thereon is to my mind within the meaning of *Stringer's* case (L.R. 4 Ch. 475) a fraudulent and delusive balance sheet. It purported to shew something, as was said in that case, which any man who applied his mind to the subject would say offered no clue whatever to the profit which had been made." Mellish, L.J., in the same case, said that the declaration of a bonus without any profit or loss account having been made out was a *mala fide* proceeding on the part of the directors. In *Leeds Estate Building Co.* v. *Shepherd*, 36 Ch.D. 787, at 801, Stirling, J., says:—

> It seems to me that the views expressed by the learned Judges who decided *Rance's* case are consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital, fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of accounts, such as it was their duty to prepare and submit to the shareholders, and have declared the dividend complained of without having exercised thereon their judgment as mercantile men on the estimates and statements of account submitted to them.

See also *Owen Sound Lumber Co.*, 25 D.L.R. 812, 34 O.L.R. 528 (varied, 33 D.L.R. 487.)

The decision in *Re Sharpe* [1892], 1 Ch. 154, is to the same effect. Here also dividends under the guise of interest were paid out of profits. No profit and loss account was ever made out, or any steps taken to enable the directors to say whether there was a profit or not. It was not suggested that the directors were not acting honestly, but North, J., said that they "did not do their duty to the shareholders in not having the proper accounts made out before any such payments were thought of for a moment." In appeal, Lindley, L.J., said at 165:—

> As soon as the conclusion is arrived at, that the company's money has been applied by the directors for the purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted.

Not only must directors see that proper accounts, justifying the payment of dividends, have been made out and verified, but they must exercise their own judgment with reference to them, and not delegate to their officials the exercise of that judgment

and discretion which it is their duty to take upon themselves, and if they neglect to do so, they will be held responsible, if it turns out that in fact the dividend should not have been paid. *Leeds Estate Building Co.* v. *Shepherd*, 36 Ch.D. 787; *Re Mashonaland Exploration Co.*, [1892] 3 Ch. 577. Where, however, statements of account in proper form are prepared for their information by the officials whose duty it is to supply it, and whose integrity, skill and competence they have no reason to suspect, they are entitled to act upon such information, and will not be held responsible if they were deceived. *Re National Bank of Wales*, [1899] 2 Ch. 629, affirmed in the House of Lords *sub nom. Dovey* v. *Cory*, [1901] A.C. 477; *Prefontaine* v. *Grenier*, [1907] A.C. 101. In *Dovey* v. *Cory*, Lord Halsbury was careful to point out that the case would have been different if it had been shewn that the director there sought to be charged had "exhibited a complete neglect of the duties he had undertaken." It was not contended that the dividends paid by this company were not paid out of capital. Butchart has admitted his liability by allowing judgment to go by default, and nothing more need be said as to him. He was no doubt well advised in not attempting a defense of the indefensible, because a clearer case of misfeasance and breach of trust, not to call it by any harsher name, it would be difficult to imagine. Whatever may be said with respect to his co-defendents, he was an active participant in all the wrongdoing disclosed. The conduct of the defendant Ford after he became a director in June, 1913, is but slightly less reprehensible. He was the accountant in charge of the company's books, and must have known not only that the company had no profits, but that its capital was becoming rapidly exhausted. Both he and the defendant Trick set up the defence that they were never legally elected directors, and I think that much must be conceded. There was no shareholders' meeting held in June, 1913, although what purports to be the minutes of such a meeting were written up by Ford, and pasted in the minute book. By these minutes, both he and Trick are named directors, and they both consented to act as directors. That they had assumed the functions of directors is shewn by the protest which they signed in January, 1915, if there was no other evidence of their acting. Whether they were legally elected or not makes no difference. They were *de facto* directors, and for all acts of omission or commission on their part, they are liable in the same

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manner and to the same extent as if they had been *de jure* as well as *de facto* directors, *Coventry and Dixon's* case (1880), 14 Ch.D. 660; *Re Owen Sound Lumber Co.*, 25 D.L.R. 812, 34 O.L.R. 528.

The defendant Ford was not only a party to the payment of a dividend December, 1913, to the amount of $1,469.01, but in the absence of Butchart, who nevertheless concurred, he himself declared and paid a further dividend in June, 1914, amounting to $1,878.02, at a time when the capital was so far exhausted that he had difficulty in getting together enough money to pay it. His excuse that he thought these dividends had to be paid cannot for a moment be allowed, even if it were conceivable that he entertained any such belief. He also endeavours to excuse himself by asserting that he was a mere clerk, subject to the control of Butchart. He, however, assumed the position of a director, and with it the responsibility. It would never do to permit a director who actively participates in the commission of a wrong to excuse himself from liability upon the plea that he was under the control of and acted by direction of somebody else. See remarks of Riddell, J., in *Re Morlock*, 23 O.L.R. 165, at 170. But the evidence does not bear out either of the above contentions. His correspondence with Butchart after the latter left Winnipeg shows that he was not under Butchart's domination, and that he paid the dividend in June, 1914, not because he thought the company was bound to do so, but for the purpose of bolstering up the declining credit of the company and to lull the unfortunate shareholders into the belief that the company was prosperous. In a letter written to Butchart on May 29, 1914, he says:—

> Money is coming in on second and third payments (*i.e.*, on stocks) fairly well, and we have about two thousand on hand. If we are going to pay a dividend on June 30, we will want a little more, but I guess it will come from somewhere. I would advise paying this dividend or else we will have a bunch of kicks and perhaps a lot of enquiries, and we can't stand that just now. What do you think of this, and what do you think we should pay?

On June 1, Butchart replied that he would try and get the money for the dividend, and advised Ford to try and pay 10 or 12 per cent. per annum. After this, on June 30, Ford paid by cheque, countersigned by the defendant Trick, a dividend of 12 per cent. to the amount of $1,878.02. Both Ford and Trick participated in this dividend also. There was not the slightest attempt to comply even in form with the requirements of the law as to balance sheets or profits and loss accounts. No statement

of the company's affairs was prepared, no meeting of directors was called, nor were any of the other directors even consulted. The purpose entertained by both Ford and Butchart was to maintain the company in a fictitious credit and their conduct comes close to, if it has not actually passed the border line of rendering them criminally liable for conspiracy, Criminal Code, sec. 144, *Burnes* v. *Pennell* (1849), 2 H.L.C. 497, 525 (9 E.R. 1181); *Reg.* v. *Esdaile* (1858), 1 F. & F. 213.

Ford was the prime mover in paying the dividend in June, 1914, but he was also a party to the one paid in December, 1913. In this case the cheques were signed by Butchart, and were countersigned by Ford. I am unable to entertain the slightest doubt as to his liability to repay both these dividends.

The defendant Trick cannot be held liable for anything done prior to January, 1914, when he for the first time acted as a director by countersigning cheques. Even if he had been legally elected a director in June, 1913, he did not attend any meetings, and took no part in the management of the company's affairs prior to the date named. He left everything to Butchart and Ford, in whom he appears to have had implicit confidence. His conduct may have approached closely that complete abnegation of the use of his faculties on behalf of the company, spoken of in some of the cases as equivalent to gross negligence; but as to the dividend of December, 1913, I think he would escape liability upon the principle of the *Marquis of Bute's* case, [1892] 2 Ch. 100, and in *Re Denham & Co.*, 25 Ch.D. 752, even if he were then a *de jure* director.

He is in a different position with respect to the June, 1914, dividend. It is not charged that he wilfully did what he knew to be wrong, even with respect to this dividend, or that he knew the company had no profits out of which it could be legally paid. But honesty of that negative sort which consists merely in the absence of conscious wrongdoing is not enough. He must use such ordinary prudence as a man under such circumstances would exercise on his own behalf. What he did know was that no statement of the company's affairs was ever submitted to the directors, or to him as one of them, and that he was in complete ignorance as to the company's financial condition. He had no information as to whether or not it had earned profits out of which a dividend could be paid. Moreover, he knew that the directors had not been

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called together to consider the question of a dividend. He knew that Butchart, the managing director, was absent, and had been absent for several months, and that if a dividend had been declared, it must have been upon the sole authority of Ford, who had usurped the functions of the entire board. When requested by Ford to sign cheques in blank for the purpose of paying a dividend, he says he asked for a statement of the affairs of the company, but got none, and without the slightest further enquiry he signed cheques in blank, knowing and intending that Ford should use them in paying to the shareholders a 12% dividend.

It was urged in his behalf that countersigning the cheques was a mere gratuitous act on his part not required by the company's by-laws, and not necessary to render the cheques negotiable at the bank. It is true the original by-laws adopted by the shareholders only required cheques to be signed by the president, and although by the minutes recorded in the minute book, the shareholders at a subsequent meeting amended this by-law so as to require cheques to be signed by the president or secretary-treasurer and one director, the meeting, as a fact, never was held. The evidence, however, shows that both Butchart and Ford believed that a signature by one director in addition to that of Ford was essential, and that otherwise cheques would not be cashed. I infer that the bank was so instructed, in which case Trick's signature was necessary to make the cheques negotiable. In my opinion, however, it makes very little difference whether these dividend cheques could or could not have been cashed without Trick's signature. The point is that his signature thereto, supplemented by Ford's evidence, shews that he knew what the cheques were to be used for, and puts it beyond doubt that he was a party to the payment of this dividend.

Counsel for Trick puts forward the rather novel contention that it was not the signing of the cheques in blank by him, but their issue by Ford, which caused the loss, and therefore Trick could not be held liable. In support of this proposition he cited *Cullerne* v. *London etc. Permanent Building Society*, 25 Q.B.D. 485. An attempt was made in that case to hold a director liable who had concurred in a general resolution authorising the society to make a loan to members on the sole security of their shares. This resolution was *ultra vires*, but upon the faith of it, the directors, not including the director sought to be charged, made loans upon the

security of shares alone and loss resulted. The Court held the loss resulted from the making of the loans and not from the passing of the resolution and that the director was not liable. Lindley, L.J., said at 489:—

> If the resolution alone had been passed, nothing would have happened; it would have had no result. A new wrongful act by independent persons was the real cause of the loss.

But what the director in that case did is very different from what the defendant Trick is charged with. Had the director in that case signed a cheque in blank, and delivered it to a co-director or to a subordinate official, intending that it should be filled up and paid out for the amount of one of the *ultra vires* loans, he would have done an act of the same character as that with which Trick is charged. The signing of the cheques here was the *causa causans* of the loss sustained by the payment of the illegal dividend.

To hold that the defendant Trick had fulfilled the duties which the law casts upon a director would be to reduce a director to the level of an automaton. His conduct was much more blameworthy than that which was disclosed in *Rance's* case, *supra*, *Leeds Building Co.* v. *Shepherd*, *supra*, or many of the other numerous cases cited in which directors were held liable. In my opinion, he was guilty of negligence so gross as to amount to a breach of trust.

It is next claimed that the defendants Butchart and Ford, while directors, were paid salaries contrary to sec. 32, (4) of the Companies Act. Omitting the irrelevant portion, that section is as follows:—"No by-law . . . for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at an annual meeting or a special general meeting." It is not disputed that each of these directors was paid out of the funds of the company a considerable sum as alleged remuneration for services, and that no by-law authorising such payment was ever passed, nor was such payment sanctioned by the shareholders. The object of the section is that those who govern the company shall not have it in their power to pay themselves without the shareholders' sanction. *Mackenzie* v. *Maple Mountain Mining Co.*, 20 O.L.R. 615. *Primâ facie* directors are not entitled to any remuneration for their services in the absence of statutory authority. Palmer's Company Law, 10th ed., 183; Mitchell on Canadian Commercial Corporations, 1031, *Dunstan* v.

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Imperial Gas Co., 3 B. & Ad. 125 (110 E.R. 47); *Fellows* v. *Albert Mining Co.*, 3 Pugs. 203; *Roray* v. *Howe Sound Mills*, 22 D.L.R. 855; *Minister of Railways* v. *Quebec & S. Ry. Co.*, 12 Can. Ex. 11, 14, 58.

In *Re George Newman Co.* [1895], 1 Ch. 674, Lord Lindley, speaking for the Court of Appeal, said:—

> Directors have no right to be paid for their services, and cannot pay themselves or each other, out of the company's assets, unless authorised so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting.

The prohibition is not confined to payment for services as president or director, but extends to every payment voted by directors to one or more of themselves whether under the guise of fees for attending at board meetings or for the performance of any other service for the company, when the appointment should properly be by by-law. *Birney* v. *Toronto Milk Co.*, 5 O.L.R. 1; *Benor* v. *Canadian Mail Order Co.*, 10 O.W.R. 1091; *Beaudry* v. *Read*, 10 O.W.R. 622; *Bartlett* v. *Bartlett Mines Ltd.*, 24 O.L.R. 419. *Re Morlock & Cline Ltd.*, 23 O.L.R. 165; *Crawford* v. *Bathurst Land Co.*, 37 O.L.R. 611; *Re Matthew Guy Carriage Co.*, 4 D.L.R. 764, 26 O.L.R. 377. In the case of *Van Hummell* v. *International Guarantee Co.*, 10 D.L.R. 306, 23 Man.L.R. 103, which appears to be in conflict with this view of the law the Judge's attention was not drawn to the section of the Companies Act in question.

It is a breach of trust for a director to pay himself remuneration not voted by the shareholders, (*Re Bolt & Iron Co.*, 14 O.R. 211, affirmed 16 A.R. (Ont.) 397; *Re Whitehall Court*, 56 L.T. 280), for which the directors are jointly and severally liable. *Re Oxford Benefit Building Co.*, 35 Ch.D. 502; *Young* v. *Naval, Military & Civil Service Co-operative Society*, [1905] 1 K.B. 687. The money so paid may be recovered by the liquidator. *Re Bolt & Iron Co., supra*; *Re George Newman & Co., supra*.

To this claim the defendants Butchart and Ford have no shadow of a defence. A clearer case of total disregard of the statute can hardly be imagined. They have not even the excuse that their services were of value to the shareholders.

As the defendant Trick is in the same position with respect to the illegal payment of remuneration to Butchart and Ford as he is with respect to the charges that the funds of the company were unlawfully used to pay commissions on the sale of its shares

and to re-purchase its shares from dissatisfied shareholders, I will defer considering his liability under these several heads for the present.

The fact is clearly established that a very large sum was paid out of the company's funds to the Globe Securities Co. The system followed was to credit the Globe Securities Co. with commission on all shares sold and to charge it with the amount paid to the agent, of whom several appear to have been employed, by whom the subscription was obtained.

In *Metropolitan Coal Consumers* v. *Scrimgeour*, [1895] 2 Q. B. 604, followed in *Co-operative Cycle and Motor Co.*, 1 O.W.R. 778, and *Re Fruit and Vegetable Co.*, 12 S.R. (N.S.W.) at 59, it was held that a company might properly pay a small commission for placing its shares. In that case the commission paid was 2½ per cent., and the memorandum of association stated that one of the objects of the company was to pay out of its funds all brokerage commissions, etc., for the issuing of its capital stock. Without such a provision it is extremely doubtful whether the payment of an underwriting commission for getting its capital subscribed is not *ultra vires*: *Faure Electric Accumulator Co.* (1888), 40 Ch.D. 141. In the view I take of this case I am not called upon to decide whether or not a company may legally pay a reasonable commission to a broker for services rendered in placing its shares. In this case the transaction was not of that character, but was a scheme to divert the company's money into the pockets of Butchart. What purports to be the minutes of the first shareholders' meeting held on June 12, 1912, as originally entered contains no resolution authorising the sale of the company's shares through the Globe Securities Co. or for the payment of a commission to that company. Of course, it is possible that such a resolution may have been passed at that meeting, and not entered, but it is highly improbable that such was the case. The probability is that Butchart manufactured this resolution as an addition to the minutes when he requested Ford in June, 1913, to re-enter them, just as he manufactured the minutes of the meeting of June, 1913, and January, 1914. At any rate upon the evidence before me I cannot hold that any such resolution ever was passed by the shareholders. The evidence is that Butchart used the bank account of the Globe Securities Co. as his own, and paid in and drew out moneys therefrom at will.

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Ford says he never knew any person else than Butchart in connection with that company. I arrive at the conclusion then, as an irresistible inference, from known facts and circumstances that the whole manœuvre was but a scheme devised by Butchart to make a further inroad upon the company's funds, and constituted on his part a gross breach of trust for which he is liable.

As to Ford, the case stands somewhat differently. He probably was led to believe by Butchart that the resolution referred to had been actually passed. I have no reason to think that Butchart confided in him to the extent of telling him the whole truth. Assuming, however, that so far as he was informed, the Globe Company was entitled to receive all the resolution gave it, he could have no justification for paying a sum greatly in excess of anything to which it could possibly be entitled by the terms of the resolution. To the extent then, that Ford was a party to payments to the Globe Company, in excess of the amount it would be entitled to by the terms of the resolution, he also was guilty of misfeasance, and is liable to recoup the company to the extent to which its funds were thereby depleted. This, of course, will include moneys paid to others and charged to the Globe Company account.

It is not necessary to consider whether or not the premium on shares paid by shareholders might have been lawfully used to pay commission on the sale of shares, because the amount paid to the Globe Company greatly exceeded the amount of such premiums, and was to that extent a payment out of capital, and the liquidator is entitled to recover the amount from the directors by whom it was paid: *Re Monarch Bank*, 22 O.L.R. 516.

The charge is next made that the funds of the company were used to re-purchase the company's shares from dissatisfied shareholders, and upon the evidence, the charge is fully made out. That it is *ultra vires* of a company to traffic in its own shares unless such trafficing is expressly permitted by statute, is too clear for argument. *Trevor* v. *Whitworth*, 12 App. Cas. 409; *Common* v. *McArthur*, 29 Can. S.C.R. 239 at 245; *Stavert* v. *McMillan*, 24 O.L.R. 456; *Colonial Assurance Co.* v. *Smith*, 12 D.L.R. 113, 23 Man. L.R. 243.

These *ultra vires* and illegal payments were made by Butchart and Ford and as to their liability I entertain no doubt whatever.

The case against Dr. Trick upon the evidence as to these latter three heads of claim is that from time to time, commencing with January, 1914, he, at the request of Ford, countersigned considerable numbers of cheques in blank. There can be no reasonable doubt Dr. Trick affixed his signature to these blank cheques in his capacity as a director, and in compliance with what he believed to be one of the regulations of the company, and that without his signature the cheques would not be paid when presented at the bank. He probably believed that Ford would only use them for the legitimate purposes of the company, as the exigencies of the business required. He signed them, however, without any enquiry as to the purpose for which they were to be used, knowing as he must have known that he was arming Ford with the power to dispose of the company's funds as he saw fit.

Having relinquished all control over the company's funds, he cannot in my opinion shelter himself against the liability for their misuse under the plea that he acted honestly, and that he trusted Ford not to use them for an improper purpose. A man may not intend to commit a fraud, or do anything which casuists might call immoral, and yet so conduct himself that his honesty of purpose affords him no defence. With respect to these blank cheques Dr. Trick is in my opinion in exactly the same position as he would have been had he signed them after they had been filled in with the name of the payee to whom they were subsequently issued by Ford. I cannot see that his position is any better, and I do not think it is any worse. I adopt the language of James, V.C., in *Joint Stock Discount Co.* v. *Brown*, L.R. 8 Eq. 381, at 404. The contention had been put forward in that case that the signing of a company's cheque by a director was a mere ministerial act.

> I am startled (he said), at hearing any such statement. A company for its own protection against the misapplication of its funds requires that cheques should be signed by certain persons. Of course it is quite clear that no company of this kind could be carried on if every director was obliged to sign every cheque, and it is therefore required that the cheques should be signed by a certain number of persons, for the safety of the company. That implies, of course, that every one of these persons takes care to inform himself, or if he does not take care to inform himself, is willing to take the risk of not doing so, of the purpose for which and the authority under which the cheque is signed; and I cannot allow it to be said for a moment that a man signing a cheque can say "I signed that cheque as a mere matter of form, the secretary brought it to me, a director signed it before me, two clerks have countersigned it; I merely put my name to it."

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Had cheques properly filled out for any of the purposes for which Ford afterwards used them been brought to Dr. Trick for his signature, he would have been bound, I think, to make some enquiry as to why such payments were being made. Had he done so I have no reason to believe that Ford would not have told him the truth. But it is useless to speculate as to what might have occurred had he acted with the prudence and care which is expected of a man who occupies a fiduciary position. He blindly trusted to Ford and, with him, is equally responsible. The payment of salaries and re-purchase of shares were both *ultra vires* acts, and to the extent that cheques signed by him were used for either purpose, he is liable.

As to the payment to the Globe Company he knew from a conversation with Butchart of the resolution directing the sale of the company's shares through the Globe Company. I cannot find that Trick had any reason to suspect that the Globe Company was a mere alias for Butchart or that the resolution had not actually been passed by a shareholders' meeting. He no doubt had been deceived by Butchart, but he cannot be held responsible for having been deceived. To the extent that the cheques signed by him were used to pay commissions to which the Globe Company would be entitled under the terms of the resolution, it cannot be said that he was guilty of misfeasance. But a much larger sum was paid to or on account of that company than it could possibly be entitled to under the terms of the resolution, and to the extent to which the cheques signed by him were used to make such payments he is, I think, clearly liable. Had such a cheque payable to the Globe Company been presented to Trick for signature, it would have been his duty to at least enquire as to the state of the account. Had Ford in reply to such an enquiry assured him that the amount was due and payable, he might have been entitled to rely upon such assurance; *Dovey* v. *Cory*, *supra*, but on the contrary had he learned the true state of the account, he would have been bound to hold his hand.

There will be judgment declaring that the defendants are jointly and severally guilty of acts of misfeasance, and breaches of trust as directors of the company, and that they are liable to contribute to the assets of the company, as follows:—The defendant Butchart must repay all moneys paid: (1) to himself as salary or

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remuneration; (2) to Ford as salary or remuneration; (3) all moneys paid as dividends; (4) all moneys paid to or on account of the Globe Securities Co's commission on the sale of shares; (5) all moneys paid for the repurchase of shares; (6) automobile appropriated by him, value $1,500.

The defendant Ford must repay all moneys paid under headings (1), (2), (3) and (5) after June 4, 1913, and all moneys paid under (4) after that date in excess of the amount to which the Globe Company would be entitled under the resolution referred to.

The defendant Trick must repay all moneys paid under headings (1), (2), (3), and (5) in so far as cheques signed by him were used to make such payments, and under (4) to the extent that such cheques were used to pay commissions in excess of that warranted by said resolution.

If the parties cannot agree, there will be a reference to the Master to take the accounts. The plaintiffs are entitled to costs against all the defendants. I hold that the case was of special importance, and I remove statutory bar as to taxation of costs. I grant fiat for costs examination. *Judgment for plaintiff.*

REX v. DONNACONA PAPER Co.

QUE.

S. P.

Quebec Sessions of the Peace, Hon. P. A. Choquette, J.S.P. February 13, 1917

SUNDAY (§ III B—15)—LABOUR AND BUSINESS—PAPER MILL.

The operation of a paper mill is not a "work of necessity or mercy" permitted to be carried on continuously without closing down over Sunday under the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 12.

Statement.

TRIAL of a charge laid by Felix Marois, of the City of Quebec, Clerk of the Board of Conciliation and Arbitration of the Province of Quebec, and duly authorized by the Attorney-General of the Province upon an information laid under oath, on the 10th of August last (1916), against the defendant company as follows:—

"That on the sixteenth day of July in the year one thousand nine hundred and sixteen, a Sunday, at Donnacona, County of Portneuf, in the District of Quebec, the Donnacona Paper Company, Limited, of the said place of Donnacona, in the said district, unlawfully did commit an offence against the Lord's Day Act, to wit: did unlawfully carry on his ordinary calling as manufacturer and in connection with the said ordinary calling for gain

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did employ then and there (among other people) Geo. McKee, Hormidas Fiset, Joseph Gingras, Louis Emond, Charles Rivard, Adjutor Denis, against the form of the statute in such case made and provided."

A. Lachance, K.C., for the Crown.

S. Montgomery, K.C., and *A. Fitzpatrick*, for defendant.

JUDGE CHOQUETTE entered judgment as follows:—

"Seeing that after pleading not guilty the defendant, on the day fixed for the hearing, moved to have the complaint dismissed as it did not disclose any offence punishable under The Lord's Day Act, being ch. 153 of the Revised Statutes of Canada, 1906, and claiming that, assuming that it had carried on its business on the said Sunday and obliged its employees to work, it came under one of the exceptions provided by sec. 12 of the said Lord's Day Act.

"Seeing that the complaint was declared regular and legal and that it was ordered that the case should proceed to trial and hearing.

"Seeing that it has been proved, especially by the evidence of Geo. N. McKee, manager of the defendant company, that the defendant had, on Sunday the 16th day of July, 1916, as alleged in the complaint, carried on its business and obliged its employees to work as on other days of the week, though considerably less in number, and that it has not been established that the work then done was a work of necessity, humanity and urgency.

"Seeing that there was not necessity for the defendant to manufacture paper and pulp on the said Sunday and still less to load it on cars for shipment.

"Seeing that it appears from the deposition of the said McKee that if the employees worked on Sunday in the manufacture and shipping of paper and pulp it was, among other reasons, he says, in order to support the competition of the United States and of other parts of this country and to enhance the profits; because in certain manufactures in these different places there was also work on Sunday; and also because, in refraining from work on the Lord's day, only resuming it at midnight Sunday after closing at midnight on Saturday, the quality of the paper, for some hours after the work was resumed, would be inferior.

"Seeing that by the Lord's Day Act the only work that can be done on Sunday by the defendant, especially during the winter

season in view of the rigour of our climate, is attending to the lights, maintaining the fires and sometimes making repairs urgently needed.

"Seeing that of the 64 men who, according to the said McKee, were obliged to work on Sunday (16th July last), it would have been sufficient to employ only some and probably only one as it was the summer season and it has not been shewn that on that day there were urgent and necessary repairs to be made.

"Seeing that on Sunday only works of necessity, humanity and urgency are permitted, and that it is for the accused, in order to escape condemnation, to establish clearly that the works done on Sunday the 16th July last were those mentioned above and such as are provided for in said sec. 12 of The Lord's Day Act.

"Seeing that it is not sufficient for the defendant, in order to be permitted to work on Sunday, to plead or even to prove that certain manufacturers of pulp and of paper in this country and in the United States do not close their factories on Sunday and that consequently, in order to meet the competition, fill its contracts and make more profit it was obliged to do the same, since, if this claim is admitted, all the merchants, mill owners, manufacturers, agriculturists and others could invoke the same reasons and then the law would be a dead letter.

"For all these reasons and in view of the complete proof of the allegations in the complaint I condemn the said defendant to a fine of $100 and the costs." *Defendant convicted.*

LEDINGHAM v. MERCHANTS BANK OF CANADA.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ. A. April 3, 1917.

1. ESTOPPEL (§ III D—60)—WAIVER OF CONDITION UPON ASSIGNMENT OF CONTRACT—"UNTIL OTHERWISE ADVISED."
A promise by a debtor to pay the money due under a building contract, to an assignee thereof, "until otherwise advised," does not estop him from setting up a provision in the contract as to his right to discharge out of the contract price any indebtedness for the work on the part of the contractor.

2. CONTRACTS (§ II D—145)—INTERPRETATION—"OR"—"AND."
In an assignment of "all moneys due *or* accruing due," the word "or" will be read as "and."

Statement.

APPEAL by the plaintiff from the judgment of Murphy, J., in an action for declaration as to money payable under a contract which has been assigned. Reversed.

S. S. Taylor, K.C., for appellant; *H. B. Robertson*, for respondent.

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C. A.

LEDINGHAM v. MERCHANTS BANK OF CANADA.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The defendants, Moore & Pethick, entered into contracts with the plaintiffs Mackenzie, Mann Co. Ltd. to do certain railway construction work. These contracts contained an article—No. 29—to the effect that if Moore & Pethick failed to pay any persons to whom they might become indebted for work and labour connected with these contracts, Mackenzie-Mann Co. Ltd. might discharge the same out of the moneys coming to Moore & Pethick under the contract. Moore & Pethick sublet part of the work to the plaintiffs Ledingham & Cooper, who became, in respect of labour and material supplied by them under their sub-contract, creditors of Moore & Pethick. The defendant, the Merchants Bank of Canada (Moore & Pethick's bankers), took an assignment from them of all moneys due and to become due and payable by Mackenzie, Mann Co. Ltd. to Moore & Pethick under said contracts. This instrument is dated January, 29, 1913, and due notice thereof was given to Mackenzie, Mann Co. Ltd. who, in acknowledging receipt of same by letter, said:—

—that if and when the contract is completed there is anything due to Moore & Pethick on account of the hold-back of these contracts, the said assignment will receive consideration.

Subsequently, a change was made in the management of the bank and the new manager, Mr. Fraser, on February 22, 1914, took from Moore & Pethick another assignment. Why this second assignment of what appears to be the same moneys was taken is not made clear. Mr. Fraser says he was not familiar with the form of the first assignment taken by his predecessor and wanted to use his own form. Objection to this second assignment is taken which I may as well dispose of now. It assigns all moneys due *or* to become due and the contention is made on behalf of the plaintiffs that it is an assignment only of moneys due, and, in the alternative, of moneys to accrue due. I think this point in the case may be dismissed with this observation, that the bank may rely on either or both instruments, and that in any case it is abundantly clear that "*or*" is a mere slip, and must be read "*and*."

Notice of the assignment of February 22 was given to Mackenzie, Mann Co. Ltd. who, in acknowledging receipt of the notice in a letter dated March 20, 1914, said:—

We will as requested pay all moneys due or accruing due to Moore & Pethick to the Merchants Bank of Canada until otherwise advised.

The defendants rely upon this as an agreement or undertaking on the part of Mackenzie, Mann Co. Ltd. to pay all such moneys

irrespective of said article 29. It is clear that this promise is not a binding one, either in its broad or limited interpretation: there is no suggestion of consideration.

For the purpose of disposing of the first prayer of the statement of claim, and narrowing the case down to what is left, namely, a question of estoppel, I may refer to the fact that Moore & Pethick assigned $11,000 of these moneys to the plaintiffs, Ledingham & Cooper, on January 30, 1915. Having come to the conclusion, as indicated above, that the assignments to the bank are good in substance and in form, this assignment to Ledingham & Cooper is eliminated from further consideration as there will be nothing left after the bank's claim is discharged.

Then as to the relief sought in the second prayer of the statement of claim, which is for a declaration that Mackenzie, Mann Co. Ltd. have no right to apply moneys in their hands, part of the contract price, in payment of the indebtedness of Moore & Pethick to Ledingham & Cooper by virtue of said article 29.

As I pointed out above, the defendants claim that Mackenzie, Mann Co. Ltd. are estopped from exercising the privilege retained by them under said article.

As I have already said, the letter is not a binding promise. The defendant bank claims that it acted upon the letter to its prejudice. I do not find any evidence in support of this, but I do not think that if there were such evidence the bank was entitled to complain of anything which Mackenzie, Mann Co. Ltd. did or said. I construe the letter of March 20 as saying nothing more than that Mackenzie, Mann Co. Ltd. would pay to the bank such moneys as Moore & Pethick were entitled to enforce payment of. Their paying afterwards sums into the bank from time to time pursuant to the assignment adds nothing to that situation: they were bound to pay without any promise at all money in hand payable to Moore & Pethick.

Subsequently, a situation arose which enabled them to say: We will exercise the powers given by article 29, we will pay to Ledingham & Cooper moneys which we have a right to deduct from those otherwise payable to Moore & Pethick and pay them to Ledingham & Cooper.

Reference has been made to the later correspondence in which at first Mackenzie, Mann Co. Ltd. took the ground that the assignment to the bank of February 22 was defective, and that the

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assignment of January 30 in favour of Ledingham & Cooper took priority over it.

Still later, Mackenzie, Mann Co. Ltd. expressed their determination to pay the money into Court and allow the bank and Ledingham & Cooper to contest their respective right to it. That was not done, and later still Mackenzie, Mann Co. Ltd. fell back on their rights under article 29 and brought this action for a declaration in respect thereto.

I can find nothing in all this to amount to an estoppel, and therefore I think the plaintiffs are entitled, or rather the plaintiffs Mackenzie, Mann Co. Ltd. are entitled to a declaration such as they ask in their second prayer.

Then again, in my opinion, the closing words of the said letter of March 20 contain a reservation in favour of the writers. It was contended by defendant's counsel that the words "until otherwise advised" meant until otherwise advised by the bank. Those words have a well-defined significance in legal parlance. They do not mean until you, the bank, otherwise advise us, but do mean until we are otherwise advised on our part, or, in other words, until we see reason for doing otherwise.

Now, Mackenzie, Mann Co. Ltd. until the time arrived for deciding whether they should pay the balance of the moneys in their hands to Moore & Pethick, or their assignee the bank, did not find it necessary to finally decide what course to pursue. When they understood, however, that Ledingham & Cooper were not likely to be paid unless they paid them themselves, they were put to their election, and I think they were entitled to elect to carry out the intent of the original contracts and discharge Moore & Pethick's indebtedness to their sub-contractors.

I would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I agree in the conclusion of the Chief Justice.

Had the letter relied on by the respondents not contained the limitation "until further advised" I might have come to a different conclusion, but without expressing any opinion as to that, I think the Chief Justice has given the correct interpretation to those words, and, so agreeing, I arrive at the same conclusion.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—This is an appeal from Murphy, J., that Judge dismissing the action and allowing the counter-claim of the Merchants Bank of Canada. The action was

one for a declaration that the plaintiffs Ledingham & Cooper were entitled as against the defendants the Merchants Bank of Canada to be paid by Mackenzie, Mann Co. Ltd. the sum of $9,200.08, under a contract in writing of date November 18, 1911. The plaintiffs Mackenzie Mann Co. Ltd. entered into a contract with the defendants Moore & Pethick, whereby Moore & Pethick agreed to do certain grading and other work in connection with the construction of the line of the Canadian Northern Pacific Railway; and a contract was entered into in writing of date May 10, 1913, between the plaintiffs, Ledingham & Cooper, and the defendants, Moore & Pethick, whereby the plaintiffs, Ledingham & Cooper agreed to do a portion of the work contracted to be performed by the defendants, Moore & Pethick under the contract mentioned of date November 18, 1911, and it was provided in the contract of May 10, 1913, that the plaintiffs, Ledingham & Cooper, the sub-contractors, undertook

all the obligations of the contractors (Moore & Pethick) under their contract with Mackenzie Mann Co. Ltd. for this section of the work above named, and in accordance with the specifications embodied therein (the conditions of which contract and specifications the sub-contractors have examined and satisfied themselves of before signing this agreement, and which, during the currency of this agreement, can be examined at the office of the contractors at Victoria, B.C.)

The sub-contractors, the plaintiffs Ledingham & Cooper, completed the contract and there was due and owing to Ledingham & Cooper at the time of the bringing of the action and there is still due the sum of $9,206.68 in respect of the work done. On February 24, 1914, the Merchants Bank of Canada obtained an assignment of all moneys due in respect of contracts and the supplying and doing of work by the defendants, Moore & Pethick, for Mackenzie, Mann Co. Ltd., which assignment reads as follows:—

Know all men by these presents that we John Wheeler Moore, Jr. and George H. Pethick, both of the City of Victoria, in the Province of British Columbia, carrying on business under the firm name of Moore & Pethick for and in consideration of the sum of $1 of lawful money of Canada, to us in hand paid, by the Merchants Bank of Canada, and of other valuable considerations, do hereby transfer assign and set over unto the said Merchants Bank of Canada all moneys now owing, or hereinafter to accrue due or become owing to us from Mackenzie Mann Co. Ltd., under or by virtue of any and *all of the contracts between ourselves and the said railway company*, for the supplying of material or doing of work, for the said company or in respect of any matters now existing or hereinafter to exist with the said company. To have and to hold the same unto the said Merchants Bank of

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Canada absolutely. *And we do hereby authorize direct and empower the said Mackenzie, Mann Co. Ltd., to pay to the said Merchants Bank of Canada, any and all sums of money now due, or hereafter to become due to us as aforesaid, and to accept the receipt of the said Merchants Bank of Canada, or their duly authorized agent as a full and complete discharge for the payments thereof.*

In witness whereof the parties hereto have hereunto set their hands and seals this 24th day of February, 1914, (Sgd.) Jno. W. Moore, Jr.
G. H. Pethick.

The letter forwarding the assignment was in the following terms (apparently through some error it was sent to the Treasurer of the Canadian Northern Pacific R. Co., but it eventually got to the proper hands as will be seen by a letter which will hereafter appear):—

The Treasurer 20th March, 1914.
Canadian Northern Pacific Railway Co.
Vancouver, B.C.

We enclose you herewith an assignment made by Moore & Pethick of Victoria in favour of the Merchants Bank of Canada of *all* moneys now due to them or hereafter to accrue due to them from your company in connection with the contracts between Moore & Pethick and your company or in any other way. We would ask you to be good enough to acknowledge receipt of this and to state that in accordance with the tenor thereof you will *pay moneys* due or accruing due to Moore & Pethick to the Merchants Bank of Canada.

ABBOTT, HART-MCHARG, DUNCAN & RENNIE.

The letter acknowledging receipt of the assignment follows:—

Messrs. Abbott, Hart-McHarg, Duncan & Rennie March 20, 1914.

We are in receipt of your letter of the 20th inst. addressed to the Treasurer of the Canadian Northern Pacific Railway. The assignment made by Moore & Pethick in favour of the Merchants Bank of Canada is also to hand.

We will, as requested, *pay all moneys due or accruing due to Moore & Pethick*, to the Merchants Bank of Canada until otherwise advised.

MACKENZIE MANN & COMPANY LIMITED.

On January 30, 1915, the plaintiffs, Ledingham and Cooper, became possessed of an assignment from Moore & Pethick of the amount claimed to be due to them, addressed to Mackenzie, Mann Co. Ltd.

The contention put forward by the plaintiffs Mackenzie, Mann Co. Ltd. is that they are entitled to pay to the plaintiffs Ledingham & Cooper the amount in question in the action, *viz:* $9,206.68 —an amount admittedly due and payable to them by the defendants, Moore & Pethick, under the contract between Ledingham & Cooper and Moore & Pethick, previously referred to for and in respect of work agreed to be performed under the principal contract between Moore & Pethick and Mackenzie, Mann Co.,

basing their contention upon clause 29 of the principal contract, which reads as follows:—

Provided also that before making payment upon any progress or final estimate, the company may require the contractor to satisfy the engineer, or other authorised representative of the company, that all claims against the contractor or any sub-contractor for labour, teams, plant, materials or things employed, hired, or supplied upon or for the works have been paid or satisfied, or, if any such claims are found to exist, may at its option withhold from such payments sufficient amounts to satisfy the same, or may pay to the contractor the amount due under such estimate in instalments, giving to the contractor from time to time such sums as it deems sufficient to meet such claims, and withholding the balance until the same are satisfied, or may pay all or any of such claims, rendering to the contractor the balance due under such estimate after deducting the payments so made. All the covenants contained in sec. 23 of this contract respecting inspection and extract of, and from the contractor's books and papers, and assistance by and estoppel of the contractor, shall apply to any action taken or situation arising under this section.

Shortly stated the contention is that the assignment held by the defendants the Merchants Bank of Canada is subject to this term of the contract. There is no evidence to show that notice was brought home to the Merchants Bank of Canada of the terms of the contract or in particular this term thereof.

It was admitted at the Bar during the argument that no question of the possible establishment of any liens was to be apprehended, and there is no privity of contract, or any legal liability whatever upon Mackenzie, Mann Co. to pay any moneys to Ledingham & Cooper, and sec. 29 is merely a provision, optional of exercise by Mackenzie, Mann Co., and one which they could forego or so conduct themselves that it would be inequitable for a Court to hold that it could be successfully invoked. Now what are the circumstances here? Upon the faith of the assignment and what was agreed to by Mackenzie, Mann Co., the Merchants Bank of Canada make advances in due course and rendered it possible, it is fair to assume, for the contractors to wholly complete their contract. In view of all the facts and the surrounding circumstances, and the course of conduct of Mackenzie, Mann Co., their agreeing as they did in answer to the receipt of the assignment that "we will as requested pay all moneys due or accruing due to Moore & Pethick to the Merchants Bank of Canada until otherwise advised", a clear case of estoppel, in my opinion, exists; unquestionably the Merchants Bank of Canada acted upon this representation and thereby altered its position and to its prejudice. The moneys in question are moneys

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due to Moore & Pethick, they are not due to Ledingham & Cooper, and now the attempt is made to not pay to the Merchants Bank of Canada the moneys which are due to Moore & Pethick, but to pay these moneys to Ledingham & Cooper to whom they are not due (*Carr* v. *London & N. W. Ry. Co.* (1875), L.R. 10 C.P. 307, per Brett, J., at pp. 316, 317; *Pickard* v. *Sears* (1837), 6 Ad. & El. 469 (112 E.R. 179); *Freeman* v. *Cooke* (1848), 2 Ex. 654 (154 E.R. 652); *Swan* v. *N. Brit. Australasian Co.* (1862), 7 H. & N. 602; *Cornish* v. *Abington* (1859), 4 H. & N. 549, 556; *Cairncross* v. *Lorimer* (1860), 3 Macq. 827—*per* Lord Campbell, L.C. at p. 829).

That the assignment to the Merchants Bank of Canada is complete and effective in my opinion is incontrovertible: *Ritchie* v. *Jeffrey* (1915), 26 D.L.R. 703, 52 Can. S.C.R. 243, is clearly distinguishable: there the difficulty was that there was no evidence to pay the amount out of any particular fund; in the present case no ambiguity exists.

Upon the whole case, I am of the opinion that Mackenzie, Mann Co. by their conduct induced the Merchants Bank of Canada to rely upon it that all moneys due to Moore & Pethick would be paid to the bank and upon the faith of this representation the bank continued to finance the contractors, Moore & Pethick, and that estoppel is created; and further it would be inequitable to admit of payment of these moneys to Ledingham & Cooper in denial of what in my opinion is a clear obligation in law. The moneys are due and payable to Moore & Pethick, at most as between Mackenzie, Mann Co. and Moore & Pethick the option exists; but it is an option that has been waived, and it is incapable of being invoked as against the requirement in law upon the facts to pay the moneys to the Merchants Bank of Canada.

The trial Judge arrived at the right conclusion in dismissing the action and allowing the counterclaim, *i.e.*, in giving judgment in favour of the Merchants Bank of Canada for the $9,206.68. It follows that in my opinion the appeal should be dismissed.

Appeal allowed.

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MACDONALD v. FOX.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. April 3, 1917.

1. HUSBAND AND WIFE (§ IB—26)—NOTE BY WIFE—HUSBAND'S DEBT—INDEPENDENT ADVICE.

A married woman is liable on a promissory note signed by her as security for a debt of her husband, without any independent advice, if no undue

influence was exercised upon her and the solicitor acting in the matter has done so merely as a friend and not on behalf of either husband or creditor. [*Bank of Montreal* v. *Stuart*, [1911] A.C. 120, distinguished.]

2. PRINCIPAL AND SURETY (§ IA—1)—NOTE—PRIMARY LIABILITY. A promissory note signed as security for another's debt does not create a suretyship, when it is apparent that a primary liability was intended.

Statement.

APPEAL by the plaintiff from the judgment of SPOTTON, Co. C.J., sitting as a Judge of the County Court of the County of Halton, dismissing, as against the defendant Rosella Fox, an action, brought in that Court, against Thomas W. Fox and Rosella Fox, his wife, to recover the amount of a promissory note made by both defendants, on the ground that the signature of the defendant Rosella Fox had been obtained by undue influence.

Gordon Waldron, for appellant.

William Laidlaw, K.C., for respondent.

The judgment of the Court was read by

Ferguson, J.A.

FERGUSON, J.A.:—This is an appeal from a judgment of His Honour Judge Spotton whereby he dismissed the plaintiff's action, on the ground that the signature of the defendant Rosella Fox to the promissory note sued on had been obtained by undue influence within the principles laid down in the case of *Bank of Montreal* v. *Stuart*, [1911] A.C. 120.

The action is against Thomas W. Fox and Rosella Fox, his wife, and is on a promissory note dated the 23rd April, 1907, made by the defendants in favour of John Macdonald, and payable six years after date, with interest at five per cent. half-yearly.

The defendant Thomas W. Fox did not defend.

The defendant Rosella Fox filed an affidavit in answer to the specially endorsed writ, and her defences as indicated by that affidavit are as follows: (1) that the note was procured from her by wrongful, unlawful, and fraudulent misrepresentation, or by duress; (2) that the note was procured without consideration being given therefor; (3) that the note was procured from her without independent advice; (4) that the note was given as collateral security for notes given by one Samuel Joyce, and that the principal debt was barred by the Statute of Limitations. (No attempt is made to justify the defence of the Statute of Limitations.)

The evidence discloses that in 1903 the plaintiff, the defendants, and D. O. Cameron, a solicitor, were all residing in Oakville, Ontario, and that Cameron was a friend of the defendants. In

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that year, Cameron, on the instructions of Thomas W. Fox, drew a deed from Fox to his daughter Florrie Fox of a property in the city of Toronto, the expressed consideration being natural love and affection and one dollar; the property was conveyed subject to two mortgages amounting to about $4,200.

In 1905, Cameron, acting as solicitor for a purchaser, Philip Kelly, drew a deed from the defendant Rosella Fox to Philip Kelly of some lands in Oakville.

Some months after drawing the Kelly deed, Cameron, as solicitor for John Macdonald, issued a writ, and on the 2nd June, 1905, obtained in the County Court of the County of York a judgment against Thomas W. Fox for $392.48 and $12.12 taxed costs.

From that time on, Cameron, it appears, acted as solicitor for Macdonald, endeavouring to collect from Thomas W. Fox the amount of the judgment, following him by proceedings in the North-West Provinces and by other processes in this Province.

Between 1903 and 1907, the Fox family moved out of Oakville to a farm in the county of Halton, owned by the defendant Rosella Fox; for some months prior to April, 1907, John Macdonald, the creditor, had endeavoured to persuade Rosella Fox to give him security for her husband's debt; having had three or four interviews with her for that purpose, but being unsuccessful, Macdonald asked Cameron to attack the alleged voluntary conveyance which he had drawn in 1903. Cameron says that he refused to act as solicitor for Macdonald in an attack upon a deed which he had drawn; and that, on Macdonald persisting in the statement that he would take these proceedings, Cameron stated that he would go with Macdonald to the Fox farm and try to get a settlement or an adjustment; on the 23rd April, 1907, Macdonald drove Cameron from Oakville to Milton, and, their way taking them past the Fox farm, they stopped on the road and spoke to Fox and his wife, Macdonald endeavouring to persuade Mrs. Fox to give him security for her husband's debt, and she refusing.

In the afternoon on their way back from Milton to Oakville, Macdonald and Cameron again stopped at the Fox farm; this time they went into the house; those there present were Macdonald, Cameron, Fox, Mrs. Fox, and Florrie Fox (now Mrs. Booth); a

discussion arose as to whether or not Mrs. Fox would give security for her husband's debt. Cameron told them that Macdonald threatened to take proceedings to attack the deed in favour of the daughter. The defendant Rosella Fox's account of what took place, as given in her evidence in chief, is as follows:—

"Q. What took place in the house about this debt? A. Well he spoke of getting security, and then he spoke of the houses in Toronto that he had, that had gone over to my daughter, that she had bought, you might say, only it was not put that way in the deed.

"Q. Yes? A. And he said it could be set aside.

"Q. The deed to your daughter of the houses in Toronto could be set aside on account, you said, of something in the deed? A. Yes, the way they were drawn, it could be set aside. I asked him if there was anything wrong, and he said Macdonald could take proceedings against them right away if I did not comply with his request and give the security.

"Q. And how did that affect you? A. Well my daughter had put her money in the houses, and I did not wish to see her lose that. If they offered them for sale, I had not the money at the time to redeem them, and I did not wish her to lose her money, which was all she had at the time, you may say—pretty nearly all.

"Q. Well then you say that, after you were told this by Mr. Cameron, you signed the note? A. Yes, I signed the note for that reason.

"Q. Why did you sign it? A. I signed it because I was afraid it would destroy the deed for the houses to her. For no other reason.

"Q. The note is for a very unusual time—six years. Was there anything said about that? A. Well, I said I could not pay the note at that time, and that I would not sign it unless it was for a great length of time."

She was cross-examined, and put it this way:—

"Q. And it is a fact that you asked Mr. Cameron whether Macdonald could do that? A. Yes, I asked him. I said to him, 'What is wrong about the deed?' I said, 'Didn't you draw it right, what is wrong about it?'

"Q. Yes? A. And he said that he thought, the way it was drawn, Macdonald could set it aside.

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"Q. Did he not rather say that Macdonald might? A. Pardon?

"Q. That Macdonald might be able to set it aside? A. He said he thought he might, but he didn't say he could or he would.

"Q. He didn't say he could or he would? A. He would if he could I suppose, but he didn't say he could.

"Q. He didn't say he could but that he might? A. Yes."

Cameron puts it in his examination as follows:—

"Q. You have told at one stage she appealed to you? A. Yes, she did.

"Q. And you said what? A. Macdonald said he was going to attack the conveyance, and she asked me if he could, and I said he could, certainly, but I said it is hard to tell whether he would win or lose. It is going to be a costly action. It is for yourself to decide what it is best to do. That is just about what I told her.

"Q. Who were you acting for then? A. Not anybody. I told Macdonald I would not have anything to do with the suit, but I would go and try to settle the thing in an amicable way.

"Q. Your account of it would be that you were on a mission of peace? A. That is what I was trying to do, I didn't want to see a fight."

It was under these circumstances that the note sued on, dated the 23rd April, 1907, was signed, and it did not fall due till April, 1913. Mrs. Booth retained the property in Toronto; and in the fall of 1912 sold it for much more than she gave for it.

This action was commenced on the 15th February, 1915. At the trial evidence was given which went to shew that the conveyance to Florrie Fox was not voluntary, and that Mr. Cameron had advised on an incomplete knowledge of the facts. It was also shewn, however, that the defendant Rosella Fox was fully informed on those facts.

The learned Judge makes the following findings:—

"Macdonald came to the defendant's house with Cameron as his solicitor acting for him in this transaction; a friend of the Fox family and their solicitor in other matters, when occasion required. Rosella Fox had refused all ordinary requests to become surety for her husband. This time different means were taken to procure her signature. Cameron mentioned to her the transfer of the houses in Toronto from the husband to the daughter, and told her

that, unless she signed, Macdonald would bring action right away to set the transaction aside. Mrs. Fox said, 'What is wrong?' and that he, Cameron, should know, as he drew them. She did not wish her daughter to lose them, she did not want law. She became discouraged and signed.

"Thomas Fox appears to be a worthless fellow, incapable of giving his wife or any one else proper advice in a matter of this kind, even had he been asked. Their family solicitor on whom they relied was persuading her to sign, holding up before her financial loss to the daughter as a reason why she should. She had no advice at all except that of Cameron, who went out for the purpose of getting security for Macdonald's claim against her husband. In the witness-stand Cameron admitted it would have been better had she taken advice, but that it did not occur to him to caution her about it.

"I am of opinion that the proof of undue influence is complete, and that this case falls within *Bank of Montreal* v. *Stuart*.

"I therefore dismiss the action, as against the defendant Rosella Fox, with costs."

As I read the decision in *Bank of Montreal* v. *Stuart* and the authorities on which it is based, it decided: (1) That in a husband and wife transaction there is no presumption of law that the husband has an undue influence over his wife, and that it is not necessary to the validity of such a transaction that the wife should be shewn to have had independent advice. See *Euclid Avenue Trusts Co.* v. *Hohs* (1911), 24 O.L.R. 447, at p. 450; also *Howes* v. *Bishop*, [1909] 2 K.B. 390, 402. (2) That, where a creditor seeking security from *his* debtor's wife employs the debtor's solicitor, the wife, in the absence of other independent advice, is entitled to look to her husband's solicitor for advice; and, the solicitor thus acting as the law-agent of all parties, the creditor is fixed with knowledge of all things known to the solicitor, and may not benefit by the neglect or failure of such solicitor properly to advise the wife of his debtor.

The fact that Mrs. Fox had not advice independent of her husband, without more, not being sufficient to entitle her to relief, we may proceed to consider: was there undue influence exercised by the husband or any one else? Was Mr. Cameron in acting, either in the capacity stated by the learned trial Judge, namely, as "family solicitor in other matters," or, as he puts it in his

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evidence, as not for any one, but as "friend and peacemaker," under any legal obligation to the defendant Rosella Fox which he neglected to her detriment, or to the plaintiff's advantage? Was the plaintiff responsible for such neglect, if any? If so, was the transaction so improvident, unfair, and unconscionable that the Court should, after a delay of many years, when the position of the parties is changed, set it aside and refuse to enforce it?

The evidence all goes to shew that, as between husband and wife, Mrs. Fox was much the stronger personality; that Mr. Fox did not persuade or influence her into signing the note, or attempt to do so; and that he had no domination over the mind of his wife. Her examination and cross-examination shew the respondent to be a well-informed, intelligent, and self-reliant woman, not likely to be dominated by any member of her household, and certainly not by her husband, of whom the learned Judge says: "Thomas Fox appears to be . . . incapable of giving his wife or any one else proper advice in a matter of this kind, even had he been asked." We may therefore take it that the undue influence was not that of Thomas Fox.

It is not suggested that, as the result of long acquaintance and a continued course of dealing, Cameron had obtained the confidence of Mrs. Fox, or a control and ascendency over her mind, so that she would do anything in a business way that he asked or advised her to do. No case of obtaining and abusing confidence by Cameron is suggested; but the learned trial Judge suggests that because Cameron had, in 1903, drawn a deed for Fox, and in 1905 drawn a deed for Rosella Fox, he continued, in 1907, to be solicitor for Fox and his family. I do not think this finding is borne out by the evidence; it was in 1905, after drawing the deed from Rosella Fox to Kelly, that Cameron, acting for John Macdonald, recovered the judgment against Fox; and thereafter he did not act for Fox; and I do not think any one present when the note was given regarded Cameron as still being solicitor for Fox or his family, and no one attempted at the trial to say that such was the case; clearly Cameron did not so regard himself, and it is not so pleaded; which would hardly have escaped Mr. Laidlaw had the respondent suggested that as being her idea of the relationship between herself and Mr. Cameron. On the contrary, the idea of the respondent, as indicated by her affidavit, is, that Cameron, as the plaintiff's solicitor, had been

guilty of misrepresentation, fraud, and duress, for which charges no foundation appears in evidence.

For these reasons, I am of opinion that Mr. Cameron did not continue as solicitor for Thomas W. Fox and his family, and if acting only as Macdonald's solicitor owed no special duty to the defendant, and that, therefore, the judgment cannot be supported on the reasons given by the learned trial Judge.

From *Willes* v. *Barron*, [1902] A.C. 271, 283, it might be argued that, by voluntarily assuming the rôle of candid friend, advising both the plaintiff and the respondent, Mr. Cameron assumed not only a moral but a legal obligation to the respondent, and placed himself, to the knowledge of and with the approval of the plaintiff, in the position of solicitor advising both parties, so that the plaintiff would be fixed with Cameron's knowledge and his neglect or breach of duty to the defendant, and thus prevented from taking any advantage therefrom. Were I of the opinion that Mr. Cameron did occupy the position of solicitor for all parties (which I am not), still I think that the respondent must fail, because there was no mistake, dishonesty, or neglect.

It is common ground that in 1903, when Thomas Fox was indebted, he instructed Mr. Cameron to draw, and he (Fox) executed, a conveyance, on its face declaring it to be made in consideration of natural love and affection; that the plaintiff, having failed to collect his judgment, learned of the voluntary transaction, and went to Cameron to have him attack the deed; that Cameron properly refused to attack a deed he had drawn; but still, thinking the transaction to be, according to his instructions, voluntary, and thus subject to a creditor's attack, took the very commendable position of trying to avoid litigation in a dispute that appeared on its face to be more doubtful for Mrs. Booth than for the plaintiff. That being so, he, on being asked the question, tells the defendant, "that Mr. Macdonald might attack the deed, and if he does the result is doubtful, and the litigation will be expensive—decide for yourself." On that she exercised her own judgment and settled. I fail to see wherein it can be found that there was dishonesty. In fact I think it is conceded that there was none. As to neglect, it might be argued that Cameron advised without having before him all the facts as now disclosed in evidence; the answer to that is that all the parties to the transaction were present, the respon-

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dent knew the facts, and she cannot complain or blame Mr. Cameron if in asking his opinion she did not put him in possession of the facts within her own knowledge. In any event, Mr. Cameron did not have knowledge of these facts, and therefore knowledge through him cannot be imputed to the plaintiff.

While the evidence adduced at the trial goes to shew that the deed to Florrie Fox was not voluntary, it is not clear that Cameron's advice was erroneous or should have been different, or that the respondent suffered therefrom. See *Stewart* v. *Stewart* (1839), 6 Cl. & F. 911.

But, as I said before, I am of the opinion that Cameron was not solicitor for all parties. Mr. Cameron's evidence that he was advising, as a friend of all, as peacemaker for all, and as solicitor and agent of none, should be accepted.

Now let us look at the transaction itself and the consideration therefor to see if it be one of those unfair and unconscionable transactions that suggest undue influence and should not stand.

The plaintiff was asserting a right, a doubtful right if you will, but doing so *bonâ fide;* the respondent, desiring to save her daughter from the loss of her property, which would result were the plaintiff's alleged right enforced, with the benefit of Mr. Cameron's honest opinion, negotiates a bargain whereby the plaintiff gave up that right, and his judgment against Thomas W. Fox, and gave six years' time for payment. Such a compromise should not be lightly set aside: see *Lucy's Case* (1853), 4 DeG. M. & G. 356. As a result of the compromise Mrs. Booth kept her property; and, having in the meantime received the rents and profits, sold it in 1912 for about $2,500 more than she gave for it; during all these years the respondent gave no intimation that she intended to rue her bargain; but, after the house is sold, and the parties cannot be restored to their original position, she sets up defences of fraud, misrepresentation, and duress, which she does not attempt to prove.

Mr. Laidlaw argued before us that the note sued upon was held by Macdonald as collateral security for an indebtedness of Thomas W. Fox and one Joyce, and that the notes taken from Joyce bore interest at six per cent. per annum, while the note sued on bore interest at five per cent., and that, therefore, under the principle governing the rights of sureties, as laid down in *Bolton* v. *Salmon*, [1891] 2 Ch. 48, the respondent as surety was

discharged from liability. This defence does not appear to have been in mind at the trial, and the evidence is not as clear as it might perhaps be made; but I think the result of the evidence is, that, at the time the note was made, it was the judgment against Thomas W. Fox that was being settled so as to prevent threatened action thereon, and that it was intended that the defendants should, as I think they did, become primarily liable for the claim of Macdonald; and that the getting and taking of the notes from Joyce was something to be done in case of the defendants; and that, therefore, the respondent was not a mere surety for Joyce, and that the authority cited is not applicable to the facts of this case.

For these reasons, I think the appeal should be allowed with costs, and that judgment should be entered against the separate estate of Rosella Fox for the amount of the plaintiff's claim and costs. *Appeal allowed.*

W. v. W.

Manitoba King's Bench, Galt, J. May 25, 1917.

DIVORCE (§ II—5)—JURISDICTION—IMPERIAL STATUTE.

The Imperial Divorce and Matrimonial Causes Act, 1857, is not in force in Manitoba and the Courts of that province have no jurisdiction thereunder.

ACTION for the annulment of a marriage. Dismissed.

Statement.

W. J. Donovan, and *G. S. Scott*, for applicant; no one for respondent.

GALT, J.:—This is a petition presented to the Court by the petitioner praying that an order be made declaring her marriage with the respondent to be null and void.

Galt, J.

The petition and affidavit verifying the same appears to be in compliance with the requirements of the Imperial Divorce and Matrimonial Causes Act, 1857 (Statutes at Large, vol. 99, ch. 85), and a sufficient case is made out for annulment of the marriage under that Act. Personal service of the petition upon the respondent was shewn to have been made on April 13, 1917. On May 3, 1917, the return day of the petition, Mr. W. J. Donovan appeared on behalf of the petitioner, and no one appeared for the respondent, and the matter was adjourned until to-day, when Mr. Donovan and Mr. G. S. Scott appeared for the petitioner. The respondent was not represented.

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The jurisdiction of the Court of King's Bench in Manitoba to deal with divorce and matrimonial causes appears to mainly depend upon the provisions of the Manitoba Act, 33 Vict. ch. 3 (Dominion), and 51 Vict. ch. 33.

The Manitoba Act was assented to on May 12, 1870, and was confirmed by Imperial Act, 34 & 35 Vict. ch. 28. Sec. 2 provides as follows:—

> 2. On, from, and after the said day on which the order of the Queen-in-Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or, by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole, of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act.

The Manitoba (Supplementary Provisions) Act, 51 Vict. ch. 33, sec. 1, provides as follows:—

> Subject to the provisions of this Act, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on July 15, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom, applicable to the said province, or of the Parliament of Canada.

It is admitted by counsel for the petitioner that no such jurisdiction as is contained in the Imperial Divorce and Matrimonial Causes Act, 1857, has ever yet been recognized or enforced in the Province of Manitoba, but it is argued that such jurisdiction is applicable to the Province and there is no valid reason for denying the exercise of it.

Great reliance was naturally placed by the learned counsel upon the fact that jurisdiction in matrimonial causes had long been recognized in the Province of British Columbia and is in force there to-day. Reference was made to the learned and exhaustive judgment of Martin, J., of the Supreme Court of British Columbia, in the case of *Sheppard* v. *Sheppard*, 13 B.C.R. 486, and to the judgment of the Privy Council in *Watts* v. *Watts*, [1908] A.C. 573, in which case the Privy Council held that the Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that colony and in respect of matrimonial offences alleged to have

been committed therein. Their Lordships, in delivering judgment, referred in very complimentary terms to the judgment of Martin, J., in *Sheppard* v. *Sheppard*.

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No doubt there are important distinctions between the relative positions of Manitoba and British Columbia in respect to this question, and it may well be that the English jurisdiction was introduced into British Columbia but not into Manitoba. But, having regard to the fact that no such jurisdiction has ever yet been recognized by the Courts of this province in matters of such momentous importance as divorce and matrimonial causes, I think it would be presumptuous of me, even if I were fully convinced that this jurisdiction had been introduced, to render an authoritative decision to that effect. It often happens, as indeed it has happened in the present case, that a respondent allows judgment to go by default against him or her. In such a case there would be no appeal, and yet the judgment so pronounced would create the belief in many minds that the jurisdiction existed in Manitoba. Several such cases might arise, from time to time, and it is the practice of our Judges to accept as binding a decision rendered by a brother Judge unless and until it be reversed or varied by the Court of Appeal. Under such circumstances, I feel that if such jurisdiction does exist it ought to be declared by our highest Court rather than by the judgment of a single Judge without any probability of appeal.

For this reason, I dismiss the petition. *Action dismissed.*

REX v. TREMBLAY.

QUE.

K. B.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Lavergne, Cross, Carroll and Pelletier, JJ. November 13, 1916.

PERJURY (§ II A—40)—OFFICIAL STATEMENT MADE UNDER OATH OF OFFICE—PROMISSORY OATH.

Perjury is not chargeable in respect of a Court bailiff's certificate purporting to be made under his "oath of office" previously administered on his appointment; *ex. gr.* in Quebec a *procès-verbal* of service certifying the distance travelled in order to serve Court process.

Statement.

CROWN case reserved on a trial for perjury in which a verdict of guilty had been returned against the accused by the jury sitting at the criminal assizes for the month of March, 1916, in the District of Three Rivers.

The accused is a bailiff of the town of La Tuque. In a cause in the Superior Court for the District of Three Rivers, *Dontigny*

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v. *Trottier*, he had as bailiff made the following return of the service of the action:—

"I, J. A. Tremblay, the undersigned, one of the bailiffs in and for the District of Three Rivers of the Superior Court of the Province of Quebec, living at the town of La Tuque, certify under my oath of office that I have performed service on Phil. Trottier the defendant named in and as commanded by the present writ on the first day of December, one thousand nine hundred and thirteen, between two and three o'clock in the afternoon, by leaving and delivering at that time the copy of the said writ and the copy of the declaration annexed thereto addressing the defendant himself. I certify that I had been at Parent to make the said service and I noted upon the said copy the date of such service.

"I certify further that the distance between the place where the said writ and declaration were so served and the Court-house of the Superior Court in the District of Three Rivers is 120 miles, and that the distance between my residence and the place where the said service was made is 120 miles.

"La Tuque, 1st December, 1913. "J. A. TREMBLAY.

"Distance 120 miles	$30.00
"Service	50
"Postage	05
	"$30.55"

The accusation of perjury is based upon the fact that the accused had declared under his oath of office, for the purpose of deceiving justice, that he had served the writ on the defendant Trottier at the place called Parent, 120 miles from La Tuque, while in fact he had served it in La Tuque itself, some yards from his residence.

The accused has undergone his trial and has been found guilty. Before sentence was pronounced and upon motion of the accused, Mr. Justice Drouin, presiding at the assizes, reserved for the consideration of the Court of King's Bench (criminal side) the four following questions, namely:—

1. Can the public prosecutor in order to prove the accusation of perjury against the accused produce merely a copy certified by the prothonotary of the record containing the perjured statement, or should he produce the original of such return?

2. Is the certificate in the bailiff's commission signed by the Honourable Mr. Justice Cannon that he had sworn Joseph Albert Tremblay equivalent to the production of a document containing the oath itself and on a charge of perjury, can the production of such a document be dispensed with?

3. Does a false affirmation, declared to be made under the oath of office of a bailiff, constitute perjury, and is the return of the accused containing it perjury within the meaning of secs. 170-172 or any other section in the Criminal Code of Canada?

4. Is there in the deposition of the accused any admissions and acknowledgments sufficient to cover the omissions or irregularities, the existence of which can be recognized by the Court?

L. G. Belley, for the accused; *P. Bigué*, K.C., for the Crown.

PELLETIER, J.:—The indictment alleges that the return of the bailiff affirms that the service took place at Parent. Pelletier, J.

I do not see this affirmation in the return of the bailiff; it even says the contrary. The return of the bailiff which refers only to La Tuque declares that he served the writ on the 1st December, 1913, "then and there;" it afterwards states that he went to Parent to make the said service but it does not say that he made it there.

It is possible and even probable that the procès-verbal of the bailiff was cleverly manipulated in order to justify his trip to Parent and claim the $30 which are demanded on account of it, but it does not follow that we can say that he did so; we cannot say that the bailiff has positively certified that he made the service at Parent because he does not say so. Against this method of procedure by the bailiff there are other remedies.

The accused also adds in his return that the distance from his residence at La Tuque to the place of service was 120 miles. As a matter of fact, the service took place at La Tuque and this assertion is erroneous so far as La Tuque is concerned, but the accused as bailiff without doubt intended to say that having gone to Parent to endeavour to perform the service it is that which constitutes the 120 miles in question.

In these circumstances all this is far from being clear, and even if perjury could be founded upon a procès-verbal by a bailiff I believe it could not be done in the case with which we are concerned.

However that may be it has not been proved in this case that

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the bailiff was ever sworn. All that was produced before the jury is the commission appointing the accused bailiff. This commission incidentally states that the accused had taken the oath but that is not proof that the oath in question was taken.

In consequence the proof that the accused had been sworn when he was appointed bailiff has not been furnished and as the charge of perjury is based upon the fact of this alleged oath of office that the accused had taken when he was appointed bailiff, the charge is not proved.

In any event it is a fact certain in all this that it is only the case of an oath of office which the accused had taken to faithfully perform his duties as bailiff. But if this oath had been taken and that fact had been proved, the bailiff is not guilty of perjury, even if he states in a procès-verbal of service matters as facts which are not so.

The indictment then charges no offence of perjury coming under the operation of the criminal law and I am therefore of opinion that the verdict should be quashed as demanded by the motion we have before us.

As to the answers to be given to the questions propounded I would answer the first in the negative. However, it appears that the original of the return of the bailiff has been filed in Court and that the prothonotary has then—not being able to part with the original—produced the certified copy that we have before us. That appears to me sufficient and legal.

I would answer the second and also the third question in the negative.

As to the fourth question, it was the province of the jury to decide if there were sufficient admissions and avowals on the part of the accused who freely and voluntarily offered himself as a witness, but the admissions and avowals of the accused could not make him guilty of perjury in the case before us because there cannot be perjury in the matter of an oath of office.

To sum up, I am of opinion that the verdict should be set aside.

Part of the above notes expresses my personal opinion, but the Court is unanimous in answering the third question in the negative. Consequently the verdict is set aside and the accused Tremblay is discharged.

THE COURT quashed the conviction on the third ground and entered judgment as follows:—

"Considering that the record as submitted to this Court does not contain the necessary material to permit the Court to answer the first, second and fourth questions submitted;

"Considering, however, that according to the record as submitted to this Court there is sufficient to enable us to answer the third question;

"Considering that the answer to this third question should be and is in the negative;

"The Court quashes and annuls the verdict of guilty rendered against the accused, Joseph Albert Tremblay, on the 14th April, 1916, at Three Rivers, and the said Joseph Albert Tremblay is in consequence discharged for all lawful purposes from the said indictment." *Conviction quashed.*

NAROVLANSKY v. PORTIGAL.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. April 17, 1917.

JURY (§ IV—80)—RIGHT TO SPECIAL JURY.

Under sec. 59 of the Jury Act (R.S.M. 1913 ch. 108) a Judge may grant a special jury, (1), when he grants an order for a jury in a case otherwise triable without a jury and a party to the action requests a special jury; (2), when in a case triable by a jury, unless waived by consent, a request for a special jury has been made within 6 days from the time when the action is at issue; this is in harmony with the provisions of the King's Bench Act (Man), secs. 49-50.

Statement.

APPEAL by plaintiff from the judgment of Galt, J., directing the issues to be tried by a special jury. Affirmed.

B. L. Deacon, for appellant.

E. R. Levinson, and *C. E. Finkelstein*, for respondent.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—In this case the plaintiff applied to the referee for an order that the issues be tried by a jury. The order was made and thereupon the defendants applied, under sec. 59 of the Jury Act, for a special jury. The referee stated that if he had the power to do so he would order the action to be tried by a special jury, but he thought that under the above section he could not so order, because the application for the special jury was not made within six days from the time when the action was at issue. On appeal from this order, Galt, J. directed that the issues be tried by a special jury.

The difficulty in the case arises from the somewhat obscure wording of the above sec. 59. That section is as follows:—

A Judge in chambers, on granting an order for the trial of a civil case by a jury or, in the case of an action for libel, slander, breach of promise of mar-

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riage, illegal or excessive distress, illegal or excessive seizure, criminal conversation, seduction, malicious arrest, malicious prosecution, false imprisonment, breach of warranty or for the recovery of damages under the Employers' Liability Act, at any time within 6 days from the time when the action is at issue, may, at the request of any party to the action or proceeding, order that the issue of fact therein shall be tried and the damages assessed by a special jury according to the law and practice in that behalf being and existing in England on the fifteenth day of July, 1870 save where altered by the following sections.

The plaintiff contends that under the above section all applications for special juries must be made within 6 days after the action is at issue. But this reading of the section would be in conflict with secs. 49 and 50 of the King's Bench Act which enable a Judge to order trial by jury in cases which otherwise would be tried by a Judge without a jury, and to make this order at any time up to, or even at the trial. Then, under sec. 59 of the Jury Act, the Judge may, on granting a jury, make an order for a special jury. A close reading of sec. 59 of the Jury Act makes it appear that the Judge may grant a special jury on one of two distinct occasions or sets of circumstances; first,—when he grants an order for a jury to try the case, where otherwise it would be tried by a Judge without a jury, and a party to the action requests a special jury; second,—where, in a case which shall be tried by a jury, (unless the parties by consent waive such trial) a request for a special jury has been made by a party to the action within 6 days from the time when the action was at issue. This is a reasonable interpretation of the section and harmonizes it with the above provisions of the King's Bench Act.

The order made by Galt, J., should be affirmed and the appeal dismissed with costs in the cause to the defendant.

Appeal dismissed.

N. B.

S. C.

LUNT v. PERLEY.

New Brunswick Supreme Court, Chancery Division, White, J. December 1, 1916.

1. PRINCIPAL AND AGENT (§ II A—6)—AUTHORITY TO SELL—PURCHASE BY AGENT—ACCOUNTING.

An agent's authority to sell does not give him the right to purchase; if he withholds from the principal an offer from a third person, in order to purchase at a lower price, he is bound to account to the principal for the difference between the amount he had paid, and the amount he had realized on a resale.

2. GUARANTY (§ I—2)—BY AGENT TO PRINCIPAL—CONSIDERATION.

An agent's guaranty for the payment of rent by a tenant to whom he leased the property contrary to the principal's instruction, that the rent be payable in advance, which guaranty was not the inducing cause for the principal's acceptance of the tenancy, is without consideration and the agent is not liable for rent in default.

ACTION for an account, between principal and agent, of certain moneys claimed to be due the principal by the agent.

R. B. Hanson, for defendant; *P. J. Hughes*, for plaintiff.

WHITE, J.:—While the plaintiff seeks, in this suit, for an accounting by defendant, his claim arises in respect of what are substantially two distinct causes of action.

1. He claims that defendant, as his agent, leased to a tenant, named Randall, the plaintiff's farm near Oromocto, for a period of 3 years, for a yearly rental of $70, payable semi-annually, it being agreed between the plaintiff and defendant that the defendant would guarantee payment of $50 yearly of said rent, and should retain the remaining $20 of the annual rental, after payment of taxes, as remuneration for his services in the matter. The plaintiff claims that there is $50 due to him and unpaid of the last year's rent under that agreement.

2. The plaintiff claims that the defendant was employed by him as his agent to sell certain timber growing on said farm, and that by wrongfully misrepresenting the true value of said timber, and by concealing offers he had had for the same, the defendant induced the plaintiff to sell the lumber to him in the summer of 1909 for $200, a price very much below the real value of the timber, as the defendant well knew. The plaintiff avers that the defendant, the following summer, that is to say in 1910, sold the lumber for $500, and asks to be paid this sum less the $200 already received, and for damages.

The defendant denies specifically all the allegations in the statement of claim, and pleads payment. As to the sale of timber, the defendant pleads that he purchased it for $200 at the plaintiff's request, and that the plaintiff received and accepted the said sum in full satisfaction. This last defence is, of course, only good when coupled with a denial of the misrepresentations and concealment charged, or, with an averment that plaintiff was aware of such misrepresentation and concealment when he accepted the $200.

I will first deal with the claim for rent. It appears that the plaintiff purchased the farm in question, together with some stock thereon, about 1904, paying therefor $3,700, a price which both parties conceded to have been very excessive. After residing on the farm for a couple of seasons the plaintiff leased it, and the

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stock thereon, to a man named Maxwell, and went to the United States where he has ever since continued to reside. Later, he employed the defendant to sell at auction the stock left upon the farm, and shortly after engaged the defendant as his agent to look after the property and rent the same. There is some dispute, which I do not think very material, as to whether the defendant applied to the plaintiff to be appointed his agent, or whether the request came from the plaintiff. The farm was rented from May 9, 1907, for one year to a man named George P. Mills, who owned land adjoining, for a rental of $75 paid in advance. Upon the expiration of Mills' tenancy on May 9, 1908, the defendant leased the farm to one Randall for 3 years at an annual rent of $70, payable half-yearly. From the letters in evidence, which do not constitute the complete series which passed between the parties, as some are lost or destroyed, it would seem that the plaintiff wrote the defendant, complaining of this rental to Randall, without payment of rent in advance, as being contrary to the plaintiff's instructions; for, by a letter of the defendant, dated August, 1908, the defendant says:—

I write you to say that I do not agree with you in saying that a good tenant simply consists in paying the rent on a farm in advance and the doing just as he pleases with the farm and buildings, such as was done last year, making a ram pasture about the house and taking no care of anything, growing oats on every piece of land that would produce them and making the land so I could not in 3 years rent it at all. I could have got the rent from the same man in advance again, but, sir, I have a reputation that I don't intend to have destroyed by renting your farm in a mean, contemptible manner. The man I now have on the farm is an honest person; has kept all winter 1 or 2 horses and 5 head of cattle and buying fertilizer to put on the farm and keep the place looking as though it had some friends, and will without doubt pay the rent half-yearly, and if he failed I would consider myself personally liable since I am doing the business. If you are in straits for the money I will advance it. I most positively state that I have written you the true statement as regards the condition the tenant stands in.

In a letter dated June 7, 1909, the defendant says:—

Enclosed please find a cheque for $50, being rent due you for last year on farm at Burton. The tenant is keeping the place in good condition so that if you get a customer to buy it will show to fair advantage. While the rent has been a long time reaching you, this, I can assure you, you will never lose a dollar of it while I manage the business, for I certainly would expect to pay up in case the tenant failed so to do.

These letters, I think, would have sustained the plaintiff's contention that the defendant guaranteed payment of the rent, or rather of the $50 thereof annually, which it is conceded is all

the plaintiff was to receive, had it appeared that there was any consideration for such guarantee. It would seem that the defendant, in leasing to Randall without receiving rent in advance, was acting contrary to his instructions; and in such case, had it been proved that the guarantee was given to induce the plaintiff to accept the tenancy thus created, and that the plaintiff had accepted the same in consequence of this guarantee, that would have formed a sufficient consideration. But the evidence does not, I think, establish, either directly or by necessary inference, that such was the consideration, or that there was any consideration for the guarantee.

I therefore find against the plaintiff upon this part of his claim.

With reference to the second branch of the plaintiff's claim, the facts are as follows: Some time in the spring of 1907, the plaintiff wrote to the defendant that he wished to sell the lumber on his farm. On cross-examination of the defendant the following occurs:—"Q. You agreed to undertake to sell the lumber? A. Yes. Q. And to get the best price you could for Mr. Lunt? A. Yes."

In a letter from defendant to plaintiff, dated May 10, 1907, the defendant wrote:—

> You had better send me the plan of the farm so I can look over the timber part. I have been over but think it would be the proper thing to have the plan before I can complete the look over.

From the testimony of Ashley Hatch, whose evidence I believe, it appears that this witness cruised the property in 1907 with a view to buying the lumber. Asked as to his estimate of the quantity of logs on the lot, he said, "I thought about 30 to 35 would make myself safe of what I call merchantable lumber." He explained that by "merchantable lumber" he meant 9 to 12 inches at the top. He says this would consist of fir, spruce and pine—more pine than anything else. He states that besides this there were undersized logs and boom poles. He estimated the number of these boom poles at 2,500, and says the majority of them were fir, though "there was some bunches of fine spruce."

While referring to this evidence of Mr. Hatch, I may as well here mention testimony given by him upon another point, inasmuch as the plaintiff appeared to lay some stress upon it. The witness stated, that after he had cruised the Lunt lumber, he

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asked the defendant for the plaintiff's address; that the defendant replied that any business he had to do with Mr. Lunt would have to be done through him, Mr. Perley, as Lunt's agent, and refused to give the plaintiff's address. Mr. Hatch says he can't be sure whether or not he made the defendant any offer for the lumber, but thinks he did not. He does not, explicitly, state that he informed Mr. Perley of his purpose in seeking the plaintiff's address, so that it is possible the defendant did not understand he wished to buy the lumber.

It appears that in the latter part of June, or early in July, 1907, the defendant took J. D. Bridges to cruise the lumber as a prospective, or possible, purchaser. Bridges, who was called as a witness for the defendant, stated, that he made no estimate as to the total quantity of saw logs and battens, because he could see there was not enough to keep a team employed a winter, and, therefore, not enough for him to bother with. He says, that for this reason he made no offer, and would not have given $100. Asked as to the boom poles, he said there might possibly be 2,000, about as many spruce as fir, although he did not take particular notice.

It further appears that Mills, the then tenant of the farm, accompanied the defendant and Bridges on the cruise of the lumber, and that, in Bridges' hearing, offered the defendant 4 cents apiece for the boom poles. This offer the defendant rejected, assigning as his reason for so doing, that he would sell the whole standing lumber in one lot.

In a letter, dated July 14, 1907, from the defendant to the plaintiff, is the following:—

I have been over and looked at the green wood on your farm and find that it is wooded chiefly with fir, a wood that does not improve like spruce or pine, and would say that it would be just as well to sell as to think of keeping since it does not stand age. It blows down and gets very rotten when not cut of small dimensions. I am quite sure that I could make good sale for you if you thought proper to so direct. Could sell by lump sum or by the thousand feet board measure. If sold by lump sum the money could be paid in advance of cut.

The defendant testified that in thus writing he was referring to the cruise made in company with Mr. Bridges.

Under date of October 8, 1907, the defendant wrote among other things as follows:—

After looking over your lumber land I would think that it should be worth, say, $150. Have been offered $125 for it. There is very little of what we call

lumber on it, and the fir trees now on it will not be much better since they do not enlarge, and keep going down. The next owner has cut wood away out to his rear and the whole place is liable to be burned over, and if that took place your lumber would not amount to anything. Write me stating the amount you ask and I will see if I can make a sale for you.

In the letter of August, 1908, already referred to, the defendant writes, "I have not disposed of the lumber as yet. Lumber has gone off a bit and I will not sell under your figures for sure." From this, it would seem that the plaintiff had fixed a minimum selling price, but there is no letter in evidence showing what such price was, save possibly, that in a letter from the plaintiff to the defendant, dated July 2, 1909, and which I will quote later, the defendant writes that Mr. Perley, in his letters, had mentioned $225 as a price for the lumber.

R. B. Smith gave evidence as defendant's last witness. From his testimony, it appears that, in the summer of 1908, he built a saw-mill at Oromocto, having previously carried on a lumber milling business at Blissville. He says that in the spring, or summer, of 1908, he cruised the lumber in question in company with Mr. Perley. This, he says, he did because Mr. Perley had asked him if he did not want to buy. The estimate he formed upon the cruise was, that there would be about fifty thousand merchantable lumber, which he valued at $3 per thousand stumpage, and a quantity of boom poles, the number of which he did not estimate closely, as he did not use boom poles in his business, and did not saw laths from the round. He says, that as nearly as he can recollect, he valued the boom poles at $50 in an offer of $200 which, he states, he made to the defendant at the conclusion of their cruise, for all the lumber on the land. In that offer he did not, he says, value at anything timber which would neither saw into lumber nor make boom poles. The witness stated that Mr. Perley refused his offer, and made no counter-offer, although he promised to see Mr. Smith again before he sold. The defendant admits, that when he refused Smith's offer he hoped, by doing so, to get a somewhat better price from him later; although he admits likewise, that he did not, at the time, make any counter-offer, or proposal, as to the price at which he would sell.

I confess it strikes me as somewhat singular that the defendant should have made no such counter proposal either at the time or later, particularly in view of the fact that, as appears by the defendant's August letter referred to, the plaintiff had given him

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a selling price; and especially does this seem strange, in view of the defendant's ideas as to bargaining, as disclosed by the explanation which he gives as to why, when later he was selling the lumber on his own account, he, at the outset of the negotiations, demanded a considerably larger price than he expected to get and was willing to take. This explanation was, that he was then dealing with a mill-owner and the price he at first demanded was well enough "to start with."

In a letter to the defendant, dated June 20, 1909, the plaintiff, among other things, writes as follows:—

Is there any possibility of raising $150 on the sale of lower end of marsh, and, say, $225 on timber or the lumber I should say on the place so long as appearance of property looking each side of you as you drive up to the house is not spoiled? Would you care to purchase timber yourself at price I ask, and look over lower end of marsh proposition and consider that. I want to raise $375 for a business proposition I am in and don't want to borrow money when I have goods of my own that ought to produce figure named.

By letter dated June 26, 1909, the defendant replied:—

Mr. W. P. LUNT,

Your letter received and contents noted. I will visit the farm to see what I would recommend you to do about offering part of the marsh for sale and in the meantime feel the parties living nearer as to their buying some of it. I now feel you would have plenty left so farm would not be crippled for the want of marsh hay. I will send you a cheque for $200.00 on the lumber the farm contains that being the best offer I have had in the past for it, if you wish, and will let you know about my visit to the place as soon as I can attend to it.

(Sgd.) GEORGE A. PERLEY.

To this letter the plaintiff sent the following reply:—

Mr. G. A. PERLEY,

Your letter dated June 26 to hand and accept your offer of $200 for lumber. Do your best in regard to piece of marsh mentioned in previous letters. The price you mentioned in your previous letters touching on the sale of lumber on place was $225, but maybe lumber is quoted at lower figures at present time. Trusting to hear from you later in regard to your arrangement and price of marsh land, that is if any terms are agreed upon with folks around the place later on. As regards cheque for lumber you can mail that on at your earliest. (Sgd.) WILLIAM P. LUNT.

I do not see that it would throw any light upon the questions at issue here to pursue the subsequent correspondence between the parties.

F. B. Carr, was a witness for the plaintiff. It appears from his evidence that in the summer of 1910 he moved to Oromocto his portable rotary and lath mill, which he had previously been operating some 12 miles or so up river. In July of that year he, in company with the defendant, cruised the lumber in question

with a view to purchasing the same. He says, that when they were done cruising, he asked the defendant, "the value that he put upon the lumber," and that the defendant stated, he wanted $650 for it. Later, the witness bought the lumber from the defendant for $500, by agreement which then, or soon after, was embodied in writing bearing date November 15, 1910. The witness stated that he did not try to beat the price down below $500, but named that sum as the price he would give in response to the defendant's request that he would make an offer. He further said, that while he had not yet sawn all the lumber, and could not, without his accounts, give figures, he had not, since his purchase, regretted his bargain.

The defendant testified that the price he at first asked Mr. Carr was $600, and not $650; that, when he bought the lumber from the plaintiff, he had no idea he could sell it for more than a small advance on what he had paid; that when he bought he expected to sell to Smith, and that until Carr made his offer, he had never, since he bought, tried to sell to anyone. He admitted that, although he helped Smith buy a lot of lumber by driving him about the country and introducing him to parties who had lumber to sell, he had never, after getting Smith's offer of $200, approached him again on the subject of sale of the Lunt lumber until after Carr had offered $500 for it, when he informed Smith of that offer before closing with Carr. He stated that from the time he himself bought, he had not received any offers except the two referred to in his letters, namely, $125 from Cogswell, and $200 from Smith; and that, besides these two men, Bridges was the only other man to whom he had tried to make a sale for the plaintiff. He admitted that until he wrote the letter of June 26, 1909, offering to buy at $200, he had never informed the plaintiff of Smith's offer, and says that his statement in that letter, that $200 was "the best offer I have had in the past for it," referred to Smith's offer. He never advertised the lumber for sale, assigning as a reason for this, that he was not asked to do so, although in his letter of July 10, 1909, which I have quoted, he proposed to see if by advertising he could not get a better offer than the $150 one he had received for the marsh land he was instructed to sell. Perhaps I should add that he ultimately sold this piece of marsh land to Robert B. Smith for $150, without, it would seem, having first carried out his idea of advertising for a better offer.

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In stating the evidence thus far I have, except when otherwise expressly indicated, set forth such facts only as are either admitted by the defendant, appear by correspondence, or are established beyond question. If I were required to decide this case upon this evidence alone, I confess I would have found some difficulty in doing so. On the one hand, there is the fact that the proposal to sell to the defendant came from the plaintiff. Moreover, I think it quite evident that the plaintiff, in selling to the defendant, must have well understood that the latter would not have bought unless he anticipated making some profit on the transaction. On the other hand, the law is well settled that an agent for sale, such as was the defendant, being in a position of trust, cannot himself purchase from his principal without first communicating to his employer all facts within his knowledge which he should reasonably expect would influence his principal, if aware of them, in either deciding not to sell to the agent, or in determining the price at which he would sell.

Here, if the plaintiff had been aware—I will not say of the real character and quantity of the lumber on his land, because it is possible the defendant himself may have been mistaken as to that—but if the plaintiff had been aware of the limited efforts put forward by the defendant during the term of his agency to find a purchaser; if, above all, he had known of Smith's offer and the circumstances under which that offer was made, including the promise by the defendant that he would not sell without first giving Smith another chance to buy, I have little doubt that the plaintiff would not have sold to the defendant as he did without at least having first ascertained whether Smith would give him a better offer. But I do not have to decide the issue here entirely upon the evidence to which I have referred.

Martin Cogswell was examined as a witness for the plaintiff. He stated that in the summer of 1907 he was at work for the defendant repairing a barn when the following conversation took place between him and the defendant.

Q. Who mentioned them first? A. Mr. Perley asked me if I knew anything of them. Q. Of what? A. Of those logs in the Lunt property. Q. And what did you say? A. I said I did. Q. And what was further said? A. He asked me if I would like to purchase the stumpage—the logs. Q. What else was said? A. Well, I said yes, if we could agree on the price I would like to have them. Mr. Perley asked me what I thought they was worth. Q. What did you say? A. I told him about $350 I could afford to give for them

if I was going to cut them. Hanson: He asked you what they were worth? A. Yes sir. Hughes: And you said about $350. You could afford to give for them if you were going to cut them? A. Just exactly. He said, very well, young man, he said, that ain't too bad. I will give you an option onto these logs, and we will talk the matter over later. I'll see you again. Q. Did you ever make any further deal with him concerning them? A. Did not.

The defendant, while admitting that Cogswell was working for him on his barn in the summer of 1907, denies that he had any such conversation as that which the witness alleges. He says that at Cogswell's own place, whither he had gone to collect money, Cogswell asked him to sell the Lunt lumber and offered him $125 for it; that this was the only offer Cogswell ever made to him for the lumber and that it was to this offer he referred in his letter of October 8, 1907.

Had I been required to decide this case entirely upon the uncorroborated testimony of Cogswell, contradicted as it is by the defendant, I would have decided it adversely to the plaintiff, because in that event I would have felt that the plaintiff had failed to establish misrepresentation or concealment by the defendant with such certainty as would require me to set aside the sale. But there is the further evidence of Mills, the person already referred to as having been at one time tenant of the Lunt property.

This witness states, that some time after he had accompanied Bridges and the defendant on their cruise of the plaintiff's lumber, he himself cruised the property with a view to buying the lumber. He says, that later, during the summer of 1907, he met the defendant, and made him an offer of $300 cash for all the lumber on the place. He states that the defendant replied: "I have a better offer than that." Witness asked, "How much?" to which Perley answered, "$350 and he would have given me four." The witness then asked who the man was; to which the defendant replied, "Martin Cogswell." This witness, Mills, impressed me favorably at the time he was giving his evidence, and upon reading the stenographer's report of his testimony, together with all the other evidence in the case, and I may say I have read all of the evidence once, and most of it several times—I cannot but accept the testimony of Mills upon this matter as true.

I therefore find that the defendant must pay to the plaintiff the sum of $300, that is to say the sum of $500, which he received from the sale of the lumber to Carr, less the $200 already paid to

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the plaintiff by the defendant for the lumber, and I do so adjudge and order.

The plaintiff asks for damages. The only damages which I could award him under the circumstances would be damages in the nature of interest. Had the defendant made the sale to Carr, as the plaintiff's agent he would have been entitled to his commission for selling. This the plaintiff does not now have to pay. Under all the circumstances I will not award any damages.

As the plaintiff has failed in establishing a substantial part of his claim, I do not think it just that the defendant should have to pay all the costs of this action. I, therefore, adjudge and order that the defendant do pay half the plaintiff's taxed costs of suit, exclusive of witness fees, and that in addition he pay all plaintiff's witness fees to be taxed to the plaintiff.

Judgment for plaintiff.

ONT.

D. C.

MINISTER OF INLAND REVENUE v. NAIRN.

Division Court, Essex Co., Ontario, Smith, Co.J. January 31, 1917.

1. INTERNAL REVENUE (§ I—3)—SALES TO "CONSUMERS"—WAR REVENUE ACT, 1915.

A sale by retail to a revenue inspector buying for the purpose of finding whether or not the seller was complying with the requirements of the War Revenue Act, 1915, Can., in affixing revenue stamps on goods sold, is a sale "to a consumer" within the provisions of that Act.

[*Ethier* v. *Minister of Inland Revenue*, 27 Can. Cr. Cas. 12, 32 D.L.R. 320, followed.]

2. MASTER AND SERVANT (§ III A—289)—MASTER'S LIABILITY UNDER PENAL LAWS FOR SERVANT'S DEFAULT.

The Special War Revenue Act, 1915, Can., makes the employer liable for the penalties which it provides in respect of failure of his employee in the course of his employment to affix revenue stamps on the retail sale of certain drug preparations, although general directions had been given by the employer to the employee not to sell such goods without affixing and cancelling the stamp.

[*Ethier* v. *Minister of Inland Revenue*, 27 Can. Cr. Cas. 12, 32 D.L.R. 320, approved; and see Annotation on "Master's Liability under Penal Laws," 32 D.L.R. 233.]

Statement.

APPEAL by the Minister from the decision of the Police Magistrate for the City of Windsor, pronounced on the 25th November, 1916, dismissing the charge of the appellant against the respondent of a violation of sec. 15 of the Special War Revenue Act, 1915, 5 Geo. V. ch. 8 (D.).

Section 15 provides: "Every person selling to a consumer any bottle or package containing (*a*) a proprietary or patent medicine . . . shall, at or before the time of sale, affix to every such bottle or package an adhesive stamp of the requisite value as mentioned in the schedule to this Part."

Gerald McHugh, for appellant.

T. Mercer Morton, for George Nairn, respondent.

SMITH, Jun. Co.J., in a written judgment, said that the respondent carried on business as a grocer in the city of Windsor, and on the 13th October, 1916, Herman J. Dager, an inspector employed by the Department of Inland Revenue, purchased from a clerk in the employ of the respondent a package of health salts, being a package containing a proprietary or patent medicine within the meaning of the Special War Revenue Act, 1915. The clerk making the sale to the inspector did not, either before or at the time of the sale, affix a stamp, as required by sec. 15.

The learned magistrate dismissed the charge against the respondent on the ground that the inspector who made the purchase of the article in question was not a "consumer" within the meaning of sec. 14 of the Act.

Section 14 provides: "In this section and in the remaining sections of this Part, unless the context otherwise requires (*i*) 'consumer' means a person who uses (*a*) a proprietary or patent medicine . . . either in serving his own wants or in producing therefrom any other article of value; and 'selling to a consumer' includes selling by retail."

Following the decision of Mr. Justice Cross in the case of *Ethier* v. *Minister of Inland Revenue*, 27 Can. Cr. Cas. 12, 32 D.L.R. 320, the learned Judge held that the words, "'selling to a consumer' includes selling by retail," in sec. 14 of the Act, would include the sale in question to the inspector; and, therefore, that the sale was one which required the affixing of a stamp at or before the time of the sale. On this ground the appeal succeeds.

It was argued by counsel for the respondent that he should not be liable for the act of his servant, in view of the fact that instructions were given to the clerk to affix stamps on all articles of this kind sold by him. But, following the *Ethier* case, the clerk omitted to affix the stamp while acting within the scope of his employment in selling the article, and the employer, the respondent, is liable.

The appeal should be allowed, but without costs, and the respondent should pay to the appellant the sum of $50 and such costs as were incurred on the trial before the magistrate.

Appeal allowed.

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S. C.

HAMILTON v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. February 6, 1917.

ADVERSE POSSESSION (§ II—60)—NULLUM TEMPUS ACT—INTERRUPTION—JUDGMENT—ACKNOWLEDGMENT.

A default judgment obtained in an ejectment action by the Crown, which was never enforced, or an acknowledgment of title in writing, will not interrupt the adverse possession of Crown lands or prevent it from ripening into a title under the Nullum Tempus Act. A statute (Ontario Limitations Act, 1902) making an acknowledgment an interruption of possession of Crown lands is not retroactive.

Statement.

APPEAL from the judgment of the Exchequer Court of Canada (16 Can. Ex. 67) in favour of the Crown on information of intrusion. Reversed.

The information of His Majesty the King was filed in the Exchequer Court for the purpose of recovering possession of a piece of land situated at the south-east corner of Rideau St. and Mosgrove St. in the City of Ottawa. The land was a portion of the ordnance lands of the City of Ottawa, the title being vested in Her late Majesty's Officers of Ordnance and was partly occupied at one time by what was known as the By-Wash or Waste-Weir Reserve extending from the Rideau Canal Basin to Rideau St. through which the overflow or surplus waters of the canal found their way from the canal basin as it existed many years ago. The appellants' grandparents went into possession of this land in the year 1832 without having acquired a title from the officers of Her Majesty's Ordnance. In the month of February, 1890, an information was filed in the Exchequer Court of Canada against the parties then in possession thereof, including the parents of the defendants in the present action. No defence was filed and judgment was obtained by default, and entered for possession of the lands and premises in the information mentioned, and upon that judgment a writ of possession was issued to the sheriff of the County of Carleton and placed in his hands. Subsequently an order was obtained for the issue of a new writ of possession which writ was duly issued on January 16, 1902, and placed in the hands of the sheriff.

The said defendants were not evicted under the judgment and writs of possession above mentioned, but continued in possession of the land, and as they had died it was considered advisable by the Crown to exhibit a new information against the defendants in this action, who claimed, and were in occupation of the land.

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They entered a defence in which they denied the title of the Crown and further pleaded that the title to the lands was vested in them inasmuch as they and their parents had been in uninterrupted, actual, visible and continuous possession and enjoyment of the lands and premises since the year 1832, and were still in full possession and enjoyment thereof. To this defence the respondent replied setting up the former proceedings and the judgment which was obtained against the persons under whom the appellants claim, and further pleaded that the defendants, either as defendants in the present action or as claiming under the defendants in the former action, were estopped from denying the Crown's title.

The action came on for trial before Cassels, J., in the Exchequer Court on May 11, 1915. In support of the information the Crown placed in evidence all the proceedings in the former action of intrusion, and also produced a letter written by Susan Cousens and Sarah Cousens to the then Minister of Public Works. The former of these persons, Susan Cousens, was afterwards Susan Hamilton and mother of the appellants in this action, and one of the defendants in the former action. That letter is as follows:—

Ottawa City, 17th October, 1871.

Sir,—We the undersigned (being sisters) beg to inform you that having understood that the small property or lot situated on the southern side of Rideau street and adjoining the by-wash (leading from the Canal) on the west side of it, on which there is a wooden building, has been applied for by the St. George's Society for the purpose of erecting a hall thereon. We would hope that the same might not be sold, as we consider our right to it cannot be alienated from the length of time said lot has been possessed by our family, namely, 39 years. Our father the late James Cousens in his lifetime settled upon this lot in 1832 with permission of the Ordnance Department, our mother outlived our father and resided upon this property for a number of years and at her decease bequeathed it to us, and we have continued upon it ever since. Our father's name was entered upon the books of the department at the time of his settling down here which was then called By-town, these facts are known to many of the citizens.

The corporation taxes levied from time to time have been duly paid all along to this date, and we most urgently and respectfully solicit that the aforesaid lot be sold to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same.

Hon. H. L. Langevin, C.B.

SUSAN COUSENS.
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The judgment delivered by Cassels, J., held that His Majesty was entitled to recovery of possession of the said lands.

Fripp, K.C., for appellants; *Hogg*, K.C., for respondent.

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Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The Att'y-Gen'l for the Dominion of Canada brought this suit by information claiming possession of certain lands and premises therein described and which now are, and for the past 84 years have been, in the possession of the defendants or their predecessors in title.

The matter comes before the Courts in a rather curious fashion because in the year 1890 the Att'y-Gen'l brought a similar suit to recover possession of those, amongst other lands, and obtained judgment in default of pleading. Possession, however, was never had under this judgment and no writ of possession has been issued or applied for in the name of His present Majesty. The defendants then interested in the lands now in question are dead, and the Att'y-Gen'l has thought it necessary to take these proceedings in which he must prove the title of the Crown in right of the Dominion. The defendants have been in possession for more than 20 years since the judgment of 1890.

Whether the Crown could have relied simply on the judgment by default of 1890 as establishing the title of the Crown is a question which I think we are not called on to decide, because in the present proceedings counsel for the Crown set up a title w'ich he stated at the opening of the trial, as follows:—

HIS LORDSHIP:—How did the Crown get title to it?

Mr. Hogg:—The Crown got title under the original statutes. The canal was constructed under the statute of 8 Geo. IV. and by 7 Viet. ch. 11. That statute vested the property in the principal officers of Her Majesty's Ordnance in Great Britain: that the Rideau Canal and all its appurtenances became vested in the Principal Officers of Ordnance, and remained in that way until Confederation, and became part of the property of the Dominion of Canada under the Confederation Act. That is the short history of the title, so far as the Crown is concerned.

This is clearly erroneous. If the canal and all its appurtenances remained vested in the Principal Officers of Ordnance until Confederation, there is nothing in the B.N.A. Act, 1867, which would have made it the property of the Dominion of Canada.

The B.N.A. Act by sec. 108 provides that "the Public Works and Property of each Province enumerated in the third schedule to this Act shall be the property of Canada;" the third schedule is headed "Provincial Public Works and Property to be the Property of Canada;" the first item in this schedule is "Canals with Lands and Water Power connected therewith" and the ninth is "Property transferred by the Imperial Government and known as Ordnance Property."

Now, there is no doubt that the Rideau Canal was Ordnance Property, and, as such, it appears to this day in the schedule to the Ordnance and Admiralty Lands Act (R.S.C. 1906, ch. 58). If, therefore, it passed to the Dominion under the B.N.A. Act, 1867, it was as Ordnance Property. The legal advisors of the Crown have evidently supposed that it passed like ordinary canals the Property of the Province under the first enumeration in the third schedule of "Canals with Land and Water Power connected therewith" This is the only item of the third schedule which is printed in the extract from the B.N.A. Act, 1867, given in the printed "Schedule of Statutes and Parts of Statutes to be referred to on argument of this Appeal."

But whether the canal passed to the Dominion under the first or the ninth item in the third schedule it would be, of course, an essential link in the title to prove that it was at Confederation the property of the Province of Canada, and not only has no attempt been made to shew this, but counsel, as appears from his statement above quoted, has set up that it then remained vested in the Principal Officers of Ordnance.

It does not follow, of course, that because the title which the Crown has set up in this suit is bad it has not really a good title. I am certainly aware that there are a number of statutes dealing with the Rideau Canal but I do not think it is incumbent on the court to search amongst pre-Confederation statutes and other evidences of title for the purpose of seeing if a good title can be made out. Moreover, there may be points of difficulty and doubt arising on these statutes and documents. It would, indeed, seem absurd to suppose that the Court should have to deduce the title and decide upon its validity independently of either of the parties to the suit.

The statute of the Province of Canada, 19 Vict. ch. 45, can scarcely be looked upon as a model of clearness or accuracy. If it is to be held to establish that the Ordnance properties of which it purports to dispose had been transferred to the province, it would seem that this could only be by implication; there is no recital to that effect as we find in the Dominion statute, 40 Vict. ch. 8, whereby certain other Ordnance property transferred directly to the Dominion was disposed of. In the provincial statute, on the contrary, there is only a recital of the intention

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that they should be transferred whilst the second schedule to the Act, which alone can be material here, is headed "Military Properties in Canada *proposed* to be transferred to the Provincial Government." The description in the schedule is, however, of the most meagre description; indeed it does not seem to deal with the canal at all. The schedule is in the following form:—

THE SECOND SCHEDULE.

Referred to in this Act being the Schedule of Military Properties in Canada proposed to be transferred to the Provincial Government.

Situation	Approximate Quantity of Land. A. R. P.	Description of Buildings or Military Works.
	(Amongst the Properties enumerated are)	
Rideau and Ottawa Canals	.....	City of Ottawa, Barracks. Blockhouses and Adjuncts of the Canals.

The canal, it will be seen, is only mentioned as giving the "situation" of the properties mentioned in the third column. Again are we to suppose that the lands on either side of the canal and round the basin and by-wash are to be considered "adjuncts of the canal"? Even if they are included in this expression may not the Province of Ontario have some claim to these lands?

I am, of course, giving no opinion on any of these points and merely mention them as possible difficulties arising on the title of the Crown; it is unnecessary to pursue their consideration further since I hold that it was for the respondent to shew title which has not been done. I think as I have already intimated that the respondent having set up in this suit a title which is defective cannot be heard now to say that the judgment given by default in 1890 establishes that the title of the Crown is a good one.

If the lands now claimed are Dominion property they are apparently subject to the Ordnance and Admiralty Lands Act, and this might be of importance to the defendants even if the judgment appealed from were upheld since the Act reserves special privileges to persons in actual occupation of such lands with the assent of the Crown. With this, however, we are not immediately concerned.

The Crown permitted the defendants or their predecessors in title to remain in undisturbed possession for 58 years before

taking action in 1890 and took no steps to enforce the judgment then obtained during the ensuing 24 years. During this long lapse of time all parties concerned have died. The form of government of the country has been repeatedly changed, and the then newly founded and insignificant By-town has become a great city, the capital of the Dominion of Canada. Under these circumstances, I think the Courts need not hesitate to require the strictest proof of a claim to oust the defendants. Failing this, I think substantial as well as legal justice will have been done by leaving them undisturbed in the possession which they have so long held.

This is a case in which we may recall what the Privy Council has said concerning the difference in the relation between the Crown and the subject in this and in older settled countries. Such long periods of time as those prescribed in the Nullum Tempus Act seem to consort more with the slowly altering conditions in the latter, than with those in a country which has witnessed such phenomenal changes as Canada during the past century. Without encroaching on the functions of the legislature we may endeavour to mitigate the hardships of a rigorous enforcement of rules, which change of time and place render oppressive.

Holding the view above stated, it is not necessary for me to deal with other points raised at the trial and dealt with in the judgment of the Judge of the Exchequer Court. The plaintiff not having proved title cannot recover judgment on the claim for possession of the lands. The appeal must be allowed and the action dismissed with costs.

Davies, J.

DAVIES, J.:—Several questions arose out of this appeal which, I confess, I have had some difficulty in solving.

A copy of a plan of a portion of the Rideau Canal, dated in 1847,

shewing the boundaries as marked on the ground of the land belonging to the Ordnance at Bytown (Ottawa) and the part of lot C, Concession C, in the Township of Nepean taken from N. Sparks,

signed by Michael McDermott, C.E. and P.L.S., and also by the Lieutenant-Colonel and a number of officers of the Royal Engineers was apparently received in evidence at the trial, though objections were taken to its reception. A witness proved it to be a copy of the original plan on file in the Department of the Interior,

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Ottawa, Ordnance Branch, and I do not doubt it was properly received.

If properly in evidence, it would place beyond doubt the fact that the lands in question were part of the 60 ft. around the basin and by-wash of the Rideau Canal.

The Ordnance stones X. Y. marked O. B. S. on the plan shew the by-wash to have extended to Rideau St. There is no evidence whatever as to the date when these ordnance boundary stones were placed but they must have been so placed before the date of McDermott's plan, in 1847, and most probably before 1846, the date of the statute making clear what part of the canal and its adjuncts were retained by the Crown.

But apart from that plan I agree with the trial Judge that the oral evidence given at the trial with respect to the locus and the by-wash of the canal in conjunction with the several written acknowledgments of title made by the defendants and their predecessors in title sufficiently establish the title in the Crown to the locus in question.

After quoting part of the evidence given by John Little, a witness in his 84th year, the Judge concludes, and I agree with him, that "the by-wash" in question is "no doubt the creek which was referred to by this witness and the cottage in question would be erected on the 60 ft."

The Judge, after referring to and quoting the Ordnance Vesting Act of 1843, 7 Vict. ch. 11, providing for the restoration to the parties from whom they were taken of the lands taken for the Rideau Canal and afterwards found not to be required and the subsequent statute of 1846, ch. 42, 9 Vict., making clear what was intended by the previous Act of 1843, namely, that its provisions should be construed to apply to all the lands at By-town set out and taken from Nicholas Sparks, except

(1) So much thereof as was actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge and of the Basin and By-wash, as they stood at the passing of the Ordnance Vesting Act; excepting also:

(3) A tract of 60 feet around the said Basin and By-wash.

concludes

That the Basin and By-wash and the 200 ft. along the canal and the 60 ft. along the By-wash were retained by the Crown.

I do not think there can be any reasonable doubt of the correctness of this conclusion.

Once that conclusion of fact is reached there cannot remain any doubt as to the title of the Crown. The statute, 19 Vict. ch. 45, of the late Province of Canada, passed in 1856, recites amongst other facts that

the Ordnance lands of this province consist at the time of the passing of this Act of the several lands, estates and property comprised in the two schedules to this Act,

and that Her Majesty had signified Her gracious intention (*inter alia*)

that all such of the lands and other real property comprised in the said part recited Act (7 Vict.) as are comprised in the second schedule to this Act annexed, and all title, estate and interest therein respectively, should be transferred from the said Principal Officers and *become re-invested in the Crown, for the public uses of this Province.*

The enacting clause of this Act carries out specifically the expressed intention of the recital and vests all the lands, etc., mentioned in the second schedule absolutely in Her Majesty for the benefit, uses and purposes of the province.

Among these lands so transferred from the principal officers of Her Majesty's Ordnance and vested in the Crown for the use of the province was the Rideau and Ottawa Canals and "adjuncts of the Canals."

I cannot doubt, therefore, that after the passage of this Act the by-wash, so called, of the Canal basin extending as far as Rideau St. and the reservation of 60 ft. on each side of it being adjuncts of the canal were vested in the Crown for the use of the Province of Canada and were transferred by the B.N.A. Act to the Dominion.

The Crown, therefore, may, under the evidence given and these statutes, be said to have proved title to the land sued for.

But the question at once arises out of the defence of over 60 years continuous possession set up by the defendants in themselves and their predecessors in title.

The fact of such continuous possession seems to have been sufficiently proved and would entitle the defendants to judgment, unless the acknowledgments of title made by them in their letters to the Hon. Hector Langevin, Minister of Public Works in 1871, the Hon. Alexander MacKenzie, Premier and Minister of Public Works in 1874 and to Sir John Macdonald, Premier, in 1890, together with the judgment by default obtained by the government on a writ of intrusion brought by the Crown for the recovery

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of these lands in 1890, together, or any one or more of them, operated as an interruption of such possession.

I confess that upon this question I have had many doubts, not indeed as to the meaning and legal effect of these letters as an acknowledgment of title in the Crown, because I have no doubt whatever that they did so operate, but on the question whether such an acknowledgment is sufficient under the Nullum Tempus Act to interrupt a possession which the evidence shews was not as a fact interrupted.

The actual possession of the defendants and their predecessor in title was never interrupted. They remained in continuous possession for over the required sixty years and were never ousted nor disturbed by the Crown.

If it can be held that the provisions of the Real Property Limitations Act relating to acknowledgments of title and the effect of such acknowledgments extended to the Crown, and that the Crown could avail itself of such acknowledgments as interrupting defendants' possession of the lands, then the case for the Crown is made out, in my opinion, and the appeal should be dismissed.

I cannot, however, reach that conclusion. The Nullum Tempus Act does not contain any reference to acknowledgments of title as staying the running of the periods of prescription, but it does provide that an interruption by entry and receipt of the rents and profits by the Crown shall stay the running of such period. It would seem a bold step for the Court to add yet another fact or incident to those the Nullum Tempus statute expressly mentions as interrupting possession against the Crown. After a good deal of hesitation I am unable to say that it should do so; and I agree with the argument that this section of the Real Property Limitations Act (now sec. 14 R.S.O. 1914 ch. 75) should not be construed as including adverse possession of *Crown lands* because that Act had no application to such possession, which is specifically dealt with by the Nullum Tempus Act.

In the year 1902 the section of the Real Property Limitations Act providing for the effect of an acknowledgment in writing of the title of the person entitled to any land or rent by the person in possession was for the first time declared applicable to "rights of entry, distress or action asserted by or on behalf of His Majesty."

The letters of the defendants on which the Crown relies as

such acknowledgment, were written years before that statute of 1902 (2 Edw. VII. ch. 1, sec. 18) was passed; and at the time it was passed the prescriptive period of 60 years of uninterrupted and continuous possession by the defendants and their predecessors in title had elapsed.

The statutory title of the defendants under the Nullum Tempus Act was therefore complete years before the legislation was passed in 1902, unless, of course, it is held that the provisions of the Real Property Limitations Act relating to acknowledgments before they were expressly made applicable to rights of entry or action by the Crown can be invoked by the Crown. As I have already said, I incline to the opinion they cannot be so invoked. Nor can I construe the legislation of 1902 as having a retrospective operation upon possession which had already ripened into and become a statutory title. Whatever may be said in favour of a retrospective operation being given to the legislation of 1902 with respect to the possession of land which had not ripened into a complete statutory title in the possessors or claimants, I cannot yield to the suggestion that it can have such a retrospective operation with respect to a possessory title which had so ripened.

It seems clear under the decided cases of *Re Alison*, 11 Ch. D. 284, and *Sanders* v. *Sanders*, 19 Ch.D. 382, that where a statutory title has once been acquired under the Statute of Limitations it cannot be defeated by any subsequent acknowledgment or even by any subsequent payments of rent unless these continue for such a period as creates a new statutory title.

The reasoning of the Judges in these two cases in appeal would indicate that the statutory title so gained was, as stated by Jessel, M.R., "a complete title which extinguished the other."

Assuming that to be so, then it would seem most unreasonable to give a retroactive effect to the statute of 1902 which would operate to destroy a complete statutory title gained years before, and resurrect an extinguished one. That certainly goes to destroy the argument that the statute is one relating to procedure only.

Then as to the effect of the recovery of the default judgment by the Crown before the prescriptive period had elapsed but notwithstanding which the defendants continued in possession and were not dispossessed I have also entertained some doubts.

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I cannot find any direct authority which gives a different effect to a judgment recovered by the Crown on a writ of intrusion from that recovered in an ordinary ejectment between subject and subject, or which indicates that the former had the effect of interrupting the defendants' possession while the latter admittedly has not. The best consideration I have been able to give the question leads me in the absence of authority to the conclusion that the mere obtaining of a judgment against the defendant on a writ of intrusion without further action dispossessing the defendant does not operate to interrupt the defendant's possession and that to do so there must be an actual dispossession under the judgment or an attornment or payment of rent by the party in possession.

For these reasons, I concur in allowing the appeal.

Idington, J.

IDINGTON, J.—The information of intrusion herein is answered by a general denial of all the facts alleged therein and of any title in the Crown or possession by it of any of the lands in question, and by an assertion of title in appellants and possession since the year 1832.

The respondent replies, amongst other things, that an information of intrusion was filed against a number of persons including predecessors in title of the appellants and judgment got by default for the possession of the lands in question and other lands in the year 1890.

The respondent put in evidence a certified copy of the proceedings in said case including the judgment for default of appearance awarding possession to the respondent.

The claim of the respondent is rested thereon and upon an alleged statutory title. His counsel, by way of proving the identity of the land in dispute with part of the whole included in said proceedings, called a surveyor who testified, according to certain plans, filed subject to objection, that the lands in question fell within the description therein, and in the information of intrusion, upon which the judgment for recovery of possession had been awarded.

There was no evidence adduced relative to the actual survey on the ground or to the authenticity of the said plans so filed, or that any of them were based upon or practically identical with, or in fact formed part of the evidence necessary to maintain the alleged statutory title (if any) of the respondent to the lands in

question. That statutory title depends upon statutes which can only operate and be properly made effective by the production or proof of the documents therein referred to and especially the plan as that

> of those (lands) marked and described as necessary for the said purposes on a certain plan lodged by the late Lt.-Colonel By, of the Royal Engineers, the officer then employed in superintending the construction of the said canal, in the Office of the Surveyor-General of the said late Province and signed by the said Lt.-Col. By, and now filed in the office of Her Majesty's Surveyor-General for this Province.

We have in the record a plan evidently made in 1847, after all the said legislation now relied upon, and after the settlement between one Nicholas Sparks and those acting for the Crown. We are asked to act upon this plan. But why? I am puzzled to understand, for the plan which the legislature proceeded upon was that of Lt.-Col. By, thus referred to.

There is nothing I can discover identifying this plan in 1847 with said plan certified by Lt.-Col. By, which assuredly should be taken as the guide determining what land respondent might claim herein. As already pointed out there is nothing in evidence identifying the work on the ground with that of Lt.-Col. By or his plan. The case was evidently launched by the officers of the Crown in reliance solely upon the force and effect to be given the said judgment, for everything else seems to have been ignored.

Even the acknowledgment upon which the trial Judge rests his judgment, was evidently considered of as little importance as I attach to it, for reasons to be assigned presently.

The counsel for the Crown at the trial, after presenting the certified copy of the judgment, introduced it and other material thus:—

> The only other evidence I have is the evidence that was taken on discovery. I do not know whether your Lordship has looked at that.
>
> *Mr. Hogg*:—There are one or two letters or petitions that are attached to this ancient fyle that I would put in, merely to shew the relations that were existing between the government and these people at that time.

The trial Judge found himself unable to attach the importance counsel for the Crown evidently had attached to the said judgment and the effect thereof.

He therefore accepted as an answer to the claim of continuous possession for 60 years, the alleged acknowledgment in writing (Oct. 17, 1871).

Even if the only statute invoked by the appellants had con-

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tained a provision excepting its application and operation in the case of such acknowledgments in writing as are given effect to by many statutes of limitation, I should much doubt the efficacy of this writing which clearly points to some agreement or grant conditionally binding the Crown, in honour at least, to give the ancestor of the signers a right to purchase at some price to be fixed, and which has never been fixed, and appeals to a record in the department at the time of "his settling down here" which I take it means, upon the lands in question.

I asked in the course of the argument if any inquiry or search had been made relative to said entry or record of the import thereof, and was answered by counsel on either side that no such search or inquiry had been made.

If respondent ever seriously intended to rely upon this or other letters as acknowledgments falling within any conceivable exception to the operation of the statute we should have been told in evidence what the official relation respectively was, of each of those to whom such letters were addressed, to the land in question so that thereby we might have been enabled to understand how either one of them could be held an agent of respondent to receive such letters of acknowledgment.

I should be loath to attach much (if any) importance to such a document without the fullest information at least on the part of the Crown relative to the import of what such claim as made therein implied, and how it could be treated as an acknowledgment taking away the rights acquired by the statute.

There are in the record two other letters from one of the same parties, and a descendant, and others, addressed respectively in 1874 and 1890 to the Premier of Canada for the time being, upon the question. Strange to say there does not appear according to the record to have been any reply made to any of these letters.

It is to me inconceivable that these several letters should go unanswered and if answered that there is no copy of record of reply thereto.

The only reason I can assign for the non-production of the replies, is that counsel did not think it conceivable at the trial that the Crown could properly rest its case upon either that I have quoted, or the others I refer to.

With the greatest respect for the trial Judge I am unable to give that effect which he has given to the letter above quoted.

I understand how easy it would be for him and those arguing, accustomed to the consideration of acknowledgments as a usual part of statutes of limitations, to overlook the fact that their utility in the way of answering any statute of limitation is dependent upon whether or not the statute of limitations in question has made any acknowledgment a bar to the operation of the statute or an exception therefrom.

The statute invoked in this case is the Nullum Tempus Act of 1769, 9 Geo. III. ch. 16, of which the first part of the first section thereof seems in itself complete, and reads as follows:—

Whereas an Act of Parliament was made and passed in the Twenty-first year of the Reign of King *James* the First, intituled, *An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever;* and thereby the Right and Title of the King, His Heirs and Successors, in and to all Manors, Lands, Tenements, Tythes, and Hereditaments (except Liberties and Franchises) were limited to Sixty years next before the Beginning of the said Session of Parliament; and other Provisions and Regulations were therein made, for securing to all His Majesty's Subjects the free and quiet enjoyment of all Manors, Lands, and Hereditaments, which they, or those under whom they claimed, respectively had held, or enjoyed, or whereof they had taken the Rents, Revenues, Issues, or Profits, for the Space of Sixty Years next before the Beginning of the said Session of Parliament: And whereas the said Act is now by Efflux of Time, become ineffectual to answer the good End and Purpose of securing the general Quiet of the Subject against all Pretences of Concealment whatsoever: Wherefore be it enacted by the King's Most Excellent Majesty, by and with the Assent and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That the King's Majesty, His Heirs, or Successors, shall not at any Time hereafter, sue, impeach, question, or implead, any Person or Persons, Bodies Politick or Corporate, for or in anywise concerning any Manors, Lands, Tenements, Rents, Tythes, or Hereditaments whatsoever (other than Liberties or Franchises) or for or in any wise concerning the Revenues, Issues, or Profits thereof, or make any Title, Claim, Challenge, or Demand, of, in, or to the same, or any of them, by reason of any Right or Title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the Space of Sixty Years next before the filing, issuing, or commencing, of every such Action, Bill, Plaint, Information, Commission, or other Suit or Proceeding, as shall at any Time or Times hereafter be filed, issued or commenced for recovering the same, or in respect thereof; unless His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or some other Person or Persons, Bodies Politick or Corporate, under whom His Majesty, His Heirs, or Successors, any Thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by Force and Virtue of any such Right or Title to the same, the Rents, Issues, or Profits thereof, or the Rents, Issues, or Profits of any Honour, Manor, or other Hereditament, whereof the Premises in Question shall be Part or Parcel, within the said Space of Sixty Years; and that the same have or shall have been duly in charge to His Majesty, or some of His Progenitors,

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Predecessors, or Ancestors, Heirs, or Successors, or have or shall have stood *insuper* of Record within the said Space of Sixty Years.

There would seem no exception to this taking away of any right of action except those specified therein of which neither such like acknowledgment as relied upon nor any former action for mere recovery of possession is one.

The judgment in question was merely for possession and nothing else was prayed for except the costs of suit.

It was entered April 14, 1890, and a writ of *hab. fac. pos.* was issued thereon the same day. Nothing further was done till January 16, 1902, when an order was made by the late Burbidge, J., then Judge of the Exchequer Court, directing that a writ of possession do issue out of said Court. That is followed by a præcipe for a writ of possession. Whether issued or not does not appear. The record is thus completed so far as we know. Now assuming the foregoing quotation from the Act to be as it seems self-contained, how can the said judgment and such acts as done thereunder (which in no way interrupted the adverse possession of those under whom the appellants claim) be said to answer the clear and imperative language of the section so far as barring any right to bring an action?

The statute makes no provision for an acknowledgment of any kind save in the way and form expressed in the specified exceptions in the Act.

The Real Property Limitations Act of Ontario in force at that time and in all subsequent re-enactments or revisions thereof down to 1902, contained in a section thereof a distinct provision for an acknowledgment in writing being "deemed according to the meaning of that Act to have been the possession of the person to whom given," but that cannot be presumed to be available for use under the Nullum Tempus Act. That section in R.S.O. 1897, was numbered "13."

The whole of the said Real Property Limitations Act is clearly intended to apply only to cases as between subject and subject, except some provisions dealing with some easements and profits. Its various editions, as it were, throughout all the time in question down to 1902, remained as regards these exceptions, and I think in other respects relative to the effect of acknowledgments in writing, exactly the same. The secs. 34 to 39 inclusive in R.S.O. 1897, and what is referred to in the sec. 42 thereof, shew what

these exceptions cover. These exceptions fail to touch such land as in question herein. These sections are, moreover, instructive as shewing how the acknowledgments in writing which have been relied on must be conceived and framed. The language which might meet the requirements of sec. 13 in R.S.O. 1897, might fall far short of being useful under these secs. 34 and 35, or sec. 42.

The language of the Act as to acknowledgments enlarging or preserving the rights of mortgagees or mortgagors is again of a different nature and illustrates the intention to confine such kind of legislation strictly to that being dealt with and the relation between those thus specified.

The fact that it was found thus necessary to define wherein the Crown should and should not be affected seems, if anything needed, to exclude all else having relation to the Crown as beyond the scope of the Act.

I shall revert presently to the later development in legislation and to the question of acknowledgment in this regard.

I, meantime, submit that as the said acknowledgment could have no effect when given, it could not be made effective after the full 60 years had run which gave appellants an absolute bar to this action, we are not much concerned with such development.

The truth is that a statute of limitations is nothing more or less than a definition of circumstances under which the Courts are forbidden to aid him who otherwise would be entitled to seek their assistance to recover for him his money or his property.

And what one Act of that kind may provide is of little help in the case falling under another such Act unless clearly intended to be read together.

There is, as the result of legislative development, now usually added to that negative conception, some provision for vesting in him who has enjoyed possession of land for the time specified, the title thereto which is to be recognized by the Courts.

The ideas I am suggesting and seeking to give expression to are perhaps better and certainly more concisely expressed and illustrated by Lightwood in his work on Time Limit of Actions, ch. 1, as follows:—

> Prior to the year 1833 a right to recover land might be barred either by Statute of Limitations (32 Hen. 8, c. 2, which barred real actions, such as the writ of right and novel disseisin, and 21 Jac. 1., c 16, which barred ejectment), or by the operation of the Statute of Fines (4 Hen. 7, c. 24).

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The Statute of Fines both barred the remedy and extinguished the right; the Statutes of Limitation only barred the remedy: *Hunt* v. *Burn* (1702), 2 Salk. 422.

Bearing all these considerations in mind and the facts as proven and found by the trial Judge and indeed not seriously disputed, that the appellants and those under whom they claim have been in undisturbed possession since some time in 1832 the part of sec. 1 of the Nullum Tempus Act which I have quoted above, and the author already referred to at p. 143 of his said work aptly calls the negative or limiting clause of the Act, seems a complete bar to the respondent's claim to relief herein.

That bar was complete I take it by the end of 1892. What possible right can the Court have to rely on something not expressed in the statute?

I might let the matter rest there by concluding with the result that the appeal should be allowed with costs. But it is due to the trial Judge's opinion on the point of acknowledgment that I should present a number of considerations, which have occurred to me, more or less bearing thereupon. I have already pointed out why I think acknowledgments in 1871 could not fall within the Ontario Real Property Limitations Act.

10 years after the 60 years in favour of the appellants had run, the Ontario Legislature, by 2 Edw. VII. ch. 1, sec. 2, enacted as follows:—

> 2. The enactments described in the schedule to this Act are hereby repealed, but as regards the Imperial statutes, if and, so far only as the same are in force and within the legislative authority of this Province.

The Nullum Tempus Act, 9 Geo. III. ch. 16, is one of those mentioned in the schedule referred to and the note therein is "substituted for this. See sections 17-20 of this Act."

In the sections thus referred to is contained a new code as it were relative to the lands of the Crown and actions to recover same.

In sub-sec. 4 of sec. 18 provision is made for an acknowledgment in writing taking lands out of the statute and giving a new point from which time is to run.

That legislation was in turn superseded and repealed . In the process of the revision of the Ontario statutes sometimes such tentative legislation appears and disappears.

The final result would seem to be that in preparing the Limitations Act the revising commissioners in 1910 seem to have in-

corporated into that Act the substance of that legislation of 1902, by enacting by sec. 2 the provision that in this Act "action" shall include an information on behalf of the Crown and in sec. 4, subsec. 2, the section providing for an acknowledgment in writing and many others of the Act are made applicable to the Crown.

I cannot imagine that it ever was intended by anyone that this provincial legislation was intended not only to be retroactive, but also to affect the rights of any one in his relations to the Crown on behalf of the Dominion.

Nor can I think that, even if any one so intended it should affect the said relations, it would be successful unless adopted by parliament.

Of course so far as the Crown on behalf of the Province of Ontario was concerned, or may now be concerned, and the relations between it and Ontario subjects of the Crown in that behalf, I assume it was quite competent for the Ontario legislature to repeal the Nullum Tempus Act so far as it had any force and effect in Ontario.

I cannot find that the Dominion Parliament in any way ever meddled with the Nullum Tempus Act or enacted anything to make that local legislation applicable in the relation between Crown and subject.

Hence I am of the opinion that any Ontario legislation giving the Crown the right to receive acknowledgments in writing, as if efficacious to affect the Nullum Tempus Act independently of the Dominion Parliament, would be *ultra vires*.

But it seems to me that all that legislation is by 3 & 4 Geo. V. ch. 2, secs. 6, 7, 8, and 9, expressly rendered inoperative so far as it concerns the rights of such parties as, these appellants, whose rights to plead in bar herein the sixty years possession, had matured before any such legislation as Ontario's legislature had in any of these ways enacted.

The case of *Gauthier* v. *The King*, 33 D.L.R. 88, 15 Can. Ex. 444, illustrates wherein provincial law is to be administered in the Exchequer Court and when discarded.

Another question of some difficulty to me is the effect of the recovery of the judgment in 1890 in its bearing upon the rights of the appellants when we consider the effect of the affirmative clauses of sec. 1 of the Nullum Tempus Act.

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Although holding, for the reasons already given, the first clause of said section conclusive as to this action, yet there may be something arguable in the effect of the words

> no verdict, judgment, decree, judicial order upon hearing or sentence of Court shall hereafter be had or given, in any action, bill, plaint, or information in any of His Majesty's courts at Westminster,

etc., etc., which appear at the end of the last clause of the whole section, on their bearing upon the validity of the title supposed to have been transferred by the second clause.

The question arises whether these words imply that the title of the Crown must have been tried and found by such Court. I submit that no mere default judgment for want of appearance according to modern practice could ever have been in the contemplation of the parliament which 150 years ago framed this enactment.

In the case of *Att'y-Gen'l* v. *Parsons*, 2 M. & W. 23, it was objected that the title could not be proved in a case of Information of Intrusion but first found by inquest of office when the defendant had been for 20 years in possession. The Court held not, but seems to have assumed that under 21 Jac. 1, ch. 14, sec. 4 (*c*), the title must be proved in such a case as it was. And Alderson, B., referred to Manning's Exch. Prac. 198.

See the case of *Att'y-Gen'l* v. *Mitchell*, Hayes Ir. Reps. 551, and case on page 88.

The possession is theoretically assumed at common law to be in the Crown as exemplified by the authorities: Co. Litt. 41 b. 57 b; Vin. Abr. Prerog. 2, 4; Bac. Abr. Prerog. E. 6; *Elvis* v. *Archbishop of York*, Hob. 322, which were relied upon in argument in the case of *Doe dem. Watt* v. *Morris*, 2 Bing. N.S. 193; 2 Scott 276, and apparently conceded but contended the King is put to his office found, citing Com. Dig. Prerog. D., *Reynel's* case, 9 Rep. 95*a*.

The case decided nothing touching what I am concerned with here but its argument and view of the Courts is suggestive of much to be borne in mind here.

Brown in Limitations as to Real Property, p. 90, says:—

> On an intrusion upon the Crown the actual possession is acquired by the intruder (Plowd. 546) and after 20 years, continues in him "until the title has been tried, found or adjudged for the King" (21 Jac. 1, c. 14 (E); 15 Car. 1, c. 1, but in point of law the possession with respect to the nature of the remedy, is still considered to be in the Crown (*Doe d. Watt* v. *Morris*) and a grantee from the Crown after the intrusion is in no better or more favourable position than the Crown itself, and must recover such possession by a similar

remedy through and in the name of the Crown, and cannot recover by ejectment in his own name (*ib.*).

Lightwood on Time Limitations, wherein is contained almost the sole attempt at any analysis of section 1 which I have found among the many text writers I have consulted, at pp. 147 *et seq.*, says:—

There follows in the English Act a third clause which, like the first two clauses, was copied from 21 Jac. 1, c. 2, and was intended to secure the possessor who had held adversely to the Crown for 60 years against persons claiming under the Crown under grants of pretenced titles, or, to use Lord Coke's words, "against patentees and grantees of concealments, defective titles, or lands not in charge, and all claiming under them." A beneficial law, he calls it, both for the Church and the Commonwealth, in respect of the multitude of letters patent and grants of these natures and qualities, but it had become obsolete before the date of the English Act, in which it was needlessly introduced. It is not found in the corresponding Irish enactment (48 Geo. III., ch. 47).

The first clause of sec. 1 is negative and exclusive of the right and title of the King; the second is affirmative and establishes the estate of the subject (3 Inst., p. 190). In effect, the second corresponds to sec. 34 of the R.P.L.A., 1833, which extinguishes the title against which the statute has run. "These distinct clauses," said Blackburn, M.R., in *Tuthill* v. *Rogers*, 1 Jo. and Lat. 62, "had objects perfectly different."

The first was a limitation to the suit, and barred the remedy of the Crown; the second, by confirming for all time thereafter the estate had *or claimed* by the subject and enjoyed for sixty years, against the Crown's title, barred and extinguished that title and transferred it to the subject.

It seems to me that these and other indications as well as the nature of the proceedings in such an action—and for that matter in any other action—at the time of this enactment—forbid the thought that such a proceeding taken, and ended in the record before us, as result thereof in 1890, was something quite foreign to what is required by the words I have quoted from the third clause of sec. 1 of the Nullum Tempus Act.

Indeed the language used in many of the authorities I cite, and to be found suggested by others cited therein, indicates that the use of an information of intrusion for the mere purpose of a recovery of possession would formerly have been considered an improper proceeding and suggests a doubt, if the proceedings leading up to the alleged judgment by default were not entirely misconceived if intended to fulfil such a purpose as that now in question, or as having anything to do with what was contemplated by said section.

In *Friend* v. *Duke of Richmond* in 1667, Hardres, 460, at p. 461, it was said by Hale, C.B., that:—

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The judgment in intrusion is not in the nature of a seisin or possession, but only "*quod pars committatur et capiatur pro fine*." And upon that an injunction issues for the possession against the party himself and all claiming under him. And though a petition of right lies against the King in this case, yet when the King has granted the land over, an entry may be made upon his patentee. Nor does an information of intrusion suppose the King out of possession, for that would be contrary to the purport of the writ, which supposeth that the party intruded upon the King's possession.

See Robertson's Civil Proceedings by and against the Crown, p. 177, under head of Information of Intrusion to end of chapter, p. 185.

Chitty on Prerogatives also has, on p. 380, the following:—

These lands shall be held on the usual tenures, etc. Usual fee-farm rents confirmed. Putting in charge, standing *insuper*, etc., good only when on verdict. Demurrer or hearing, the lands etc., have been given, adjudged, or decreed to the King.

See also Burton's Exchequer Practice, p. 223 of vol. 1; Brown's Ex. Prac., p. 10, and cases cited; and the cases of *Greathead* v. *Bromley*, 7 T.R. 455; *Langmead* v. *Maple*, 18 C.B.N.S. 255, and especially the dictum of Willes, J., p. 270 and top 271, that:

It is not sufficient to constitute *res judicata* that the matter had been determined on; it must appear that it was controverted as well as determined upon;

and *Thorp* v. *Facey et al.*, in 1866, 1 H. & R. 678, judgments by Erle, C.J., Willes, J., and Smith, J., not as printed in case herein, and see Manning's Practice, pages 98 *et seq.*

I submit that a careful consideration of all implied in the authorities referred to in the said several text writers, and cases I cite, leads to the conclusion that the judgment relied upon does not fall within the meaning of that section.

The judgment therein referred to is one to be recovered in Westminster Hall. Without pressing that unduly, it is to be observed that in the case of *Att'y-Gen'l for New South Wales* v. *Love*, [1898] A.C. 679, when the Court above held the statute to be in force in New South Wales against the contention that there was no such office as contemplated by the language of the exception, that Court said (p. 686) that the only result would be that there is nothing upon which the exception preserving the Crown's right could operate, but certainly would not cut down the enacting part of the statute.

Without pressing that too far it may be held that the judgment contemplated is one resulting from proof, not given in the proceedings in question in 1890, but which would become inevitably

necessary before a judgment could have been entered as herein, not only 20 years but 58 years after the statute had begun to run against the Crown.

I think the cases relied upon by Cassels, J., as to the effect of a judgment in ejectment are conclusive as against a proceeding which was nothing but one for default of appearance in ejectment. Changing the name of a thing has no legal effect or at least should have none. The information in question was nothing but an ejectment suit.

I desire to make that position clear for an information of intrusion has been, when properly brought for the recovery of damages, or of rents and profits, aptly compared to an action of trespass *quare clausum fregit*. It may be conceivable that such an action might be proceeded with by such *ex parte* proceedings as to prove the title and bind. Possibly the same might take place in the proceeding to judgment in an information of intrusion and it appearing there had been no adverse possession for 20 years, a judgment by default might stand good.

I gravely doubt the efficacy thereof in face of the dictum of so great a lawyer as Willes, J., quoted above, as to the necessity for the issue being controverted.

But in any event if possession had run over 20 years, I think it should not stand unless some proof adduced of the title even if the proceedings *ex parte*.

It must be understood I am speaking of something that may operate under or as against the Nullum Tempus Act.

I repeat all this does not touch the right of appellants in this case to have this information dismissed but merely the question of what their rights may be when that has been (if ever) done.

Another question has weighed much upon me by reason of the stress laid both in the Court below and before us on the case of *Magee* v. *The Queen*, 3 Can. Ex. 304, when the late Burbidge, J., gave judgment for the Crown.

A perusal of that case suggests that we should have had the facts there proven gone into and proven here. Of course we cannot accept or act upon what appears therein as statement of fact, yet when one has been invited to read such a recital of fact it becomes painful to suspect therefrom that if we had been as fully supplied with facts as the Court was in that case and a trifle more

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suggested thereby, we might be induced to conclude that the title if still outstanding in any one but appellants had passed to the Crown on behalf of Ontario.

It does seem a very remarkable thing that though the only reason alleged for this land having (if ever) been acquired on behalf of the Crown, was that it was intended to serve the purposes or uses of a canal, yet no one has ever felt under the necessity of using it for that purpose during all the long period it has been supposed to be the property of the Crown.

It is quite clear that under sec. 108 of the B.N.A. Act all that passed to the Dominion was what could fairly be said to be then part of that in the schedule referred to therein, and described as "canals with land and water power connected therewith." If lands had been 90 years ago supposed to be needed perhaps for contractors building the canal, but in truth useless for the canal as such, I cannot think they passed to the Dominion.

Indeed I am of the opinion that lands acquired by the Crown on behalf of any of the confederated provinces for purposes of any canal, but which had obviously always been or become useless in that connection, remained at Confederation the property of the Crown on behalf of the province so concerned.

It requires some straining of the imagination to discover how lands that had remained for 33 years before the Confederation Act in the possession of people who never had anything to do with the canal in question, could then, in 1866, be properly described as lands connected therewith.

And as bearing upon the suggestion that these lands never had any connection in fact with the canal, it may be observed that the letter treated by the judgment below as an acknowledgment seems to have been prompted by some proposition to acquire them as a site for a St. George's Hall within 5 years after Confederation. What had happened their use for the purposes of the canal? Is this in a letter so much pressed on us not rather suggestive that those concerned had applied to the wrong Crown?

And when we are told nothing more than we find in evidence herein I am unable to understand how such a claim can be maintained.

I cannot in face of these and many other peculiarities of this case, assent to the proposition that the lands described in the

information are part of those belonging to the respondent, or that they ever belonged to the Crown, on behalf of the Dominion, if at all.

We have put forward in the 9 Vict. ch. 42, sec. 1, something to indicate that the lands round the canal basin and by-wash intended to be of use for the canal had been "freely granted by Nicholas Sparks" but when or how has not been shewn.

Time had run in favour of the first adverse possessor of the land in question (under whom appellants claim) at least 15 years before then.

The words "freely granted" are of very doubtful import and may mean much or little when the story of the surrounding facts and circumstances are forthcoming to give them a clear, vivid meaning.

If Sparks had the fee simple then vested in him when adverse possession first taken by the predecessors of appellants, or thereabout, then there was an adverse title as against him started running which for aught we know may have ripened long before anything done on the part of the Crown to stop its running.

It is not necessary I should try to follow this further for the necessary material is not before us.

I suggested in the course of the argument that the words "Provided no buildings be erected thereon" in the first section I have just now referred to, might well have been used as words of description and designed for the express purposes of protecting such people as Cousens.

Evidently there were others possessed of buildings on land squatted on, left undisturbed till the growing city needed a new street, and basin and by-wash had long disappeared.

The meagre evidence in the way of historical inquiry falls far short of what I imagine might have been adduced, as it seems to have been, in the case of *Magee* v. *The Queen*, 3 Can. Ex. 304, and might have lightened up much.

There are some conclusions reached by Burbidge, J., which on the facts as presented in the report of that case, do not appear to me self-evident.

The suggestion that the acknowledgment in 1870 or the judgment in 1890 might well furnish some evidence of a title independently of their value under the statute, seems to me quite untenable.

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In regard to the former there is theoretically, in one view, if the evidence had been adduced, no doubt of the title of the Crown, or in the other case of its possession.

They add nothing in either way. The question is simply whether the Limitations Act applicable has been stopped running thereby which I say it has not, because neither one of these things which might so operate has been proven.

Mr. Hogg very properly, as counsel, abstained from entering upon a part of the later history relative to the judgment which does not appear in evidence and possibly, if I understood him correctly, he only surmised a probable explanation. Yet I cannot understand why we should be asked to permit a recovery upon a judgment (for that is what it comes to) which, for some mysterious reason, if ever worth anything, cannot now be enforced in the ordinary way.

Appellants submit it has in law become spent. I am curious to know if it ever was in law worth anything.

I think the appeal should be allowed with costs throughout.

Duff, J.

DUFF, J.—I do not think it is necessary to decide the question whether or not there is sufficient evidence that the property in question is within the area acquired by the Crown under the authority of 8 Geo. IV. ch. 1, or vested in the Crown by force of 7 Vict. ch. 11, sec. 29. I shall assume that at the time the appellant's predecessor in title went into possession and erected a log hut upon the lot in 1832, a tract including this lot had been "set out and ascertained" in compliance with the provisions of the first mentioned statute as land required as a site for the Rideau Canal and its accessories. The question of substance is whether the appellants are now entitled to succeed in the litigation on the ground that the suit instituted by the Crown is barred by the Nullum Tempus Act, 9 Geo. III. ch. 16. In that enactment by the preamble it was recited that certain provisions and regulations had been made by 21 Jac. I. ch. 22:—

> For securing to all His Majesty's subjects the free and quiet enjoyment of all manors, lands, and hereditaments which they or those under whom they claimed respectively had, held, or enjoyed, or whereof they had taken the rents, revenues, issues, or profits for the space of sixty years next before the beginning of the said session of parliament; And whereas the said Act is now by efflux of time become ineffectual to answer the good end and purpose of securing the general quiet of the subjects against all pretences of concealment whatsoever.

The statute then proceeds to enact that:—The Crown shall not sue any person for or in any wise concerning any lands or hereditaments (other than liberties or franchises), or the rents and profits thereof, by reason of any right or title which has not first accrued within 60 years next before the commencement of the suit, unless the Crown or its predecessors in title have been answered by force of any such right or title, the rents or profits thereof (or the rents or profits of any honour, manor, or other hereditament whereof the premises in question are part) within the said space of 60 years (or that the same have been duly in charge to the Crown or have stood *insuper* of record within such space); and then follows a clause definitely establishing the title of the subject who shall have "held or enjoyed" any lands in respect of which His Majesty claims any title which did not first accrue within the space of 60 years before the commencement of the proceedings.

It is undisputed that the appellants and their predecessors have in fact been in actual occupation and in fact have used and "enjoyed" the land in question since the year 1832. To all appearance they have during that period acted in respect of the land as if they were the owners. They have, for example, made improvement as they have seen fit and have paid all the taxes. *Primâ facie*, therefore, there is a clear case of 60 years' holding and enjoying attracting the benefit of the Nullum Tempus Act. Certain acts of the appellants and their predecessors are, however, relied upon as shewing that this occupation is not of such a character as to entitle them to the benefit of the statute.

First it is argued that a letter written in 1871 and a petition filed in 1890 constitute acknowledgments of title which are said to interrupt the running of the statute. As to the letter of 1871, with great respect to the learned trial Judge, I think it does not amount to an acknowledgment of title in the Crown. The letter contains a declaration that the rights of the writers "cannot be alienated" and in view of that I do not think the letter can be regarded as an acknowledgment of title. The petition of 1890 goes further and if I had considered it necessary to pass upon the question I should have had some difficulty in deciding whether or not that petition read alone contains an acknowledgment of title within the meaning of the Real Property Limitations Act (C.S.U.C. ch. 88, sec. 15; R.S.O. 1887, ch. 3, sec. 13). I do not

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find it necessary to decide this point because first, the petition of 1890 must be read with the letter of 1871, and the petition of 1874, in both of which documents the petitioners asserted they were entitled to possession of the property and, secondly, because, in my opinion, a mere acknowledgment of title was not, at the time these alleged acknowledgments were given, sufficient to interrupt the running of the Nullum Tempus Act.

The provision of the Real Property Limitations Act above mentioned, is a provision enacted in 4 Wm. IV. (ch. 1, sec. 26) with reference to the limitations established by that statute. That statute effected various changes in the older law; for example, the doctrine of "adverse possession" was so much modified that it might almost be said to have been abrogated; and the right to preserve title by "continual claim" was abolished. Acknowledgment of title in writing, however, it was explicitly declared, should interrupt the running of the limitations thereby established. The limitation created by the Nullum Tempus Act was not within the contemplation of the enactment by which this was accomplished, and I do not understand upon what ground it can be held that this provision is available in the present proceedings.

Counsel relied upon secs. 17 and 18, ch. 1 of the Ontario Statutes, 1902. Sec. 17 is in effect a re-enactment of the first section of the Nullum Tempus Act. Sec. 18, (4), is a provision, the effect of which is to interrupt the running of the statute in the case of acknowledgment of the title of the Crown in writing. The argument is that by force of sec. 18, (4), the so-called acknowledgments are an answer to these proceedings. That argument must be rejected because the effect of the second clause of the first section of the Nullum Tempus Act taken together, is to establish the title of the subject on the expiry of the prescribed period, and there is nothing in the Ontario Statute of 1902 to indicate an intention on the part of the legislature that this statute should operate to divest a title acquired before it was passed—the statutory period having in this case expired 10 years.

These so-called acknowledgments, however, have some relevancy in relation to another question which must be dealt with, and that is the broad question whether or not the land was "held or enjoyed" by the appellants and their predecessors in such a character as to attract the benefit of the Nullum Tempus Act. The question is: Have the appellants and their predecessors

"held or enjoyed" the land as contemplated by the statute for a period of 60 years since the right of the Crown to take proceedings by information of intrusion which is now asserted first commenced?

The Crown cannot be disseized by a mere intrusion. The occupation, the holding or enjoying, therefore, contemplated by the statute as attracting the benefit of its provisions cannot be technically possession; but it seems reasonable to read the statute as contemplating such occupation as, if the question arose between subject and subject would constitute civil possession as against the subject-owner. On this assumption two elements are involved in the occupation required, exclusive occupation, in the physical sense, "detention," and the *animus possidendi*, that is the intention to hold for one's own benefit which, be it observed, is presumed to exist from the fact of "detention" alone. Given an occupation possessing these features the statutable conditions are, I think, fulfilled.

The first element is admittedly present. Are there circumstances disclosed by the evidence which rebut the presumption of the existence of the *animus possidendi?* The answer to this last question turns upon the point whether or not the land was "held or enjoyed" in a character inconsistent with the existence of the intention on the part of the occupants to hold for themselves? The circumstances to be considered are chiefly those disclosed by the letters and the petitions of the appellants and their predecessors.

The following relevant facts may be inferred from the statements in these letters which, of course, are properly in evidence as admissions against the appellants. First, that Cousens, under whom the appellants claim, went into possession by the permission of Colonel By, in 1832. Secondly, that a dwelling was erected by Cousens which he and his family occupied until the time of his death, and afterwards by his descendants, and various improvements were made by him. Thirdly, that applications from time to time were made, whether before or after Cousens's death does not appear, to purchase the property and that the answers were to the effect that the property was required for the purposes of the canal. Fourthly, that in 1871 a letter was written by the appellant Susan Hamilton requesting a deed of the property and explicitly laying claim to a right to retain it on the ground of

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possession. Fifthly, a petition was presented to the Government on the 10th August, 1874, by the same appellant asking in view of certain contemplated Government improvements that her "right" in the property be protected and that a legal title be granted to her. Sixthly, that in 1890 the Crown having commenced proceedings by an Information of Intrusion, the same appellant presented to the Government another petition throwing herself, as she said, upon the clemency of the Government but making no claim to any right sufficient to afford a legal defence to the proceedings taken by the Crown.

With regard to the circumstances under which possession was taken by Cousens, one must not overlook the fact that the statutes above referred to and particularly the Act of 7 Vict., shew unmistakably that the title to this property, which *ex hypothesi* formed a part of certain land owned by one Nicholas Sparks, was in dispute between Sparks and the officers having charge of the construction of the canal a very short time after possession was taken by Cousens; a dispute which was not settled finally for something like 10 years. The bare facts that Cousens went into possession with the permission of Colonel By and that the lands subsequently, by force of 7 Vict. became vested in the Crown for the purposes of the canal are not sufficient to shew that Cousens' occupation was an occupation on behalf of the Crown. They are not sufficient in themselves to repel the presumption arising from the character of the occupation as indicated by the conduct of Cousens himself in erecting a house, making improvements and paying taxes. There is the additional circumstance to be considered in connection with this, that sec. 29 of the Act 7 Vict., in confirming the grant from Sparks of a strip of 60 ft. "around the basin and by-wash" explicitly annexed the condition that no building should be erected upon the land so ceded to the canal authorities. I am not now touching the point whether or not this was a condition subsequent by force of which erection of buildings would defeat the grant. The point is that *primâ facie* the continued occupation of this land for the purposes of a residence is not in these circumstances entirely consistent with the assumption that the property was held by the resident on behalf of the public authority which had bound itself and upon which the legislature had imposed the duty to see that no buildings were placed upon it.

The letters and the petitions of 1871, 1874 and 1890, respec-

tively, contain nothing supporting the theory that the land had been held on behalf of the Crown; on the contrary, they are almost demonstrative that in the eyes of the persons who signed those documents they and their predecessors had occupied the property solely for their own behoof.

On the whole I am unable to find anything in all these circumstances which counterbalances the *primâ facie* case established by the evidence touching the nature of the occupation in fact.

The point is raised, however, that a judgment having been pronounced in proceedings commenced by Information of Intrusion in the year 1890 declaring that the lands in question were in the possession of the King and awarding judgment of *a moveas manus*, stayed the operation of the Nullum Tempus Act. I am unable to agree with this. The occupation of the appellants' predecessors was not interrupted in fact by that judgment, nor had it the effect of so changing the character of it as to make it an occupation on behalf of the Crown.

Anglin, J.

ANGLIN, J.—In the suit of the Crown to recover possession of a lot of land on the south side of Rideau St., in the City of Ottawa, claimed as part of the Ordnance lands held with, and for the purposes of, the Rideau Canal, the defendants plead two distinct defences—denial of the Crown's title and the acquisition of an adverse title under the Nullum Tempus Act (9 Geo. III. ch. 16 sec. 1).

Probably actually out of possession of the property for 82 years before the Information now at bar was filed—from 1832 to December 3, 1914—admittedly out of possession and having had no acknowledgment of its title during more than 20 years, the Crown properly assumed the burden cast upon it by the statute, 21 Jac. I., ch. 14, of proving a subsisting valid title.

Counsel representing the Att'y-Gen'l sought to establish that the land in question formed part of a tract of 60 ft. "round the Basin and By-wash" of the Rideau Canal at Ottawa reserved to the Crown out of unused lands acquired from Nicholas Sparks and to be returned to him under the statute 7 Vict. ch. 11, as defined by the statute 9 Vict. ch. 42; that these lands had been transferred to the late Province of Canada and vested in the Dominion of Canada on Confederation; and that the claim of title by possession set up by the defendants was answered by a

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judgment for possession recovered by the Crown in 1890 against their predecessor in occupation and by written acknowledgments of the Crown title.

In view of the conclusion that I have reached as to the defence under the Nullum Tempus Act, I shall merely state the result of a somewhat prolonged and critical investigation of the title preferred on behalf of the Crown. The references in the letter of 1871 and the petition of 1874, respectively written and presented by the defendants' predecessors in occupation, and in the testimony of the defence witnesses, Little and Maloney, to the house in question as situated on the west side of the by-wash, establish as against the defendants, at least *primâ facie*, that the by-wash extended past the property in question and that that property was included in the reservation to the Crown under 7 Vict. ch. 11, as explained by 9 Vict. ch. 42, of a 60 ft. tract "round the basin and By-wash." It should be noted, however, that on the plan of 1847, produced from one of the public departments and put in evidence on behalf of the Crown, the western limit of the 60 ft. tract reserved appears to pass through the house occupied by Cuzner. It may well be, therefore, that a portion of the land on which the house stood was not within the reserved tract.

I do not question the transfer to the Province of Canada of whatever land was comprised in this 60 ft. tract as part, or an "adjunct" of the Rideau Canal (19 Vict. ch. 45, sec. 6, and last item of the second schedule) or that it became the property of the Dominion of Canada under sec 108 of, and item 1 or item 9 of the third schedule to, the B.N.A. Act 1867.

It has been stated by very high authority that the purpose of the statute, 21 Jac. I., ch. 14, was to place defendants to informations of intrusion laid by the Crown, in cases to which it applies, on the same footing with regard to proof of title as that held by defendants in ordinary actions of ejectment: *Emmerson* v. *Madison*, [1906] A.C. 569, at 576. The procedure upon such informations is also assimilated to that in actions of ejectment. Shelford's Real Property Statutes (9th ed.), p. 111. The judgment obtained by the Crown in 1890 was never executed. Possession of the land was never taken under it. In this respect resembling a judgment in ejectment, as to the effect of which the cases are cited by Cassels, J., the judgment on the information of 1890

does not afford any proof of the Crown title now available by way of estoppel, admission or otherwise and does not operate as an interruption of possession such as would defeat the prescriptive claim of the defendants under the Nullum Tempus Act. It is at the highest evidence that the defendants' predecessor in possession had not at the date of the information laid in 1890 a right to possession good as against the claim of the Crown, as in fact, upon the evidence before us, she probably then had not, the adverse possession having up to that time lasted only 58 years. If an acknowledgment of title in the Crown would suffice to defeat a prescriptive claim under the Nullum Tempus Act, the judgment of 1890, in my opinion, would not amount to such an acknowledgment. Why this judgment was never executed we are left to surmise. No explanation has been vouchsafed of this extraordinary feature of a peculiar case.

Though for a time disposed to think that the letters of 1871 and 1890 written by the defendants' predecessors in occupation, one to the Minister of Public Works (see 31 Vict. ch. 12, sec. 10) and the other to the Prime Minister, might be regarded merely as offers to pay for "a paper title" by way of further assurance of a title by length of possession asserted by the writers, on further consideration I am unable to place that construction upon them. They contain admissions of title in the Crown and otherwise satisfy the requirements of acknowledgments under the Real Property Limitation Act.

But the appellants maintain that acknowledgments of title sufficient for the purposes of the Real Property Limitations Act do not interrupt the running of the period of prescription under the Nullum Tempus Act, because, while the latter Act provides for such an interruption by receipt of rents or profits, etc., it contains no reference to acknowledgments of title written or verbal.

For the respondent it was contended that in answer to the claim of title under the Nullum Tempus Act the Crown may avail itself of the provision for acknowledgments made in the Real Property Limitations Act, to be found in ch. 88 of the C.S.U.C., 1859, sec. 15, and in the subsequent revisions of the same statute. But this section on its proper construction, in my opinion, is limited in its application to cases within the purview of the statute of which it forms part and cannot be extended to cases of adverse

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possession of Crown lands, to which the Real Property Limitation Act has no application. Although the rule under which the Crown is entitled to claim that it is not bound by a statute in which it is not named does not prevent its taking advantages of a statute though not named in it, that fact cannot justify extending the application of a provision such as that with which we are dealing, even at the instance of the Crown, to cases that it was never intended to cover.

Apparently to remedy the omission from the Nullum Tempus Act of any provision for the interruption of the prescriptive period under it by an acknowledgment of title, the Legislature of Ontario, in 1902, introduced for that province, as an amendment to the Nullum Tempus Act, a provision similar to the acknowledgment section of the Real Property Limitation Act (2 Edw. VII. ch. 1, sec. 18 (iv.)). At that time, however, the prescriptive period under the Nullum Tempus Act in regard to the land in question had already been completed for about 10 years; and the letters relied upon as acknowledgments had also been written many years before.

Assuming that such an amendment to the Nullum Tempus Act enacted by a provincial legislature may be invoked in a proceeding involving the title of the Crown to property claimed in right of the Dominion, it seems to me inconceivable than it can affect the case now before us. There might have been an argument for giving a retrospective operation in this proceeding to the legislation of 1902 had the effect of the Nullum Tempus Act been merely to bar the remedy of the Crown, leaving its title and estate in the land untouched. It might then have been deemed an enactment for the regulation of a course of procedure (*The Ydun*, [1899] P. 236,) in which there can be no vested right: *Republic of Costa Rica* v. *Erlanger*, 3 Ch.D. 62, at 69. But the Nullum Tempus Act does a great deal more. Although the fact that the Crown has been 60 years out of actual possession of land adversely occupied does not establish title in a person who had occupied the land for a period which had begun when the actual occupation of the Crown had ceased but had lasted for less than the 60 years as against a stranger who has subsequently obtained possession; *Goodtitle* v. *Baldwin*, 11 East 488; 60 years' adverse possession, continuously held by one person, or by several persons succes-

sively claiming one under the other extinguishes the title of the Crown and as against the Crown eatablishes the title of the person or the last of the persons, so in possession (3 Inst. 190). The effect of the several clauses of sec. 1 of the Nullum Tempus Act is that the remedy of the Crown is first barred and then its title is extinguished and transferred to the subject holding adverse possession: *Tuthill* v. *Rogers*, 1 Jo. & Lat. 36, at 62, 72. To vested rights so acquired it would be contrary to sound construction to apply legislation couched in terms such as those of clause (iv.) of sec. 18 of the statute, 2 Edw. VII. (Ont.), ch. 1, which is not in its form or nature declaratory and does not contain a single word indicative of an intention that it should have a retroactive application. I am, therefore, of the opinion that the attempt to meet the defendants' claim of title as against the Crown under the Nullum Tempus Act by invoking the letters of 1871 and 1890 as acknowledgments of title, fails because the Nullum Tempus Act prior to 1902 did not provide for an interruption by an acknowledgment of title of the prescription which it enacts.

After counsel for the defendants had called several witnesses to testify to the occupation of the property in question by James Cuzner and his wife and their descendants down to the time of the trial, counsel for the Crown admitted the sufficiency of the proof of possession already adduced, as appears by this passage in the record:—

Mr. Fripp:—I think my learned friend will admit—he does not require me to call any more witnesses—as to our possession.

Mr. Hogg:—No, I think not.

HIS LORDSHIP:—Continuous possession for more than 60 years.

Mr. Fripp:—Yes.

The trial Judge accepted the proof of possession given by the defendants as sufficient. In finding against them on this branch of the case he proceeded solely on the acknowledgment of title contained in the letter of 1871.

I am, for the foregoing reasons, with respect, of the opinion that the defendants are entitled to succeed under the Nullum Tempus Act. I would, therefore, allow this appeal with costs and would dismiss the information with costs.

BRODEUR, J.—I concur in the result.

Brodeur, J.

Appeal allowed.

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BIRDSALL v. MERRITT.

Ontario Supreme Court, Appellate Division, Meredith C.J.C.P., Riddell and Lennox, JJ., and Ferguson, J. A. February 14, 1917.

ANIMALS (§ IC—30)—VICIOUS DOG—LIABILITY OF OWNER—KNOWLEDGE—USE OF HIGHWAY.

The owner of a dog which, to the owner's knowledge, had a propensity for running after and barking at horses and carriages travelling upon highways, is liable for an accident from a runaway of horses frightened by the dog; a kennel for the dog built on a highway is not a lawful use of the highway, though by an owner lawfully employed thereon.

[See also *Carlson* v. *McEwen*, 3 D.L.R. 787.]

Statement.

APPEAL by the defendant from the judgment of the Judge of the County Court of the County of Haldimand in favour of the plaintiff in an action brought in that Court and tried without a jury.

The nature of the action and the findings of the County Court Judge were stated in his written reasons, in part, as follows:—

The plaintiff, a farmer, was driving home with his wife and daughter on the 15th November, 1915, when they passed some men working on a gas-pipe line; and, immediately afterwards a dog belonging to the defendant ran out after the plaintiff's buggy and barked several times, causing the team to run away, throwing the plaintiff and his wife and daughter out, injuring the plaintiff, smashing the buggy, and injuring one of the horses; and this action is brought to recover $500 damages, the plaintiff alleging that the defendant's dog was of a mischievous nature, to the knowledge of the defendant. . . . I was convinced at the trial, and a subsequent perusal of all the evidence has confirmed me in the opinion, that it was the dog running out after the buggy and barking that caused the runaway, and I so find. . . . It was the natural fear of the horses from the dog rushing out suddenly and barking, and not any exceptional timidity or fault of the horses, that caused the runaway. . . . A question was raised as to the wife and daughter having caught hold of the lines, but there is nothing to shew that it in any way contributed to the accident. They say they caught hold at the end of the lines, behind where the plaintiff was holding them. There is no defence of contributory negligence, and nothing to shew that the plaintiff in any way contributed to the accident. . . .

The defendant owned the dog for at least two years prior to the accident. At least ten witnesses swore to the dog's habit of running out and barking at teams. . . . I am quite satisfied

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from the evidence that this dog had the mischievous propensity (altogether too common) of racing out, running around, and barking at horses and buggies, and that the defendant knew of this mischievous propensity. . . .

This is not a case for vindictive or exemplary damages. It is not shewn that the plaintiff is permanently injured, and no question of hired assistance is left in doubt. The plaintiff is entitled to doctor's bill, $54.75; veterinary bill, $7.50; damage to buggy, $25; damage to harness, $8.20; damage to horse, $25; besides which, there is the cost of nursing and assistance, loss of time, pain, suffering, etc. I think the sum of $350 altogether will be doing substantial justice.

Statement.

There will, therefore, be judgment for the plaintiff for $350 and costs.

George Lynch-Staunton, K.C., and *J. M. Telford*, for defendant, appellant; *H. Arrell*, for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—I am far from prepared to agree with Mr. Lynch-Staunton that the defendant's dog was lawfully upon the highway during the day on which, or at the time when, the mischief caused by his being there was done. The purposes of a highway are to afford reasonable means of traffic for all persons and things lawfully entitled to use them. Making a kennel or a lair for a dog upon it is far removed from any kind of lawful use of it, even though the dog's owner might be lawfully employed upon the highway all the time that the dog might be so kennelled or laired there.

The cases decided in England, such as *Heath's Garage Limited* v. *Hodges*, [1916] 2 K.B. 370, have to be looked at in the light of the legislation of this Province, such as that which provides that "the owner of any animal not permitted to run at large by the by-laws of the municipality shall be liable for any damage done by such animal, although the fence enclosing the premises of the complainant was not of the height required by such by-laws:" the Pounds Act, R.S.O. 1914, ch. 247, sec. 3. And see also the Line Fences Act, R.S.O. 1914, ch. 259, and the Municipal Act, R.S.O. 1914, ch. 192, sec. 399, sub-secs. 28 to 32. But this case does not depend upon any such question as that. The appeal fails upon another, and, as it seems to me, a very plain, ground.

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The trial Judge saw and heard all the witnesses. The case was well fought out, and all that could be said on each side was said before him, and he found, as facts well-proved, that the dog in question had long had a mischievous propensity for and habit of running after and barking at horses and carriages travelling upon the highways, and that the defendant had long known of such propensity and habit; and of the dangers and injuries which it might cause; and the evidence at the trial, abundantly, in my judgment, supports such findings.

To my mind it was clearly proved that the dog was one of that too common mischievous character, the danger of which was not only proved, but is indeed a thing of common knowledge. It is common knowledge that a barking and pursuing dog is one of the most dangerous and most annoying things that drivers upon highways meet with and too frequently suffer from. This dog had for years exhibited this mischievous disposition, so that his master must have known of it; and, besides, it was well-proved and found that he did. But I am unable to find any evidence of any attempt to break the dog from it; not a difficult task. On the contrary, he took and kept the dog with him all day long upon the highway, where he would have the greatest opportunity of displaying his bad character. And then and there the dog, following and barking at the plaintiff's horses and waggon, caused the injury to the plaintiff for which he has been awarded reasonable damages—damages which the defendant must have known, as every one else does, not only might be, but very likely would be, directly caused by the mischievous habit of his dog.

The case of *Zumstein* v. *Shrumm*, 22 A.R. 263, relied upon by Mr. Lynch-Staunton, has no application to this case—no mischievous propensity or habit was found to have caused the injuries or to have existed in the bird.

We are all clearly of opinion that the appeal should be dismissed. ——— *Appeal dismissed.*

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WILTON v. ROCHESTER GERMAN UNDERWRITERS AGENCY.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 4, 1917.

INSURANCE (§ IVA—160)—TRANSFER OF POLICY TO MORTGAGEE—"ABSOLUTE ASSIGNMENT"—RIGHT TO SUE.

An assignment of a policy to a mortgagee of the insured property, absolute on its face, though in fact given by way of security for the mortgage debt, is an "absolute assignment," not a charge within the meaning of the Judicature Ordinance, and the assignor has no further right to sue thereon.

APPEAL by plaintiff from the judgment of Ives, J., dismissing an action on a fire insurance policy. Affirmed.

C. F. Harris, for appellant.

The judgment of the Court was delivered by

WALSH, J.:—The plaintiff's claim is under a policy of insurance issued by the defendant insuring him against loss or damage by fire to certain furniture and other chattel property owned by him and which was wholly destroyed by fire on June 24, 1914. Ives, J., who tried the action, dismissed it and from this judgment the plaintiff appeals.

The trial Judge based his judgment upon two grounds, namely, "that the loss, if any, under the policy had been absolutely assigned before the action was brought, also that no proofs of loss had been made or declaration tendered the defendant as required in the condition of the policy." And these are the grounds urged before us in support of the judgment.

The policy bears date of September 26, 1913, and the plaintiff is the insured named in it. The following endorsement was afterwards made upon it: "The interest of Thomas Wilton as owner of property covered by this policy is hereby assigned to H. H. Foster and F. N. Stubbs, subject to the consent of the German American Insurance Co. Dated March 28, 1914. Thomas Wilton." The defendant's consent to this assignment is endorsed upon the policy under date of April 7, 1914. The fact is that, though this assignment is absolute in form, the assignees, Foster and Stubbs, were but mortgagees of the property covered by the policy and the assignment was intended to be simply by way of security for this mortgage debt. Although the defendant did not know this when it gave its consent to the assignment, it was informed of it shortly after the fire, and before the making of the settlement which it subsequently effected with the assignees. Claim was made on their behalf under this policy after the fire for $918.68 being the amount of the indebtedness in respect of which the policy had been assigned by the plaintiff to them. After considerable negotiation, a settlement of their claim under the policy was made for $459.34 in August, 1915, and they gave the defendant a receipt therefor "in full payment of all claims and demands for loss and damage to property insured under Policy 3361 on the Burdett, Alta., agency, issuing from, or as a result of

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fire which occurred on June 24, 1914, and the said company in consideration of such payment is hereby discharged forever from any further claim or demand by reason of such fire, loss and damage and said policy is hereby cancelled." The policy itself was, after this payment, surrendered to the defendant.

In addition to the Foster and Stubbs assignment, the plaintiff signed the following document which, though dated before the fire, was in fact not drawn up and signed until after it:

Burdett, Alberta, June 22, 1914.

Messrs. Rochester German Underwriters Agency,
Calgary, Alberta.

For value received please pay to J. G. Carson, of Burdett, Alberta, all moneys due me from the fire insurance policy which I hold on your company. This order is subject to the assignment given by me to Messrs. Foster & Stubbs. Thomas Wilton.

Witness: D. F. Livingstone.

This document was forwarded by Carson to the defendant's Calgary office, under cover of a letter dated on June 24, 1914, and was received by the defendant on July 1, 1914. It has never been withdrawn or countermanded in any way and it still stands as it did when it reached the defendant's hands. It was given as security for an indebtedness of the plaintiff either to Carson in his own right or to the bank of which he was the manager.

The question that arises for decision under this branch of the case is whether these assignments are or either of them is absolute (not purporting to be by way of charge only) within the meaning of sub.-sec. 14 of sec. 10 of the Judicature Ordinance as enacted by sub-sec. 3 of sec. 7 of ch. 5 of the Statutes of Alberta, 1907.

The most recent decision on the point under the corresponding section of the English Judicature Act is the judgment of the Court of Appeal in *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190. The assignment in that case, which showed on its face that it was by way of continuing security for all moneys due, or to become due, from the assignor to the assignee, assigned all moneys due or to become due to the assignor from the defendant under a certain contract. It was held that as this instrument had the effect of passing the whole right and interest of the assignor in the moneys payable under the contract by way of security, it was an absolute assignment, not purporting to be by way of charge only, within the meaning of the section and therefore that the assignor in whose name the action was brought had no right to maintain it. Mathew, L.J., at p. 194, says:—

It seems to me clear from its terms that the intention was to pass to the assignees complete control of all moneys payable under the building contract and to put them for all purposes in the position of the assignor with regard to those moneys. That being so I think, unless there be some difficulty created by the decisions on the subject, this instrument may be properly described as an absolute assignment because it is one under which all the rights of the assignor in respect of the moneys payable under the building contract were intended to pass to the assignees and not one which purports to be by way of charge only.

And Cozens-Hardy, L. J., at p. 197, says:—

If on the construction of the document it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it cannot, in my opinion, be material to consider what was the consideration for the assignment or whether the security was for a fixed and definite sum or for a current account. In either case, the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee, nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance from the assignor. Both these elements were found in *Burlinson* v. *Hall*, 12 Q.B.D. 347. The real question and in my opinion the only question is this: Does the instrument purport to be by way of charge only?

The Court of Appeal in the *Mercantile Bank* v. *Evans*, [1899] 2 Q.B. 613, reached the other conclusion with respect to the assignment there in question: That the document assigned "the whole of my rights and interest under the agreement dated June 1, 1897 . . . as security for the repayment on demand of the said sum of £200 and any further sum or sums that you may from time to time hereafter advance to me, either directly, or by way of overdraft or otherwise howsoever." This was held to be not an absolute assignment, but by way of charge only. I have found it impossible to distinguish the assignment in the *Pump House Hotel* case from this, but there must be a distinction between them for in the latter case Mathew, L. J., says that it is obvious.

Other English authorities upon the point are *Tancred* v. *Delagoa Bay Ry. Co.*, 23 Q.B.D. 239; *Comfort* v. *Betts*, [1891] 1 Q.B. 737; *Durham Bros.* v. *Robertson*, [1898] 1 Q.B. 765; *Jones* v. *Humphreys*, [1902] 1 K.B. 10.

In an Ontario case, *Re Bland & Mohun*, 16 D.L.R. 716, 30 O.L.R. 100, decided under a section which, in its material parts, is in the identical language of the Alberta section, the Chancellor (Boyd, C.) said:—

The cases point to this, I think, under the Judicature Act, that an absolute assignment of a mortgage, even if it appears on the face of the assignment that it was only for the purpose of securing a debt lesser in amount,

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would be sufficient to come under the Act so long as it did not purport to be by way of charge only.

It seems to be clear under the authorities that the determining question under the section is not the particular fact which gave rise to the assignment or the consideration upon which it is founded but the form in which it is executed. The mere fact that it is taken in security for money owing by the assignor to the assignee, even if that fact is spread on its face, does not detract from its character as an absolute assignment if its operative words are sufficiently broad to give it that character, but, if instead of that, it simply charges the fund with the payment of the amount which the assignee is entitled to get out of it, then it is not within the section.

In my opinion the first of the assignments made by the plaintiff, and perhaps also the second, is absolute. The first is so in form, for there is not a word in either of them even to indicate that it was given merely in security for an indebtedness of the plaintiff. It cannot be said that it simply charges any money that might become payable under the policy with the payment to the assignees of the amount of their claims against the plaintiff, when there is not even a suggestion on its face that it was given for any such purpose. It is true that, before making settlement with the first assignees, the defendant learned that they held the policy merely in security, but I do not think that that fact makes any difference, for even if it had appeared upon the face of the assignment in its present form, it would still have been an absolute assignment. I am not dealing at all with the fact that the defendant made a settlement with, and procured a release from, those assignees. I am simply trying to find out in whom the right of action under this policy was in view of these assignments.

It would appear not only from the fact, but also from the wording of the assignment to Carson, that the first assignees, Foster and Stubbs, were not beneficially entitled to all of the money payable under the policy, but I do not think that that can detract from their assignment or convert it into something other than that which it purports to be, namely, an absolute assignment.

Holding this view of these assignments, I think that the plaintiff by reason at least of the first of them had no right of action on this policy and therefore no right to maintain this action in his own name. The section passes to the assignee "the legal

right of such debt or chose in action from the date of such notice and all other legal and other remedies for the same." Lord Esher, M.R., in his judgment in the Court of Appeal in *Read* v. *Brown* (1888), 22 Q.B.D. 128, says of these words at p. 132:—

> The words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him.

Mathew, L. J., in *Hughes* v. *Pump House Hotel Co.*, *supra*, says, at p. 194, that if the assignment is within the section "the action must be brought in the name of the assignee." And Cozens-Hardy, L.J., in the same case, at p. 198, after holding that the document there in question was an absolute assignment, says "it follows that the plaintiff Hughes" (the assignor) "has no right of action."

Being of the opinion that at least the first and possibly also the second of the assignments here in question is absolute it follows, I think, that the plaintiff has no right of action, and for this reason alone, without considering the other one, I think my brother Ives did right in dismissing his action.

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

WILTON v. OCCIDENTAL FIRE INSURANCE Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 4, 1917.

INSURANCE (§ III E—100)—MATERIAL MISREPRESENTATION—PREVIOUS FIRES.

A question in an application for insurance as to whether the insured ever had any property destroyed by fire is material to the risk, misrepresentation of which vitiates the policy.

[*Western Assurance Co.* v. *Harrison*, 33 Can. S.C.R. 473, reversing 35 N.S.R. 488, followed.]

APPEAL by plaintiff from the judgment of Ives, J., dismissing an action on a fire insurance policy. Affirmed.

The judgment of the Court was delivered by

WALSH, J.:—This case was tried by my brother Ives with the action of the same plaintiff against the Rochester German Co., 35 D.L.R. 262 and was dismissed by him for the same reasons that he gave in dismissing that action, namely, an absolute assignment of the policy by the plaintiff and his failure to deliver proofs of loss.

I am not at all sure that the first of these grounds is well

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taken on the facts of this case, which are in this respect essentially different from those in the *Rochester German* case. Neither have I considered at all the other question arising from the plaintiff's neglect to furnish the proofs of loss called for by the conditions of the policy. The reason that I have not considered either of these questions is that there is another objection to the plaintiff's right to recover which was taken on the trial and argued before us which affords a complete answer to the action, and it can be stated and disposed of much more easily than either of the two upon which the judgment below was put.

In his application for this policy, the plaintiff was asked the question, "Have you ever had any property destroyed by fire? If so, in what office were you insured." To this question he answered "No." In his evidence given at the trial he admitted that this was an untrue answer to this question, the fact being that on two separate occasions before the date of this application, property belonging to him had been seriously damaged by fire, in such a way as I should say to have involved in each case at least a partial destruction of the property insured, the loss in each case having been covered by insurance. Statutory condition No. 1 provides that

> if any person or persons . . . misrepresents or omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

This point is, I think, concluded by authority in favour of the defendant. In *Western Assurance Co.* v. *Harrison*, 33 Can. S.C.R. 473, the Supreme Court of Canada held that this is a material question, and that an untruthful answer to it under the first statutory condition of the policy there in question precluded recovery by the plaintiff. This condition is not published either in this report or in the Nova Scotia report of the case, 35 N.S.R. 488; but, upon reference to the statute, R.S.N.S. 1900, ch. 147, I find that it is identical in phraseology with the first statutory condition of this policy. This judgment, which is binding upon this Court, is absolutely conclusive of the question, and because of it we could not, even if we would, adjudge the plaintiff entitled to recover.

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

REX v. McDOUGALL; Ex parte GOGUEN.

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New Brunswick Supreme Court, Chandler, J. November 6, 1916.

SUMMARY CONVICTIONS (§ II—20) — JURISDICTION OF MAGISTRATE—PRESENCE OF ACCUSED.

A magistrate has jurisdiction to proceed with the hearing of a charge punishable on summary conviction if the accused is in fact present, although he may have been brought there by irregular means, if the magistrate has jurisdiction over the person and offence.

[*The Queen* v. *Hughes*, 25 Q.B.D. 249, and *Ex parte Giberson*, 4 Can. Cr. Cas. 537, 34 N.B.R. 538, applied; *Re Paul* (No. 2), 20 Can. Cr. Cas. 161, 7 D.L.R. 25, disapproved.]

Statement.

MOTION to make absolute an order *nisi* to quash a summary conviction of Phileas Goguen under the Canada Temperance Act, removed by writ of *certiorari* directed to William A. McDougall, Esquire, sitting police magistrate at Moncton, N.B.

James Sherren, for Goguen.

A. A. Allen, for the prosecution, *contra*.

Chandler, J.

CHANDLER, J.:—On the 30th day of June, 1916, Phileas Goguen was arrested without a warrant by George Rideout, chief constable of the city of Moncton, and taken before Mr. William A. McDougall, sitting police magistrate at Moncton, and was then charged with keeping for sale intoxicating liquor contrary to the provisions of the Canada Temperance Act under an information laid by George Rideout. The accused being in Court, the information was read over to him to which he pleaded "not guilty." At the hearing under the information the accused was represented by Mr. James Sherren, who at the commencement of the hearing took the following objections:—

1. That the accused was illegally before the Court.

2. That there was no proper information in law to proceed with the hearing in the case on account of the way in which the accused was arrested.

3. That accused had been and was then illegally in custody.

These objections were overruled by the magistrate, the hearing was proceeded with, and the offence charged was proved. The conviction complained of was then made by the magistrate.

At the argument before me it was claimed on behalf of the prosecution that the arrest of the accused without warrant was made under the authority of sec. 147, of ch. 8, of the Acts of Assembly of the Province of New Brunswick, passed in the year 1915. This section is as follows:—

"147. Any inspector or sub-inspector under this Act, or the Canada Temperance Act, or any provincial or police

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constable, who has reason to believe from his own knowledge or upon reliable information that any person—

"(*a*) Who, in a locality where liquor licenses are granted under this Act, has not a license to sell intoxicating liquors; or

"(*b*) Who in a county, town, or city in which the Canada Temperance Act is in force, or in a locality where the sale of liquor is prohibited under the provisions of this Act,

Has on his person or in his personal possession any intoxicating liquor, with the intention of selling or disposing of the same contrary to law,

May search for such liquor, and if any be found, may seize such liquor, and if the person be unknown to him or does not give a satisfactory statement as to his identity and residence, may forthwith arrest such person without a warrant and forthwith take such person before a magistrate and there and then upon oath, charge such person with such offence, giving the reason for his belief as to the guilt of the accused, and thereupon the proceedings shall be the same as if such person had been brought before such magistrate under a warrant issued against such person."

The information laid by Rideout was not upon oath, and did not give or purport to give any reason for the belief of the informant as to the guilt of the accused as required by the section quoted, and it was contended before me, by counsel for the accused, that the information as laid was insufficient, and that the magistrate for this reason had no jurisdiction to make the conviction which he did make.

It was contended by the prosecution that the accused being before the magistrate, who had jurisdiction over the offence charged, it made no difference whether the accused was brought before the magistrate legally or not, and *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614, 40 L.T. 685, 14 Cox C.C. 284, was relied upon.

In *Re Paul* (No. 2) (1912), 20 Can. Cr. Cas. 161, 7 D.L.R. 25, Beck, J., takes the view that where the attendance of the accused has been compelled without warrant in a case where a warrant is required by law, a conviction will be bad if the accused protested before the magistrate that his arrest was illegal. He cites *Dixon* v. *Wells* (1890), 25 Q.B.D. 249, 17 Cox C.C. 48, 55 L.J.M.C.

116, in support of his contention. But see *Re Paul* (No. 1), 20 Can. Cr. Cas. 160, 7 D.L.R. 24, where Simmons, J., takes the opposite view. See also *Papillo* v. *The King* (1912), 20 Can. Cr. Cas. 329, where Cross, J., apparently agrees with Simmons, J.

In this particular case, the accused through his counsel did protest as to the illegality of his arrest before the magistrate at the commencement of the hearing.

The case of *Dixon* v. *Wells*, cited above, does not seem to me to support the contention of Beck, J., in the *Paul* case (20 Can. Cr. Cas 161).

Coleridge, C.J., in *Dixon* v. *Wells*, does say that the making of a protest by the defendant as to the illegality of his arrest at the earliest opportunity distinguishes the case from that of *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614, and *The Queen* v. *Shaw* (1865), 34 L.J. Mag. Cas. 169, 10 Cox C.C. 66, L. & C. 579, but he says in his judgment that he does not rest his decision upon the point of the protest alone, as he cannot disguise from himself that the language of several of the learned Judges in *The Queen* v. *Hughes*, and the principle that underlies the judgment of Chief Justice Erle in *The Queen* v. *Shaw*, decide that a mere protest is of no avail at whatever point in the proceedings it may be made, and that the actual presence of the defendant does away with the force of any such protest, however early it may be made, and renders the objection nugatory.

In *Ex parte Giberson* (1897), 4 Can. Cr. Cas. 537, 34 N.B.R. 538, it was held that the fact that the defendant was arrested and brought before the magistrate who made the conviction by a constable who was not qualified as required by Con. Stat., N.B. ch. 90, sec. 69, was no ground for a *certiorari* under the Liquor License Act, N.B., 1896. That the improper arrest did not go to the jurisdiction of the convicting magistrate, *The Queen* v. *Hughes* was relied upon in this case. Van Wart, J., who delivered the judgment of the Court (4 Can. Cr. Cas. 537, 34 N.B.R. 538), says in his judgment:—

> "It matters not by what means the defendant is brought before the magistrate. If, in fact, he is present, and the magistrate has jurisdiction over the person and offence, he may lawfully proceed with the hearing."

While I think that the arrest of the defendant Goguen was illegal and improper, and while no attempt was made by the officer

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who arrested Goguen to comply with the provisions of sec. 147 of the Act of 1915, still the case comes within the decision in the *Giberson* case, and I think that the magistrate had jurisdiction in this case.

In the course of the argument before me it occurred to me that there might be some reason to doubt the power of the Provincial Legislature to enact sec. 147, and this view is, I think, sustained by the following passage in Clement on the Law of the Canadian Constitution, 3rd ed., at p. 551:—

> "For example, while the Canada Temperance Act passed by the Parliament of Canada has been determined to be, as a whole, based upon the power conveyed by the opening clause of section 91, rather than upon this clause No. 27, its penal clauses are clearly part of the Criminal Law. It has been so held in several cases under that Act, provincial legislation as to procedure in such prosecutions being held *ultra vires.*"

However, I do not offer any decision upon this point, as it makes no difference in this particular case whether sec. 147 is or is not *ultra vires* the power of the Provincial Legislature.

I therefore sustain the conviction complained of and dismiss the application of the defendant. *Order nisi discharged.*

B. C.
C. A.

NICKSON Co., Ltd. v. DOMINION CREOSOTING Co., Ltd.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. May 22, 1916.

COMPANIES (§ IV C—55)—REGISTRATION OF CHARGES—EQUITABLE ASSIGNMENT.

An assignment by a company of money due under a contract, as security for an indebtedness, whether legal or equitable, is within sec. 102 of the Companies Act (R.S.B.C. 1911, ch. 39), which requires every mortgage or charge by a company to be registered in order to be valid against the liquidator.

Statement.

APPEAL by plaintiff from the decision of Clement, J., on an interpleader issue tried by him at Vancouver on January 27, 1916. The issue arose out of three contracts entered into between the City of Vancouver and the plaintiff company for laying creosoted block pavements on portions of Pender St., Hastings St., and Fourth Ave., in the City of Vancouver. The plaintiff company purchased creosoted blocks from the defendant company as they required them for the work. The contract for the Pender

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Statement.

St. work was made on May 28, 1912, the work was completed on August 22, and the final certificate of completion of the work was issued by the city engineer on September 27 of the same year. The Hastings St. contract was dated July 28, 1913, the work completed on May 21, 1914, and the certificate of completion dated September 1, 1914; and the Fourth Ave. contract was dated September 8, 1913, the work completed on July 4, 1914, and certificate issued on August 10, 1914. The amounts due from the city in each case were ascertained when the final certificates were issued. The contracts provided that the contractors should maintain the roads for one year from completion of the work, and it was further provided that the city should retain 10% of the contract price for 1 year after the completion of the work in each case to insure the carrying out of the contract to keep in repair. The Dominion Creosoting Co. supplied the T. R. Nickson Co. with all the creosoted blocks required for the work under these contracts. Under an instrument of September 3, 1912, after referring in the preamble to the Pender St. contract, that it was completed, and that there was still due from the city thereon the sum of $2,084.75 (being 10% of the contract price held for 1 year for repairs, as provided in the contract) and that the T. R. Nickson Co. was indebted to the Creosoting Co. for the purchase of creosoted blocks, the T. R. Nickson Co. assigned to the Dominion Creosoting Co. the final payment from the city of $2,084.75. By a second instrument, dated May 26, 1913, the said company made a blanket assignment of the 10% of the contract price retained by the city for the year 1913, and on June 11, 1914, they made a similar assignment with reference to all contracts during the year 1914. The assignments provided that the assignor would only receive credit for 90% of the moneys assigned on the indebtedness due the assignee, the remaining 10% being allowed the assignees on consideration of the 1 year's delay in the payment by the city of the moneys assigned. Notice of the assignments was duly served on the city, but the assignments were never registered with the registrar of joint stock companies under sec. 102 of the Companies Act. The T. R. Nickson Co. assigned for the benefit of its creditors on October 26, 1914. The liquidator brought action against the city for the amount due on said contracts. Upon the application of the city the money due on the contracts was ordered to be paid into

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Court, and that the plaintiff and the claimants proceed to trial. The plaintiff's contention was that as the assignments were not registered with the registrar of joint stock companies and they, being in the nature of a mortgage or charge, were void under sec. 102 of the Companies Act as against the creditors of the T. R. Nickson Co. The learned trial Judge held in favour of the Dominion Creosoting Co.

Statement.

Livingstone & O'Dell, for appellant; *Senkler & Van Horne*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal must be allowed. I think there is sufficient evidence to shew that the assignments were given to secure an indebtedness either present or to be incurred in the future of Nickson to the Creosoting Company, and that, therefore, they would fall within sec. 102 of the statute, which requires that a charge or mortgage must be registered in order to be valid as against the liquidator. I think that when that conclusion is reached there is really no more to be said in the case, and it becomes unnecessary to consider whether they were legal assignments or equitable assignments. In my opinion, they were equitable assignments, but I do not think they are thereby excluded from the operation of section 102. An equitable assignment may be in writing, and put in a form capable of registration. The one question being answered in favour of the liquidator, namely, that these assignments were charges or mortgages, the case of the defendant falls to the ground, and judgment must be given accordingly and the appeal allowed.

Martin, J.A.

MARTIN, J.A.:—I agree.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I also agree, with, however, some considerable hesitation, in view of the fact that the Judge took a contrary view, apparently, of the question of fact. I am, though, not so fixed in my opinion that I would disagree with my brothers, and therefore I agree in the general result. *Appeal allowed.*

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REX v. BLEILER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. February 9, 1917.

TREASONABLE OFFENCE (§ I—10) — ASSISTING PUBLIC ENEMY — OVERT ACT OF TREASON—ATTEMPTS.

The overt act of assisting another to aid a public enemy is in itself a treasonable act; the Criminal Code (Canada) does not contemplate such an offence as an attempt to commit treason.

[*R.* v. *Snyder* (1915), 24 Can. Cr. Cas. 101, 25 D.L.R. 1, 34 O.L.R. 318, referred to.]

CROWN case reserved by Hyndman, J.

A. G. Mackay, K.C., for accused; *H. H. Parlee*, K.C., for the Crown.

The judgment of the Court was delivered by

HARVEY, C.J.:—The defendant was convicted before Mr. Justice Hyndman with a jury, "For that he, the said John Jacob Bleiler, in the months of November and December, in the year of our Lord one thousand nine hundred and fifteen and in the months of January and February, in the year of our Lord one thousand nine hundred and sixteen, then and now being a resident of the Province of Alberta, within His Majesty's Dominions, did maliciously and traitorously attempt to assist the Emperor of Germany, a public enemy then and now at war with His Majesty the King, by counselling, assisting and inciting one Ernest Edward Gerard Hedenstrom, of Wetaskiwin, aforesaid, to sell to the said German Emperor a certain device or invention devised and invented by the said Hedenstrom, and informing the said German Emperor of such device and invention, and verbally and by writings and letters advising and counselling the said German Emperor, his agents and representatives, to purchase and acquire the said device or invention, and offering the said German Emperor, his agents, and representatives, to aid and assist the said German Emperor to purchase and acquire the said invention or device, all for the purpose or intent that such invention o device should be used by the said German Emperor against His Majesty the King, his soldiers, subjects and Dominions in the said war, contrary to the Criminal Code," which was the first of four charges laid against him.

Several questions have been reserved, the first of which is: "Does count 1 of the indictment disclose any offence known to the law?"

This of course refers to the charge above set out.

In *Rex* v. *Snyder* (1915), 24 Can. Cr. Cas. 101, 25 D.L.R. 1, 34 O.L.R. 318, Meredith, C.J.O., in delivering the judgment of the Court, expressed the opinion that what was done in that case constituted an attempt to commit treason. Mr. Mackay, for the accused, questions the correctness of this opinion, and argues that there is no such offence known to the law as an attempt to commit treason. The Chief Justice points out that in most cases of treason there could be no attempt as a separate offence because

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an overt act which would constitute or evidence an attempt would constitute or evidence the full offence of treason, but that the case under consideration being a statutory one was such that there could be an attempt without the full offence being constituted. In that case the conviction was quashed so the Court did not require to consider what would be the consequence of a conviction for an attempt to commit treason being sustained.

The Code contains no provision for punishment on a conviction of an attempt to commit treason. The general provision for punishment of attempts contained in secs. 570 and 571 has no application to a case where the punishment is anything but imprisonment. Treason is a capital offence, any person guilty of it being in the words of the section "liable to suffer death." No provision is made for imprisonment in the alternative. Special provision is made for the punishment of attempts to commit the capital offences of murder and rape though the general provision might apply in the latter case since rape is punishable in the alternative by imprisonment. This appears to me to be a very strong ground for concluding as I do that the Code does not contemplate such an offence as an attempt to commit treason. But that does not aid the accused much in this case for if there can be no offence of attempted treason what is charged is in fact treason, because the attempt itself furnishes the necessary overt act, which undoubtedly is an offence known to our law. I would therefore answer this question in the affirmative.

At the close of the case for the Crown, counsel for accused applied to have all the charges withdrawn, charges three and four were withdrawn, but not one and two. Counsel then asked to have these consolidated or struck out on the ground that each charged an attempt to commit treason. This was refused and the jury returned a verdict of guilty on the first and not guilty on the second. Questions are reserved as to whether the ruling on this point was wrong and if so whether the verdict of guilty is thereby affected. A consideration of the two charges satisfies me that they are not the same and that the ruling was therefore right, but I find difficulty in seeing how, even if it had been wrong, any injustice has been done the accused, the jury having found him not guilty of the second charge.

At the trial accused asked to be allowed to give in evidence to prove his loyal intentions and sentiments letters written by

him to his brother since the outbreak of the war. These were refused and the fourth question reserved is whether they were properly refused.

The general principle is that a party is not at liberty to give self-serving evidence such as this. There are of course exceptions to this as to most rules, but I can conceive of no principle upon which a person can be permitted in advance or after the commission of an act to manufacture evidence by his own statements to prove that his act was innocent as would be the case if letters, or what purported to be, but might in fact not be actual letters, should be receivable in evidence as here proposed.

The fifth question asks whether the evidence discloses an offence or only a preparation to commit or attempt to commit it. There is a mass of evidence but a very important bit of it consists of letters passing from the accused to the German Ambassador to the United States and to the Embassy, in December, 1915, and January, 1916. The first letter is to the Ambassador, calling his attention to the invention in question, expressing the writer's loyalty to Germany, and urging the investigation of the invention for the purpose of its being used in the interests of Germany in the war. To prevent the letters being opened he asks to be communicated with through a brother in the United States.

The next letter is to the Embassy and purports to be in answer to one which was apparently a reply to the first. It adds little to the first. The third is to the Ambassador and is an introduction of Hedenstrom.

It appears clear to me that these letters are in themselves clearly overt acts evidencing the treasonable intention and if accepted by the jury as meaning what they seem to mean constitute all that is necessary to establish the full offence of treason. They are some of the overt acts specified in the charge, and without considering any other act shewn by the evidence, I see no way in which they could be considered as constituting merely a preparation for the offence.

The last question asked is: "Having regard to the fact that the jury found that the accused 'was influenced to do' what he did by one Hedenstrom, and that Hedenstrom absolutely owned and controlled the device or invention, referred to in the indictment, and that Hedenstrom never intended to sell, or attempt to sell, and did not sell, or even attempt to sell, the said device or in-

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vention to the German Emperor, his agents or representatives, was there evidence to submit to the jury and should the verdict of 'guilty' stand?"

What I have said in answer to the preceding question appears to me to be applicable to this question. It is not a question of what Hedenstrom was willing or intended to do. The accused is charged not merely with counselling and assisting Hedenstrom, but he is charged with informing the German Emperor of the device and counselling him and his agents to acquire it. That was not merely attempting to assist the enemy but was assisting the enemy with advice and information which might have been of value and which the jury on the evidence could conclude that he intended to be of value. I think, therefore, this question should also be answered in the affirmative.

While in the result all of the rulings of the trial Judge are upheld, it is admitted by counsel that the trial proceeded upon the view that the charge was one of an attempt to commit treason, and the learned trial Judge's charge to the jury clearly adopts that view. It seems quite clear, therefore, that the trial Judge, misled by the counsel's conduct of the trial, did not properly direct the jury and that the verdict in consequence ought not to stand, certainly as a verdict of guilty of treason. No question is reserved, however, which permits us to deal with the conviction from this point of view, and I would therefore direct that a case be re-stated to bring this point before the Court.

Case remitted to be re-stated.

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VIPOND v. FURNESS, WITHY & Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. December 30, 1916.

1. CARRIERS (§ IIIG—467)—LIMITATION OF LIABILITY—"EFFECTS OF CLIMATE"—NEGLIGENCE.
A stipulation in an English bill of lading against liability for damage from the "effects of climate," or from negligence, includes damage from freezing while discharging cargo at an intermediate port, and the negligence clause is binding between the parties.
[31 D.L.R. 635, 25 Que. K.B. 325, affirmed.]

2. PARTIES (§ I B—55)—JOINDER OF PLAINTIFFS—DORMANT PARTNER.
A dormant partner is a necessary party plaintiff in an action for the benefit of the partnership (*Per* Fitzpatrick, C. J.).
[31 D.L.R. 635, 25 Que. K.B. 325, varied.]

APPEAL from a decision of the Court of King's Bench, Appeal Side, for the Province of Quebec, 31 D.L.R. 635, 25 Que. K.B.

325, reversing the judgment of the Court of Review in favour of the plaintiff. Affirmed.

H. N. Chauvin, K.C., and *E. G. Vipond*, K.C., for the appellant.

A. Chase Casgrain, K.C., for respondents.

FITZPATRICK, C.J.:—This is an action brought to recover the value of a shipment of lemons which were frozen while in the possession of the respondents as common carriers.

When the lemons were delivered to the respondents at Liverpool in January it appears by the bill of lading that some of the original packages were in a very frail condition, stained and recoopered and consequently more liable to be affected by frost. Immediately a special marginal note was made on the bill of lading to the effect that the company would not be responsible for the condition of the goods on their arrival.

The ship sailed in the beginning of January, arrived at Halifax on the 16th of that month and at St. John, N.B., a few days afterwards. The lemons were frozen in transit. There is no satisfactory proof of the time at which the frost reached the goods. The bill of lading, however, contains clauses and stipulations which, in terms, cover the alleged cause of injury if we are to believe the port-warden who saw the goods when the hatches were first opened immediately on the arrival of the ship at Halifax. He says that several of the boxes of lemons which he then examined were frozen.

The bill of lading exempts from liability for loss or damage resulting from "effects of climate" and from "perils of navigation." The port-warden says that the lemons were carefully stowed in the proper place in the ship, and there is no evidence of negligence except that given by Mr. Vipond, who expresses the opinion that lemons could not freeze when stowed between decks, and he adds that the injury to the lemons must have been caused by leaving the hatches open after the arrival at Halifax. As against this we have the evidence of the port-warden who testifies to the condition in which he found the lemons on the arrival of the ship. There is in the bill of lading a negligence clause which extends the scope of the exception with respect to liability to acts of negligence of the company's servants or employees.

The law applicable to the facts of this case is very clearly

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stated by Lord Loreburn in *Nelson Line* v. *Nelson & Sons*, [1908] A.C. 16, at 19 and 20:—

> The law imposes on ship-owners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of their duties, but unless they prove such a contract the duties remain; and such contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaghten said in *Elderslie S.S. Co.* v. *Borthwick*, [1905] A.C. 93 at p. 96:—"An ambiguous document is no protection."

Here we have, as I have already said, in the bill of lading exceptions and stipulations which, in terms, cover the injurious effects of climate, insufficient ventilation and heat holds. There is, further, the special entry on the bill of lading that respondent was exempt from responsibility on account of the bad condition of the goods when received, and, in addition, a negligence clause couched in singularly clear and unambiguous terms: The bill of lading says the steamship company shall not be responsible for the

> injurious effects of climate, insufficient ventilation or heat holds, risk of craft, of transhipment and of storage afloat or on shore . . . whether or not any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, whether compulsory or not, officers, mariners, engineers, refrigerating or otherwise, crew, stevedores, ship's husbands or managers, or other persons whatsoever whether on board said ship or on shore.

The binding effect of such a clause cannot be doubted. *Vide* Hals., vol. 26, p. 116, par. 197, and Fuzier-Herman, Répertoire, vbo. "Armateur," No. 178:—

> 178.—L'armateur peut donc, comme le commissionnaire de transport, et même a plus forte raison, stipuler l'affranchissement complet de la responsabilité des fautes du capitaine ou de l'équipage, "responsabilité purement civile et au second degré, en présence de laquelle subsiste la responsabilité engagée du garant direct, le capitaine." Cette doctrine développée, pour la première fois en 1869, par M. l'avocat général de Raynal a été, depuis, consacrée par de nombreuses décisions de la Cour de Cassation, et l'on peut dire que la jurisprudence est aujourd'hui définitivement fixée en ce sens.—V. les conclusions de M. de Raynal, sous. Cass., 20 janv. 1869, Messageries impériales (S. 69. 1. 101, P. 69, 247, D. 69. 1.94).

I would have also been prepared to dismiss the appeal on the ground that the proper parties are not before the Court.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant, by his accepting the first bill of lading given in Italy in order to secure a through rate, bound himself to accept such bill of lading (no matter how heavily laden

with conditions or exceptions) as any intermediate carrier, for example a shipping company at London, in the course of through transportation contemplated, chose to impose.

The contract which thus came to be made at London is, no doubt, most onerous and at first blush somewhat ambiguous.

It was clearly intended thereby, that the carrier should run no risk, and the unfortunate shipper should, if possible, bear all the risks, of every kind that the long experience of generations of carriers have discovered might be run by them in the course of their business. It seems clear from reading this wonderful instrument that so soon as a new risk had been discovered, some new words were introduced into the form of bills of lading used by these carriers. Thus there had grown as quaint and complex a document as legal knowledge of decided cases and mariners' experience could suggest, well suited to entrap the unwary shipper tempted to accept a through rate and shut his eyes to all implied therein.

The Courts have occasionally found some of such like bills of lading ambiguous, and been enabled thereby to do justice by holding the respective carriers using them liable. For, although these English carriers may contract themselves out of almost any liability, yet they are told by English Courts of justice that the attempt to do so must be in such clear and explicit terms that those they contract with should, if they took care, be enabled to understand that they were doing so, or at least so far as the particular risks involved in the contract were in question.

The railway companies in this country and shipping carriers in the United States have been restrained by legislation from carrying the law of contract so far as the respondent's bill of lading now in question has attempted.

I think in this case now presented for our consideration the respondent carrier has accomplished its purpose and so framed its contract that it is not possible for me to hold that the language is, when closely studied and carefully weighed, so ambiguous that I am unable to give it the meaning respondent stoutly contends for.

Moreover, we must observe the following stipulations in the contract:—

Any claim or dispute arising on this bill of lading shall, in the option of the shipowner, be settled with the agents of the line in London according to

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British law, with reference to which law this contract is made to the exclusion of proceedings in any other country. General average payable by cargo according to York Antwerp rules, 1890.

In accepting this bill of lading, the shipper or other agent of the Owner of the Property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.

Why, in the face of a contract, presumably under the circumstances made in London, and so expressly declared to be made in reference to British law, we should have such profuse references to another law, I am not able to understand. Doing so only confuses things. Had the action arisen out of something happening on our railways, then our Canadian legislation or Canadian law might perhaps have been instructive, even if not directly binding the parties.

As the case stands, I see nothing for it but that the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The principal point made by counsel for the appellant is that the two bills of lading, that dated December 9, 1910, and that dated January 2, 1911, must be read together, and that the effect of clause 10 in the earlier bill of lading is to qualify the terms of the second bill in such a way as to limit the operation of the exceptions set forth in par. 2 of it to cases in which the causes to which injury to the shipments are ascribed could not have been counteracted by proper diligence on the part of the carriers. This argument must, I think, be rejected, because it appears to me to be very plain that par. 10 in the earlier bill of lading is a provision in favour of the owner and not of the shipper; and I think their full normal effect must be given to the words in par. 2,

> effects of climate . . . whether or not occasioned by . . . any act or omission, negligence, default or error of judgment of the . . . persons . . . for whose acts they would otherwise be liable,

and that these words must relieve the respondents from any liability which they might otherwise have been subject to.

Some question was raised as to the law applicable. The second bill of lading contains a paragraph plainly indicating that the intention of the parties is that it is the law of England by which the construction and effect of this instrument are to be governed. Such a stipulation is conclusive both under the law of England; *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202; and under that of Quebec; Art. 8 C.C.; Savigny (Guthrie's translation, 2nd

ed.), secs. 369, 370, pp. 194 and 197; sec. 372, p. 221 (note A), p. 227; *Royal Guardians* v. *Clarke*, 17 D.L.R. 318, 49 Can. S.C.R. 229, at 251; Lafleur's Conflict of Laws, at p. 149.

The appeal should be dismissed with costs.

ANGLIN, J.:—Assuming that it is fully established that the freezing of the appellant's shipment of lemons was due to negligence of the respondents' servants, liability for such negligence is, in my opinion, clearly excluded by an express provision of the bill of lading under which the respondents carried this cargo. It is conceded, and, in view of the terms of the original bill of lading with the General Steam Navigation Co., it could not well have been contended otherwise, that the latter company had authority to tranship the appellant's goods at London, and to accept on his behalf from the forwarding steamship company a bill of lading in its customary form. It was in pursuance of this authority that the bill of lading in question was taken from the respondents and it is binding upon the appellant. It is not suggested that it is not in the respondents' usual form or that its acceptance was procured by any imposition, misrepresentation or concealment.

The question presented is solely one of construction. There is no ambiguity or inconsistency whatever in the terms of the bill of lading. I am unable to agree with the appellant's contention that it incorporates the provisions of the bill of lading issued by the original shippers, the General Steam Navigation Co. The clause relied upon for that purpose, viz.:—

> Through goods are also subject to all conditions of the company or companies which assist in their conveyance,

in my opinion, refers solely to conditions of any company or companies which might take over the goods from the respondents for the purpose of forwarding them to destination. That this is the meaning of the clause invoked is, I think sufficiently clear from its own terms. But if not, it is made so by the fact that it immediately follows another clause which stipulates that:—

> In arranging for through carriage the liability of the Furness Line is to be that of forwarding agents only.

No sufficient ground has been advanced for relieving the appellant from the clear and explicit provision of the bill of lading taken on his behalf.

For the foregoing reasons, as well as those assigned by Cross, J., in the Court of King's Bench, I am of the opinion that, under

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the special terms of their bill of lading, the respondents were exempt from liability for injury to the appellant's cargo due to climatic conditions, although that injury was occasioned by negligence of the respondents' servants.

BRODEUR, J.:—The appellant claims damages for lemons which were frozen in transit between London and St. John, N.B., on a ship belonging to the respondents.

The respondents contend that they are not responsible for the condition of those goods, because by the bill of lading they were exempted from liability for damages caused by frost.

Those goods were shipped from Italy to Montreal on a through bill of lading issued at Milazzo, Italy, by the General Steam Navigation Co. It was provided in the bill of lading issued by the latter company that those goods could be transhipped in England. When they reached England, the goods were handed over to the respondent company for the purpose of being transported to St. John, N.B.

One of the conditions of the new bill of lading was that the respondent company should not be responsible for injurious effects of climate whether or not

the loss or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, etc.

It appears that when the ship came near Newfoundland they encountered a pretty severe frost and it is likely that the lemons got frozen at that time, though the goods seem to have been stowed at the place where they should have been. It is in evidence also that when the ship reached Halifax the hatches were open for the purpose of discharging the cargo and that the lemons might then have got frozen.

However, the respondents claim that, according to their contract, they could not be held liable for negligence, default or error. Their bill of lading was accepted without any objection and became the contract determining the rights and obligations of the parties. It was provided also by that bill of lading that it would be interpreted according to the laws of England, and it has been proved in the case under the provisions of that law that bill of lading with such a clause was good and valid.

But it was contended on the part of the appellant that the new bill of lading issued in London by the respondent company was subject to the conditions and clauses of the original bill of

lading. It appears in the original bill of lading issued in Italy that the vessel owners undertook to exercise care and diligence in the carrying of goods, and that the latter clause would then be contrary to the provisions of the second bill of lading issued by the respondent company.

I am unable to find in the latter bill of lading any provisions by which all the conditions and obligations mentioned in the original bill of lading would affect the respondent company. It was even stipulated in the original bill of lading that, in the event of transhipment, the clauses, conditions and restrictions of the ship or other conveyance by which the goods are forwarded to destination were included in the original bill of lading in addition to the conditions therein stipulated.

The contract then could be modified by any new ship owner; and as in the present case the respondent company undertook to carry the goods, but with the condition that it should not be responsible for the injurious effect of climate even if the loss arose from its own negligence or the negligence of its employees, it constituted a contract which unfortunately in the circumstances of the case would not give any relief to the appellant. Those conditions might be very unjust; but they are the stipulations accepted by the parties and the Courts are bound to give effect to them.

The appeal should be dismissed with costs. *Appeal dismissed.*

Annotation—The Crown as a common carrier. **Annotation.**

It has for a long time been accepted as a principle of law that the Crown, in respect of the conveyance of goods over Canadian Government railways, is not in the position of a common carrier. In the case of *Lavoie* v. *The Queen*, 3 Can. Ex. 96, the learned trial Judge made the following observation:—

"In *The Queen* v. *McLeod* (8 Can. S.C.R. 1), the majority of the Court, following *The Queen* v. *McFarlane*, 7 Can. S.C.R. 216, held that the Crown, in respect of government railways, is not a common carrier."

In view of its importance the soundness of this doctrine is well worth a careful enquiry.

Before discussing the opinions of the Judges in the two Supreme Court cases above mentioned, it would be well to examine some pertinent provisions of the Exchequer Court Act and the Government Railways Act, and then review the principles upon which the legal liability of a common carrier are based.

In the first place, by sec. 19 of the Exchequer Court Act, R.S.C. 1906, ch. 140, it is provided that "The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action

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against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown."

Then turning to the Government Railways Act, R.S.C. 1906, ch. 36, it is abundantly clear that parliament, in enacting certain of its provisions, contemplated that the government railways would carry on the business of common carriers. For instance, by sec. 46 of the said Act the Governor-in-Council may impose and authorize the collection of tolls and dues upon any railway vested in His Majesty. By secs. 49, 50 and 51 the Governor-in-Council may make regulations for the ascertaining and collection of the tolls, dues and revenues on such railway; for imposing fines for the violation of any such regulation; and for the detention and seizure, at the risk of the owner, of any carriage, animal, timber or goods on which tolls or dues have accrued and have not been paid. It is also noteworthy that by clause (*h*) of sec. 2 of the Act, "toll" is defined to include any rate or charge, or other payment payable for any passenger, animal, carriage, goods, merchandize, matter or thing conveyed on the railway. Furthermore, clause (*i*) declares that "goods" includes things of every kind that may be conveyed upon the railway, or upon steam or other vessels connected therewith.

Our object in quoting these statutory enactments is merely to show, *expressis verbis*, how far parliament intended to place the Crown in the position of a common carrier, and to give a remedy for its breach of duty as such.

In the second place, we shall proceed to examine the principles underlying the common carrier's liability at common law.

A common carrier may be defined to be a person who undertakes for hire or reward to transport the goods of such as employ him from place to place. *Dwight* v. *Brewster*, 1 Pick. 50. The following definition from one of the older books has been specially commended both for brevity and exactness: "Any one who undertakes to carry the goods of all persons, indifferently, for hire, is a common carrier." *Gisbourn* v. *Hurst*, 1 Salk, 249 (91 E.R. 220) Cf. *Liver Alkali Co.* v. *Johnson*, L.R. Ex. 267. These definitions bring the obligations of a common carrier within that branch of the law of contract known as bailments. The bailment of common carriage falls within the fifth of Sir William Jones' classifications, viz., *locatio operis mercium vehendarum*. Jones, Bail. 36.

Yet the common carrier's liability is something more than that of an ordinary bailee. Cf. Van Zile on Bailments, 2nd ed., sec. 29 (*c*). Lord Mansfield in *Forward* v. *Pittard* (1785), 1 T.R. 27 (99 E.R. 953) at p. 33, says:— "It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident except by the act of God or the King's enemies.

Now as to railways. "That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules, of the common law, and make them eminently common carriers."

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Per Shaw, C.J. in *Norway Plains Co.* v. *Boston & Maine Rd.* (1854), 1 Gray 263, p. 269.

Now, while the Crown is liable in actions arising out of contract, it is clear law that it is not liable to the subject in actions of pure tort except where made so by statute. *Tobin* v. *The Queen*, 16 C.B. (N.S.) 355; *City of Quebec* v. *The Queen*, 24 Can. S.C.R. 420. However, it is equally certain that the Crown is liable for all breaches of contract no matter whether they depend on its servant's breach of duty or otherwise. In *Brown* v. *Boorman*, 11 Cl. & F. 1, (8 E.R. 1003), at p. 44, Lord Campbell said: "Whenever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract."

In the case of the *Windsor & Annapolis R. Co.* v. *The Queen* (1886), 11 App. Cas. 607, the claim rested on a trespass by the Crown's servants in ejecting the suppliants from a railway over which the Crown had contracted to give them possession and control for a stated period. Lord Watson, in delivering the judgment of their lordships, said (p. 613):—"A suit for damages, in respect of the violation of the contract, is as much an action upon the contract as a suit for performance: it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible."

In *Tobin* v. *The Queen* (1864), 16 C.B. N.S. 310, at p. 355, Earle, C. J., said "Claims founded on contracts and grants made on behalf of the Crown . . . are within a class legally distinct from wrongs."

"No civil wrong is a tort if it is exclusively the breach of a contract. The law of contracts stands by itself, as a separate department of our legal system, over against the law of torts; and to a large extent liability for breaches of contract and liability for torts are governed by different principles. It may well happen, however, that the same act is both a tort and a breach of contract . . . Thus he who refuses to return a borrowed chattel commits both a breach of contract and also the tort known as conversion: a breach of contract, because he promised expressly or impliedly to return the chattel; but not merely a breach of contract, and therefore also a tort, because he would have been equally liable for detaining another man's property, even if he had made no such contract at all." Salmond's Jurisprudence, 2nd ed., p. 435. Finch, J., in *Rich* v. *New York Central, etc., R. Co.*, 87 N.Y. at p. 390, said:—"We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu*, and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult . . . Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent of his principal or the lawyer of his client, the ground of duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another different purpose, the question whether such invasion of a right is

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actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test."

How far the undertaking of a common carrier protrudes itself into the border-land of obligations mentioned by Finch, J., is shown by the following extract from Keener on Quasi-Contract, p. 18:—"Of a quasi-contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises not from contract, but from a duty, is clear. While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier is to act, the obligation is really quasi-contractual in its nature, and not in the nature of a tort."

Mr. Keener's view that the obligation of the carrier sounds in contract rather than in tort is strongly supported by the opinion of Lord Mansfield in *Forward* v. *Pittard*, quoted *ante*, and by that of Lord Kenyon, C.J., in *Buddle* v. *Willson* (1795), 6 T.R. 369 (101 E.R. 600), where he says, at p. 373, that a declaration against a carrier on the custom of the realm is, in substance, *ex contractu*. In the report of this case in the Revised Reports, vol. 3, at p. 202, the syllabus reads: "The cause of action in the ordinary case of an action against a common carrier is essentially *ex contractu*." In the editorial note to *Buddle* v. *Willson*, (*ubi sup.*) we find the following:—"Lord Kenyon's judgment in *Buddle* v. *Willson*, as well as the case of *Boson* v. *Sandford*, on which it is founded, is impeached by Lord Ellenborough in *Govett* v. *Radnidge*, 3 East, 62, 69 (102 E.R. 520). But the principle is reaffirmed by Sir J. Mansfield, C.J., in *Powell* v. *Layton*, 2 Bos. & P. (N.R.) 365, (127 E.R. 669), and Mr. Dicey (On Parties, p. 20) after reviewing these, with other conflicting authorities, supports the view of Sir J. Mansfield." Let us first quote Mr. Dicey's exact words, and then proceed with those of Sir James Mansfield in the case last mentioned, as they are both of high authority. Mr. Dicey says (p. 20.):—"In spite of conflicting decisions, the doctrine laid down by Sir J. Mansfield, C.J., is (it is submitted) in theory correct. Actions for torts, founded on contract, though in form actions for tort, are in reality actions for breach of contract. They owe their existence to the fact that for technical reasons . . . declarations were often framed in tort where the real cause of action was the breach of a contract." In *Powell* v. *Layton*, Sir James Mansfield, said (pp. 369, 370):—"Let us see what is meant by the defendant's duty? How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant or the duty of an officer I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract . . . The form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract." See also *Baltimore and Ohio R. Co.* v. *Pumphrey*, 59 Md. 390; and Pollock on Torts, 10th ed., p. 558.

It would appear from this examination of the authorities establishing the criteria of the carrier's obligation, that the remedy for a breach of that obligation extends itself within the province of contract rather than within that of tort.

Turning now to a consideration of the Supreme Court cases of *The Queen* v. *McFarlane*, and *The Queen* v. *McLeod*, it is well to bear in mind that when they were decided, the Dominion Petition of Right Act, 1876, was in force.

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By that Act the subject in Canada was put in the same position as the subject in England under "Bovill's Act," 23 and 24 Vict. (U.K.) ch. 34. His petition, after a fiat was obtained thereon, was cognizable in the Exchequer Court of Canada. The question of the liability of the Crown in damages for breach of contract, was pursued with great historical research and acumen by the Court of Queen's Bench in the case of *Thomas* v. *The Queen* (1874), L.R. 10 Q.B. 31, and it was held on the authority of the *Banker's* case (14 How. St. Tr. 1), that the Crown had always been liable to the subject in matters of contract. Parliament, in enacting the Dominion Petition of Right Act of 1876, made it clear that there was no intention of giving to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the English statute above mentioned. That Act distinctly negatived any intention of giving to the subject any remedy which he would not have been theretofore entitled to. In other words, the English Petition of Right Act is to be regarded as nothing more than a statute of procedure. (See Clode on Pet. Right, p. 176.) Furthermore, by the sec. 58, of the Supreme and Exchequer Courts Act, then in force, it was provided that the Exchequer Court should have "exclusive jurisdiction in all cases in which the demand shall be made or relief sought in respect to any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown." By all of which it appears that when the *McFarlane* case and the *McLeod* case were decided the subject in Canada has as full a remedy in the Exchequer Court against the Crown for breach of contract as the subject in England had at that time. Bearing this in mind let us proceed to examine the decisions of the Supreme Court of Canada in the cases mentioned.

Dealing first with the *McFarlane* case, the petition of right set out that a quantity of timber and logs belonging to the suppliants while in transit through certain slides and booms belonging to the Dominion Government on the Ottawa River were lost "by reason of the unskilful, negligent and improper conduct" of the slide-master. The claim sounded in tort, and the Crown pleaded that there was no liability, on its part, for the negligent acts complained of, and that no contract with the suppliants was shown for breach of which a petition would lie. So that as the action was shaped and presented to the Court, there was no jurisdiction under the statutes mentioned to entertain it. Beyond this, it is submitted, that the expressions of the Judges are *obiter*. Ritchie, C.J., while negativing any analogy between the case and that of a common carrier (p. 236) thought that even if a contract of carriage could have been made out upon the facts as between subject and subject, in any event the Crown would not have been liable as a common carrier on grounds of public policy, relying therefor upon *Whitfield* v. *Lord DeSpencer*, 2 Cowp. 764. Taschereau, J., concurred with the Chief Justice. Strong, J. (at pp. 242, 243) said:—"Without enquiring whether this analogy between the liability of the Crown and a private person for a breach of contract arising from the laches and negligence of an agent is correctly assumed, it appears very clear that there is no room for applying it in the present case, for the petition of right does not show any contract on the part of the Crown to pass the timber safely through the slides, either expressly or impliedly entered into by the parties, as in the case of a carrier undertaking the carriage of goods, or arising by operation of law." Gwynne, J. (p. 244) regarded the case shaped in the

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petition as one of pure tort. So that the *McFarlane* case, thus analyzed, hardly affords a sure foundation for the doctrine that the Crown is not a common carrier in respect of government railways in Canada.

In the *McLeod* case the suppliant had been seriously injured in an accident while being carried as a passenger on a government railway. He had paid for and obtained a first-class ticket for his transportation between certain points, and was occupying a seat in a first-class car when the train was derailed. Having alleged in his petition that he had been received as a passenger upon a promise to be carried safely for reward between such points, the suppliant charged that "Her Majesty, disregarding her duty, in that behalf, and her said promise, did not safely and securely carry the suppliant . . . but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger . . . that . . . suppliant was greatly and permanently injured in body and health, etc."

It will be observed that the *McLeod* case, as shaped in the petition of right, was not an action for the breach of an ordinary contract of common carriage in respect of which the carrier would be liable without negligence being shown. Railway companies are not common carriers as regards passengers. (See *per* Lindley, L.J., in *Dickson* v. *Great Northern R. Co.* (1886), 18 Q.B.D. at p. 185; Macnamara's Law of Carriers (2nd ed.) p. 519.) A carrier of passengers is not, as such, liable as a common carrier of goods. (*East Indian Ry. Co.* v. *Kalidas Mukerjee*, [1901] A.C. 396); but when a carrier of passengers also holds himself out as a carrier of goods, he is a common carrier *qua* the goods. (*Dickson* v. *G. N. R. Co.*, 18 Q.B.D. 183.) That Ritchie, C.J., appreciated the distinction between the *McLeod* case and that arising under a true contract of common carriage appears at pp. 20, 23 of the report. He says:—"This is, in my opinion, unquestionably a claim sounding in tort, a claim for a negligent breach of duty. A carrier of passengers is not an insurer." If the learned Chief Justice had stopped there, the case would hardly have been an authority for the proposition or doctrine in question. But he proceeds to take up the threads of an enquiry into the reasons of the Crown's immunity from ordinary civil actions, begun by him in the *McFarlane* case,—and finally arrives at the conclusion that "the establishment of the government railways in the Dominion is . . . a branch of the public police, created by statute for purposes of public convenience and not entered upon or to be treated as private mercantile speculations . . . To say that these great public works are to be treated as the property of private individuals or corporations, and the Queen, as the head of the Government of the country, as a trader or common carrier, and as such chargeable with negligence, and liable therefor, and for all acts of negligence or improper conduct in the employees of the Crown, from the stoker to the Minister of Railways, is simply to ignore all constitutional principles." The majority of the Court also thought that the case could not be distinguished in principle from the *McFarlane* case, but Fournier, J., in his able dissenting judgment (p. 40) points out that the two cases are distinguishable inasmuch as the claim in the *McFarlane* case was for a pure tort while in the *McLeod* case "two essential elements for the existence of a contract of conveyance are to be found; on the part of *McLeod*, a good and valid consideration given in exchange for the service demanded, by paying the railway fare according to the tariff—on the part of the government, by the handing over of a passenger ticket as evidence of the promise to convey the respondent from C. to S."

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The *McLeod* case was decided in 1883, and comparing it with the *Windsor and Annapolis Railway* case, decided by the Judicial Committee of the Privy Council three years later (1886), 11 App. Cas. 607, and referred to *ante*, it will be seen that Fournier, J's, view that the Crown was liable for a tortious breach of contract is supported by Lord Watson's observations in the case last mentioned. Furthermore, Fournier, J., expressly controverted the argument put forward by the majority of the judges in the *McFarlane* and *McLeod* cases to the effect that it would be contrary to the interests of administration and public convenience to hold the Crown liable as a trader or common carrier in respect of railways and other undertakings operated by the government; and it is both interesting and important to note that Sir Barnes Peacock, in *Farnell* v. *Bowman* (1887), 12 App. Cas. 643, at p. 649, takes much the same view of the *ab inconvenienti* argument against the Crown's liability in these matters as Fournier, J., does. His language is so much to the point that it would almost seem that he expressly intended to impugn the conclusions of the majority of the Supreme Court of Canada in the cases mentioned. He says:—"It must be borne in mind that the local governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the King can do no wrong', were applied to colonial governments . . . it would work much greater hardship that it does in England."

The Supreme Court of Georgia, in *Western & Atlantic Rd.* v. *Carlton* (1850), 28 Georgia, at p. 182, might be cited as arriving at the same conclusion by a parity of reasoning:—"It is insisted that the State is not a common carrier, and is not subject to the rules of law which apply to common carriers. When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulation with persons engaged in the same calling."

It is convenient at this place to note that the Judicial Committee of the Privy Council has decided that the Crown, represented by a colonial government, can be chargeable with a warehouseman's obligations as a bailee.

In the case of *Brabant & Co.* v. *King*, [1895] A.C. 632, the question is decided unequivocally in the affirmative. The Government of Queensland had, under the provisions of the Queensland Navigation Act of 1876 (41 Vict. No. 3), accepted from the plaintiffs certain explosives and stored them in one of their magazines at Brisbane under the control of the Governments servants, charging the plaintiff storage-rent for the same. The Act provided that if such storage-rent was not paid, the goods might be sold by the Government. While the goods were so in storage the River Brisbane rose to an exceptional height and flooded the magazine. The plaintiffs' goods were rendered valueless by their immersion in water. Lord Watson, in delivering the judgment of their lordships, at p. 640, said: "Their lordships can see no reason to doubt that the relation in which the Government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled store-keeper . . . And that obligation included not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

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The question naturally arises after a perusal of this case, why should the Crown be held liable as a warehouseman and not as a common carrier?

We have already quoted the remarks of Burbidge, J., in *Lavoie* v. *The Queen* upon the question of the Crown's liability as a common carrier. That case was decided in the year 1892, 16 years after the Dominion Petition of Right Act was passed, and some 5 years after the Exchequer Court Act of 1887 became law. It will be remembered that the latter provided, *inter alia*, that the Court should have jurisdiction in any case "in which the claim arises out of a contract entered into by or on behalf of the Crown." The *Lavoie* case was essentially a case of common carriage. In 1905, the case of *The Nicholls Chemical Co.* v. *The King*, came before Burbidge, J., on a petition of right for damages for the loss of a certain quantity of acid while in transit over a railway owned and operated by the Dominion government.

In the interval between the decision in the *Lavoie* case and that in the one last mentioned, the learned Judge seems to have modified somewhat the view implicit throughout his reasons in the former case that the Crown can be in no sense a common carrier. But he does not conceive of the Crown being liable as an insurer. He says (9 Can. Ex. at p. 278): "The Crown is not in regard to liability for loss of goods carried in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of such goods, and any special contract made is, in general, in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants." Here we see that the learned Judge relies upon the very technical principle underlying the carrier's responsibility as an insurer (namely, that such responsibility does not arise out of the carrier's contract, but is cast upon him by the "custom of the realm") to place an action against the carrier for failure to carry and deliver the goods wholly within the domain of tort. But with all deference we would point out that to do this is to ignore the opinions of Lord Kenyon in *Buddle* v. *Willson*, of Sir James Mansfield in *Powell* v. *Layton*, and of Lord Campbell in *Brown* v. *Boorman*, cited and discussed *ante*, as well as those of text writers of high authority, certain of which we have passed in review. Remembering that common carriage is a bailment, it is noteworthy that Burbidge, J., in *Johnson* v. *The King* (1903), 8 Can. Ex. 360), found no difficulty in holding the Crown liable as a bailee for hire in respect of the duty of such a bailee to take reasonable care; yet the duty to take reasonable care in the bailment of hire (*locatio rei*) is as much an obligation, superimposed by law upon the actual contract, as the duty of an insurer is in the case of the bailment of common carriage (*locatio operis mercium vehendarum*). As Dr. Holland puts it:—"What is called, with reference to carriers, the 'custom of the realm,' is really a term implied by law in the contract of carriage." (Elem. of Juris., 9th ed., p. 241.) Finally, when we read the following observations by the Court on the contract in *Johnson* v. *The King*—"Such a contract involved all its usual terms and incidents, as well those that were expressed as those that arose by law upon the contract being entered into"—we fail to see any ineluctable reason why the Crown should not be held liable under a petition of right based upon a bailment of common carriage.

As a result of our review of the cases in the Supreme Court of Canada, and in the Exchequer Court of Canada, we venture to think that the doctrine that the Crown, in respect of the conveyance of goods over the government

railways of Canada, cannot be held liable as a common carrier, is unsound. Furthermore, we think it reasonably clear that under the Dominion Petition of Right Act of 1876, read in conjunction with the Supreme Court and Exchequer Court Acts of 1875, the Crown might have been held liable on an undertaking to carry goods to the same extent as an ordinary common carrier; and that under subsequent remedial legislation embodied in the Exchequer Court Act (R.S.C. 1906, ch. 140) and the Government Railways Act (R.S.C. 1906, ch. 36), this liability, both in its contractual and delictual aspects, is established beyond doubt. CHARLES MORSE.

Annotation.

SHORE & GRANT v. WILSON Bros.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. April 4, 1916.

LANDLORD AND TENANT (§ III D—110)—DISTRESS—LANDLORD AS PURCHASER —APPRAISEMENT.

In a sale under a distress for rent the landlord cannot become a purchaser; the sale is also void for want of appraisement as required by sec. 7 of the Distress Act (R.S.B.C. 1911, ch. 65, as amended in 1915, ch. 18).

Statement.

APPEAL by plaintiffs from the decision of Lampman, Co. J., on an interpleader issue tried at Victoria on March 1, 1916. Affirmed.

The judgment appealed from is as follows:—

LAMPMAN, Co.J.:—Jesse Evans was a tenant of premises owned by the plaintiffs and on February 1, he was in arrear for 8 months' rent—$200— and as he had no money with which to pay the rent or any other debt he saw his landlords, the plaintiffs, and told them he wanted to give up the premises in which he carried on a small business as a retail tobacconist. Plaintiffs then, on the same day, put a bailiff in for the $200 rent, and by an arrangement, Evans continued in possession and carried on the business, the plaintiffs advancing him $10 with which to buy stock.

The bailiff served Evans with a notice of the distraint, the notice containing the statement that unless he paid the rent within 5 days the "goods will be appraised and sold according to law." The bailiff, on February 4, posted at the end of a shelf in the store the following notice:—

AUCTION SALE.

THE STOCK AND FIXTURES IN AND UPON THESE PREMISES WILL BE OFFERED FOR SALE BY PUBLIC AUCTION ON THE 9TH DAY OF FEBRUARY, 1916, AT THE HOUR OF 3 O'CLOCK. A. R. MITCHELL, CITY BAILIFF.

This notice is typewritten on a half sheet of typewriting paper in caps. type and the written part is 5 inches long and 2 inches wide.

On February 9, I assume at 3 o'clock in the afternoon—I did not notice until after the conclusion of the argument that the

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notice did not state the time of the sale as being in the forenoon or afternoon—the bailiff offered the goods (consisting of stock and some fixtures) for sale at $200 and the landlords bought. The landlords then rented the premises to one Hartley who took possession and employed Evans to work for him. After the auction sale Evans assisted the landlords in removing the stock from the cigar store to another room in the same building; the tenant's fixtures were left as they were.

Wilson Bros. sued Evans on February 5, the summons was served on the 7th and judgment was entered on the 15th, and the sheriff seized the goods on February 16. Shore & Grant claimed ownership, and the matter now comes before me in an interpleader issue.

No appraisement was made as required by sec. 7 of the Distress Act as amended in 1915, ch. 18.

Mr. Elliott for the plaintiffs contends that only the tenant could sue because of the irregularities in the sale, and that if the title in the goods did not pass at the auction sale still the plaintiffs are protected because they, in effect, received the goods from Evans in payment of the rent. I do not think either of these contentions can prevail.

The sale was bad on two grounds—first, because there was no appraisement, and, second, because the landlords could not buy—since *Moore* v. *Singer*, [1904] 1 K.B. 820, there can be no doubt about this latter ground.

There seems to have been a great economy of effort in carrying out the provisions of the Act, and in giving notice of the sale. Considering the notice I am not surprised that no one except the parties and 4 or 5 others—probably the usual frequenters of the place—attended the sale. If Evans had handed over his stock to plaintiffs in payment of the rent the case would have been different. He did say "I ceded the stuff to the plaintiffs," but the words were put in his mouth by Mr. Elliott, and his acts shew nothing of the kind. All he did was to announce he could not carry on any further, and the fact that he helped to carry some stuff to another room after the sale only indicates that he was continuing to assist about the premises.

I do not think that if Evans cannot impeach the sale it therefore follows that the plaintiffs must succeed in the issue, and I

am inclined to think Evans could maintain an action for conversion—see *Plasycoed Collieries Co. Ltd.* v. *Partridge, Jones & Co. Ltd.*, [1912] 2 K.B. 345.

Judgment will be entered for defendants.

F. C. Elliott, for plaintiffs, claimants.

C. E. Wilson, for defendants, execution creditors.

MACDONALD, C.J.A.:—I would dismiss the appeal, on the single ground that the evidence in the case is not such that we can say upon it that the trial Judge was wrong in coming to the conclusion that the sale by the bailiff was an illegal sale because the property was sold to the landlords, who then occupied the dual position of sellers and buyers. I think there was no consent to this, and that, therefore, the judgment cannot be disturbed.

Macdonald, C.J.A.

MARTIN and GALLIHER, JJ.A., agreed.

Martin, J.A., Galliher, J.A.

MCPHILLIPS, J.A.:—I would dismiss the appeal. I wish to state, though, that in so doing, I hold myself open to take the view that even consent would not support a sale as between landlord and tenant.

McPhillips, J.A.

I admit that in the case of *Burnham* v. *Waddell* (1878), 3 A.R. (Ont.) 288, and also the case of *Woods* v. *Rankin* (1868), 18 U.C.C.P. 44, in the Courts of Ontario it would seem to be assumed that with consent a bailiff under a sale for distress for rent might sell to the landlord. I have always understood the law that it was against public policy to allow a tenant even to consent to a sale to the landlord, and unless there is a decision which is binding upon this Court, I would be of the view that this was not a valid sale, and that is in conformity with the present English decisions as I understand them.

I am of opinion that there was no sale *inter partes*. If the decisions of the Courts of Ontario are to be followed, *i.e.*, that consent would give validity to a sale to a landlord of course consent must be established, but the trial Judge, as I understand it, has not found upon that question. I do not think that his judgment was founded upon the question of consent. Mr. Elliott very ably pointed out that we might arrive at the inference, which inference ought to have impressed itself upon the trial Judge, but when I turn to the language of Moss, C.J.A., in the case of *Burnham* v. *Waddell*, *supra*, at pp. 291-2, I do not think we ought to adopt that submission.

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It would be an inconvenient practice if this Court were to be asked to draw inferences which should have been drawn by the Court of first instance, and upon which that Court would, no doubt, have pronounced had it been asked to do so.

Therefore, we are in this position, that there is no sale *inter partes*, and the sale (if made at all) was made by the bailiff to the landlords, but with the essential finding of consent (if the Ontario cases are to be followed) not found by the trial Judge, the sale cannot be supported. On the other point, and upon the whole case, I think it is against public policy that there should be a sale as between tenant and landlord. *Appeal dismissed.*

ALTA.

S. C.

REX v. COLLINS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 7, 1917.

INTOXICATING LIQUORS (§ III G—89) — KEEPING FOR SALE — PRESUMPTIONS AND EVIDENCE OF UNLAWFUL KEEPING.

Under sec. 54 of the Alberta Liquor Act the onus is upon the accused of proving that a package of intoxicating liquor consigned to the accused and received by him from the express company, and which was found in his possession while he was taking it from the express office to his dwelling-house, was not intended for sale on being charged under sec. 23 of the Act with keeping liquor for sale; and this although the liquor was found in an omnibus of which the accused had charge as driver for a local common carrier, the express company's responsibility in respect of the consignment from outside of Alberta having ceased on delivery to the accused.

Statement.

APPLICATION by way of *certiorari* to quash a conviction for having or keeping liquor for sale contrary to the Alberta Liquor Act.

J. E. Varley, for appellant; *H. W. Lunney*, for the Crown.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The accused was the driver of a bus from Pincher Station to Pincher Creek, a distance of two or three miles, and on the 27th of October last was found to have in his possession in the bus at Pincher Creek a package of liquor which he had obtained from the Dominion Express Company at Pincher Station and which he said he was taking home for his own use. The package was addressed to accused and was marked as from the Michel Liquor Co. Ltd.

The ground on which it is sought to quash the conviction is that the accused "was and is a common carrier and as such was and is permitted by section 25 of the said Liquor Act of Alberta to carry intoxicating liquor under the circumstances disclosed by the evidence at the trial."

Section 23 says that: "No person shall . . . keep for sale . . . any liquor except as authorized by the Act."

Section 24 provides that: "No person . . . shall have, keep, or give liquor in any place wheresoever other than in the private dwelling house in which he resides except as authorized by this Act."

And Section 25 provides that: "Nothing in section 24 . . . shall prevent common carriers or other persons from carrying or conveying liquor from a place outside of the province to a place where the same may be lawfully received and lawfully kept within the province or from a place where such liquor is lawfully kept and lawfully delivered within the province to a place outside the province or from a place where such liquor may be lawfully kept and lawfully delivered within the province to another place within the province where the same may be lawfully received and lawfully kept."

The only evidence for the defence was that of the employer of accused who said that he was a common carrier who carried parcels on instructions of the people to their houses and that accused would have a right to take such parcels from the station to the parties to whom they were consigned.

The agent for the express company stated that the goods were delivered at the station, where the responsibility of his company ceased.

It may be noted that the conviction is not under section 24 but under section 23, but in any event, assuming that accused's employer was right in his conclusions of law, accused does not come within any of the exceptions of section 25. The only place where liquor may be lawfully kept under section 24 is a private dwelling-house. There are some other places provided by the Act, such as vendors' premises, chemists' premises, etc., which need not be considered here.

By section 25 a common carrier's possession is authorized while carrying it between the places within the province where it may be lawfully kept and between such places and places without the province. The accused in the present case, even if treated as a common carrier, was not carrying the liquor between any such places. He was carrying it between the station and his own place. There is, however, nothing to warrant the conclusions that he was acting as a common carrier. He received the goods as

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the person to whom they were consigned at the express office at the station and had them in his possession as far as the evidence shews as his own property but not as a carrier. But although I have considered this point because it was the ground raised, yet as I have already pointed out, I think it is not material to the consideration of this case, for if the liquor had reached his dwelling-house it would then have acquired the protection which section 25 gives it while in transit to the house but that would be no answer to the charge of keeping it for sale; and section 54 provides that on a charge of selling or keeping for sale if *primâ facie* proof is given that the accused "had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is charged." On the facts of this case the burden is cast on the accused of proving that he did not keep the liquor for sale.

Whether under any circumstances on such an application as this it would be competent for this Court to say that he has satisfied that burden it is unnecessary to consider for in the present case he did not even state in evidence that his purpose in keeping this liquor was not for sale while evidence was given shewing that between September 21st and October 25th, he had received from the express company 15 parcels of liquor totalling 393 pounds. What the size of the parcel received on October 27th was does not appear on this application though the parcel was before the magistrate.

Quite clearly no fault could be found with the magistrate for not being satisfied on such evidence and lack of evidence that the liquor was not kept for sale.

I would, therefore, dismiss the application with costs.

Conviction sustained.

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CANADIAN OIL COMPANIES Ltd. v. MARGESON.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, and Chisholm, JJ. March 31, 1917.

1. SALE (§ III A—50)—OPTION—RETENTION OF GOODS—REMEDY—DETINUE.
An option to a purchaser to keep the containers of the sold merchandise at a fixed price is, when exercised, a sale, enforceable in an action for goods sold and delivered, and not in detinue.

2. COURTS (§ II A—164)—JURISDICTIONAL AMOUNT—SET-OFF.
The jurisdiction of a Court as to the amount sued on is not affected by a reduction of the amount by set-off.

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CANADIAN OIL COMPANIES LTD. v. MARGESON

Statement.

APPEAL by defendant from the judgment of Longley, J., in favour of the plaintiff, in the sum of $16.69 and costs, and cross-appeal by plaintiff, in an action for the return of two gasoline drums or their value and for freight charges on same paid by plaintiff; or, in the alternative, for the price of goods sold and delivered and money paid by plaintiff at defendant's request. The defence was a set-off for money paid by defendant to plaintiff for gasoline in excess of the quantity actually received. There was also a plea to the jurisdiction of the Court. Affirmed.

W. E. Roscoe, K.C., for defendant; *I. B. Oakes*, for plaintiff.

The judgment of the Court was delivered by

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—The plaintiffs shipped gasoline to the defendant in drums. It was customary in the invoice to charge the vendee with the price of the drums as well as the gasoline, but in the ordinary course of dealings between these parties the drums were returned and credit given for the amount which had been charged for them.

On April 23, 1913, the following letter was addressed by the plaintiffs to the defendant:

> Attached please find statement for $30 for 3 drums outstanding against you since September 28, 1912.
>
> This year we are collecting for steel barrels after they have been out longer than 30 days, the same as for any other merchandise, as we find it impossible to supply the trade with them if some of our customers keep them for months at a time. Of course, when the drums are returned, we will give the customer back his $10 less return of freight, provided they are returned in good order and condition.
>
> Kindly, therefore, arrange to send us back these 3 drums, as after May 15 we are making sight drafts for all that have been outstanding longer than 30 days. CANADIAN OIL COMPANIES, LTD., E. J. COLE, Accountant.

The defendant who had been drawn upon for an amount due, addressed to the plaintiffs the following letter, dated August 26, 1913:

> Your draft came to hand to-day. I am sorry that things are in a state that I deem it best to return your draft and give as the reason that I did not receive the amount of gasoline that I paid you for.
>
> Therefore I will send you one more cask in a day or two, and the three I paid you for I will keep and also the other two, so as to prove to you or anyone else that they will not hold the amount you charge me for. If you will send me 100 gallons more gasoline, I will return the 3 casks and say no more. But at present I will not pay any more until I am forced to; this, I claim, is only looking after my rights. E. W. MARGESON.

He was complaining of a shortage in quantity in the gasoline delivered to him extending over a period of sales.

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CANADIAN OIL COMPANIES LTD. v. MARGESON.

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The plaintiff, on January 24, 1916, brought an action in detinue for two drums not returned and 30 cts. freight charges on drum, in all $20.30, and in the alternative for the price of the drums as goods sold and delivered, together with the 30 cts. I refer to the particulars. The defendant pleaded a set-off claiming the value of the oil short delivered as an over payment, amounting to 102 gallons, $16.83.

Now the trial Judge has given judgment for the plaintiff for $20.30, less $3.69, making $16.61, with costs upon the lower scale. That is upon the theory that the real claim was for debt or a liquidated demand in money in the sum of $20 or over.

There is an appeal by the plaintiff, and an appeal by the defendant.

The plaintiff having invoiced the drums to the defendant at a fixed price, and by his letter having given defendant the option of electing to keep them at that price, and the defendant by his letter having elected to keep these two drums, I think there was a sale. Therefore the plaintiff could have succeeded on his action for goods sold etc., and was not entitled to sue in detinue claiming damages.

The defendant appeals because the amount recovered is only $16.61, and this Court has no jurisdiction when a debt or liquidated demand in money is under $20.

In order to make good that contention, he has to contend that the drums were sold to the plaintiff and therefore there was but a debt; that the $20 was reduced by the over-payment which would be recoverable as money received, and therefore the amount reduced by payment rather than set-off.

I am afraid I cannot agree with that contention. The claim for an allowance for shortage in quantity did not constitute a reduction by cash payments. Indeed it was pleaded as a set-off.

It is really a claim for money had and received recoverable upon a quasi contract or claim of an equitable nature which arises, for instance, when money has been paid in mistake to recover it back, by either set-off or counterclaim or by a cross action. Therefore the Court had jurisdiction. I am, I think, within two cases in our reports. *Donovan* v. *Mahar*, 2 N.S.R. James 91, and *McKenzie* v. *Long*, 3 N.S.R. (2 Thom.) 268. The reason given by Bliss, J., who delivered the judgment of the Court,

is that the plaintiff cannot know that the defendant will, in that action, make a claim by way of set-off.

The Court having jurisdiction of the action, I think it had jurisdiction to deal with the reduction by set-off which was found by the Judge for the shortage.

Both appeals will be dismissed with costs. But they ought to be small, as near as possible proportionate to the smallness of the amount involved.

The defendant having succeeded in proving a shortage of the oil will have his costs below in respect to the set-off, but not the costs of the contention that the claim is below the jurisdiction of the Court. And the plaintiff will not have costs below in respect to his case and contention that he was entitled to recover in detinue. Costs will be set-off. *Appeal dismissed.*

McEVOY v. GRAND TRUNK R. Co.

Quebec Superior Court, Lane, J. January 9, 1917.

CARRIERS (§ II O—365)—NEGLIGENCE—LIMITATION OF LIABILITY—BAGGAGE —CHECK-ROOM.

The liability of a common carrier with respect to baggage checked for safe keeping is that of a bailee for hire, and he is liable for a loss thereof through misdelivery notwithstanding a condition on the receipt limiting the liability of which the holder had no notice.

ACTION to recover the value of a travelling bag and contents checked at the defendants' parcel office and delivered to the wrong person. The company based its denial to a liability beyond $10, and the costs of the action, on the fact that the depositor of a parcel into the company's safekeeping receives a receipt on which the following condition is printed:—

Statement.

Charge: Five cents for each article for each 24 hours, to be paid on delivery of article. The depositor, in accepting this duplicate check, expressly agrees that the company shall not be liable for the loss or damage of any article covered by this check to an amount exceeding ten dollars, whether such loss or damage be caused by the negligence of the company or otherwise.

LANE, J.:—Considering that it has been contended on the one hand by plaintiff that the deposit was a necessary deposit, and on the other hand by defendant that it was a voluntary deposit, the truth would appear to be that it was a deposit for hire, the defendant company being, as regards the transaction between the parites, a *depositaire salarie*;

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Considering that in any event, and if defendant were a voluntary and gratuitous depository as regards plaintiff, the law would

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expect from it, in the carrying out of the deposit, the care of a prudent administrator;

Considering that defendant has not exercised the care of a prudent administrator, but has been guilty of gross negligence, and owing to said gross negligence the plaintiff has been deprived of his bag and its contents;

Considering that the parcel check handed to plaintiff upon the deposit of his bag was detached from a counterfoil bearing the same number which defendant retained and attached to the bag; that, although the number was plainly marked in large figures, defendant not taking the ordinary and obvious care, which was its duty and obligation, to properly compare the number of the counterfoil on plaintiff's bag with that of another deposit check handed to defendant by another depositor, and carelessly and negligently delivered plaintiff's bag to another depositor on surrender of the latter's parcel check with that upon the counterfoil on plaintiff's bag;

Considering that, unless the limitation of defendant's liability to $10 can validly be invoked, defendant would be responsible to plaintiff;

Considering, as already stated, no notice of such limitation of defendant's liability was given to plaintiff; that plaintiff could not be expected to know or suspect that defendant intended to limit its liability in the simple matter of the deposit of a parcel in its own parcel office specially set apart for the safe keeping of articles taken on deposit, especially seeing that a fee was to be charged for the service, which, however small, made a handsome profit to the defendant in the aggregate in the course of a year, and defendant, under the above narrated circumstances, cannot validly invoke the exemption by its liability contained in the small and unobtrusive parcel check in question;

The Court holds that plaintiff has established that he is entitled to judgment ordering the return by defendant to plaintiff of the bag in question and its contents within a reasonable time, which is hereby fixed at 15 days.

Failing this, the judgment adds that the company must reimburse plaintiff in the sum of $107.95, the recoverable value of the bag and its contents.

An additional claim by plaintiff for $450 for the loss of busi-

ness documents and information written in three notebooks and contained in the bag was disallowed, the Judge holding it would be unreasonable to hold the defendant responsible for matter of such alleged value. *Judgment for plaintiff.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Duff, Anglin and Brodeur, JJ. February 19, 1917.

WATERS (§ II I—155)—STATUTORY RIGHTS—DRIVING LOGS—NEGLIGENCE—"UNNECESSARY DAMAGE."

The reckless exercise of a statutory right (River and Streams Act, Ont.) in driving logs on a navigable river renders the operators liable for "unnecessary damage" to a cofferdam erected under Dominion authority; the rights of lumbermen under pre-confederation legislation, and of servants of the Dominion Government in matters respecting navigation are equal.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 31 D.L.R. 451; 37 O.L.R. 17, reversing the judgment at the trial, 24 D.L.R. 865; 34 O.L.R. 204, in favour of the defendant. Affirmed.

Wentworth Greene, for appellant; *McKay*, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting).—The appeal is of importance as raising a question of law of far-reaching consequence quite beyond anything involved in the particular case. It is not only the rights of the appellant which are in issue but the result must seriously affect the interests of the large class engaged in the lumber business, the oldest and still one of the principal industries of this country.

I am further of opinion that the jurisdiction in the subject-matter of both the Dominion and the provinces is involved, and that the respective governments should have had opportunity to present their views before the Court if they so desired.

Now no authority is shewn or even alleged for interference by the respondents with the right of floating down his logs which the appellant undoubtedly had unless lawfully deprived thereof. It is not enough to produce a contract with any one, even with the Dominion Government, unless there was competent authority for the construction of the work. The judgment appealed from is based, as the Chief Justice of Ontario says,

on the view that the cofferdam was lawfully where it was and was placed there under the authority of the Parliament of Canada in the exercise of its exclusive authority to make laws with respect to navigation.

I know of nothing to warrant this view. The Chief Justice

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suggests that "it may reasonably be found on the evidence," but I can find nothing upon the subject in the evidence. In the factum of the respondents reference is made to four of the Appropriation Acts in which sums of money are authorized to be expended for Montreal River improvements. There is nothing to connect these with any particular works, they seem to be rather evidence that no works in particular were submitted to or sanctioned by parliament. It may perhaps be assumed that the vote of those moneys was for purposes within the jurisdiction of parliament in the exercise of its exclusive legislative authority over the subject of navigation, but I do not think the fact that parliament has placed at the disposal of the government certain sums of money for improving the river, can by itself authorize an interference with a public right such as is here in question.

It has been suggested that the necessary authority may be found in the Public Works Act (R.S.C., (1906) ch. 39), which in sec. 9 provides that the Minister of Public Works shall have the management, charge and direction of the properties belonging to Canada therein enumerated which include dams and work for improving the navigation of any water, and also works constructed at the expense of Canada.

There is a similar statute to the Public Works Act for each of the departments of the government service. These Acts are purely concerned with administrative arrangements and the division of government business amongst the members of the government and their respective departments.

I do not think the Public Works Act confers any authority on the Minister of Public Works to undertake works for which the sanction of parliament is necessary; it only provides that such works when authorized by parliament shall be under the charge of the Minister of Public Works.

I do not wish to enter on any consideration of possible doubts as to the authority of parliament in the circumstances; we have not got the facts sufficiently before us. Whether the river is navigable in parts or only capable of being used for floating down logs, does not appear. At the point where the dam was proposed to be erected there are rapids which prevent navigation and there seems to have been no intention of taking any steps to render it possible. The requirements of the river at other points, or even those of the Ottawa River into which the Montreal River flows,

may justify the storage of water at the particular point; it is for parliament to decide whether this is necessary in the interests of navigation. If it has so decided its decision is not to be reviewed in the Courts. In this connection it may be noted that the Ottawa River below its confluence with the Montreal River is not navigable throughout, but at the City of Ottawa there are rapids operating large power plants under lease from the Dominion Government. Whether works for power purposes alone are within the authority of the Dominion Parliament may be doubted.

That the authority of parliament is necessary is so clear as to call for little consideration. The question may not have come before the Courts of this country, but there are numerous cases reported in the United States where the law is practically the same since it has been held that the jurisdiction of Congress over trade and commerce covers the subject of navigation, though not expressly mentioned as in the Canadian Constitution. I will only refer to the case of the *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S.R. 53. An Act of Congress of March 3, 1909, had declared that a public necessity existed for absolute control of all the water of St. Marys River in the State of Michigan "primarily for the benefit of navigation," and the following propositions (amongst others) were upheld:—

> The judgment of Congress as to whether a construction in or over a navigable river is or is not an obstruction to navigation is an exercise of legislative power and wholly within its control and beyond judicial review; and so *held* as to the determination of Congress that the whole flow of St. Marys River be directed exclusively to the improvement thereof by the erection of new locks therein.
>
> If the primary object is a legitimate taking there is no objection to the usual disposition of what may be a possible surplus of power.

I may point out that the Navigable Waters Protection Act (R.S.C. (1906) ch. 115) by sec. 4, provides that no dam shall be constructed so as to interfere with navigation without the approval of the site and plans by the Governor in Council.

The appellant is not suing for an interference with his rights but is being sued for damages alleged to have been caused in the exercise of such rights to works interfering with them. There can be no liability if the works were not duly authorized and this is not shewn.

Upon careful consideration of the evidence I am of opinion that the drive of the appellant's logs was carried out in the usual and

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proper manner and that nothing was done with wilful or careless disregard of injury to the respondents' property. Even, therefore, on the assumption that the respondents' cofferdam was lawfully placed where it was, I fail to see why the duty should be imposed upon the appellant when exercising his rights in the same manner as he had hitherto done of adopting, perhaps at great expense and risk through delay, extraordinary precautions to ensure the safety of the structure. The respondents, of course, knew that logs would be driven down the river in the Spring and should have taken proper measures to safeguard their own property. They themselves recognized this by putting up some measure of protection in a glance-boom which however proved defective and inadequate for its purpose. No actionable negligence on the part of the appellant is shewn and the appeal should be allowed.

Davies, J.

DAVIES, J.—I concur generally in the reasons and conclusion of my brother Anglin for dismissing this appeal, though I confess I do not share the "grave doubts" he expressed with regard to the applicability of sec. 4 of the Rivers and Streams Act to the circumstances of this case.

On the question of the applicability of that section I am in accord with the opinions of the Chief Justice of Ontario and of Magee and Hodgins, JJ., that the injury done to the cofferdam was in the circumstances of this case an "*unnecessary damage*" within that section and being such was not justified or covered by the general authority to drive logs down the river conferred by the statute.

But if I am wrong in my holding of the applicability of that section to this case, I agree with Anglin, J., that the presence of the cofferdam

in the river under the sanction of Dominion legislation imposed upon the exercise by the defendant of his driving rights a restriction almost, if not precisely, the same as that to which section 4 would, if applicable, have made them subject. There was, no doubt, a correlative obligation on the part of the plaintiffs not unnecessarily or unreasonably to hamper or interfere with the exercise of the defendant's rights.

Duff, J.

DUFF, J. (dissenting).—I think the reciprocal obligations of the appellant and the respondents are determined by the application of secs. 3 and 4 of the Ontario Rivers and Streams Act. I think the cofferdam was a "structure" within sec. 4; and that in order to succeed it was incumbent upon the plaintiffs to shew that "unnecessary damage" within the meaning of that section

had been caused by the servants of the defendant, the appellant. "Unnecessary damage," in my opinion, means damage which it was reasonably practicable to avoid under the existing conditions having regard to the nature of the "opening" provided. I agree with Garrow, J., that the plaintiffs, respondents, failed to shew neglect of the duty to avoid "unnecessary damage" in this sense.

It is necessary to consider the view of the Chief Justice of Ontario in which Magee and Hodgins, JJ.A., concurred that,

> the appellant's cofferdam was lawfully constructed and maintained under the authority of the Dominion Parliament for the purpose of improving navigation, either in the Montreal River or below that river, by the creation of a storage dam to conserve the head waters;

and consequently that the

> rights conferred by the Rivers and Streams Act were . . . subordinate to the right to maintain the cofferdam and the provisions of sec. 4 of the Rivers and Streams Act as to the dam or other structure being provided with a convenient "apron, slide gate, lock or opening for the passage of timber, rafts and crafts" authorized to be floated down the river, cannot cut down or impair the paramount right to maintain the cofferdam.

The Rivers and Streams Act was originally enacted by the Legislature of the Old Province of Canada (12 Vict. ch. 87). It may be that it is not within the power of the Parliament of Canada directly to repeal or amend any of the provisions of the Act. *Attorney-General for Canada* v. *Attorneys-General for Ontario, etc.*; [1898] A.C. 700; but its provisions may of course be superseded or overridden by the enactments of parliament within its jurisdiction, and rights given by these provisions may be completely nullified by the competent enactments of parliament or made subordinate to other rights created by such enactments.

The view of the Chief Justice of Ontario indicated above assumes, first, that it is competent to parliament in exercise of its legislative authority derived from sec. 91 (10) of the B.N.A. Act in relation to "navigation and shipping" to authorize the construction and maintenance of the work which the plaintiffs were engaged in constructing in such a manner as to interfere with the exercise of the rights of the defendant under the Rivers and Streams Act, and secondly, that in virtue of legislation by the Parliament of Canada the plaintiffs were invested with authority so to construct the work.

The power of parliament to give such authority under sec. 91 (29) and sec. 92 (10) of the B.N.A. Act is of course unquestionable, but it is not suggested that this work is part of any work which

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has been declared to be a work for the general advantage of Canada; and there is nothing before us to shew that it is part of a work or undertaking extending beyond the limits of the province or connecting the province with one of the other provinces.

Moreover, I cannot agree that we are entitled to say that the object of parliament in authorizing the use of public moneys in the construction of this dam was the improvement of navigation; I know of nothing in the record which justifies that conclusion.

It should be presumed that the Minister of Public Works had acquired on behalf of the Crown the right to occupy the site of the dam; and no question has been raised as to his right representing the Crown as occupier to construct and maintain the dam just as any other riparian proprietor could do so long as public or private rights are not invaded.

But *primâ facie* as an object of legislative jurisdiction the work which the plaintiffs were engaged in constructing was a "local work" within the meaning of sec. 92 (10) and therefore *primâ facie* subject to the exclusive legislative authority of the province except in so far as rights of navigation or other rights under the exclusive control of the Dominion might be affected by it.

I am not, without further examination of the question, prepared to accede to the proposition that the power of parliament derived from sec. 91 (10) in relation to the subject of "nagivation and shipping" involves in itself without the aid of the powers conferred by sec. 91 (29) and sec. 92 (10) the power to grant authority to construct and maintain works entirely local as to a particular province though connected with navigation and shipping in such a manner as to constitute what otherwise would be an invasion of private or public rights which are not rights of navigation or incidental thereto and which otherwise would be within the exclusive control of a local legislature. It is unnecessary to decide the general question for the purposes of this appeal; but it may safely be affirmed that the assumption that every work designed for the improvement of navigation or to provide facilities for navigation and shipping is necessarily a work within the exclusive authority of parliament for all purposes in virtue of sec. 91 (10) cannot be supported consistently with due effect being given to the language of sec. 92 (10) which plainly shews that the expression "local works and undertakings," as used there, embraces "canals" and "lines of ships."

I think it is clear that in fact the plaintiffs were not invested with any authority by Dominion legislation to interfere with the defendant's rights under the Rivers and Streams Act. The plaintiffs rely upon clauses in the Appropriation Act, 9 & 10 Edw. VII. ch. 1, schedule C, and 1 & 2 Geo. V. ch. 2, schedule C, by which moneys were appropriated for "Montreal River improvements above Latchford." The mere appropriation of public moneys would not of course in itself give the sanction of law to acts which would otherwise be an invasion of rights given by statutory enactment or public or private rights under the common law. Secs. 9 and 12 of the Public Works Act, R.S.C. ch. 39, do not profess to empower a Minister of Public Works to do acts of that character; and it would of course be quite contrary to settled principles to imply any such authority from doubtful expressions.

By ch. 143 R.S.C. (the Expropriation Act), however, compulsory powers are conferred upon the Minister who is the head of a department charged with the construction and maintenance of a "public work," the "public work" (it must be implied) being of such a character that parliament has authority to confer these powers for the construction and maintenance of it. The work in question (which I assume at this point to be a work of that character) being a work in respect of which public moneys were appropriated by parliament, it is by sec. 2 a "public work" within the meaning of that statute. By sec. 3 large compulsory powers are given to the Minister and it is arguable that these powers are extensive enough to authorize interference with a river or stream in such a manner as to interrupt the exercise of rights arising from the provisions of the Rivers and Streams Act; although it should be observed that by force of sec. 35 authority to interfere with "navigation" in the construction or maintenance of a public work can only be acquired from the Governor in Council.

But however extensive the powers of the Minister may be under the Expropriation Act in relation to the construction of "public works" in streams, it is made plain by the contract executed by the Minister under which the work now in question was being constructed, that no authority to interfere with rights such as those given by the Rivers and Streams Act was vested in the contractors by that contract. Paragraph 20 is conclusive upon this point, providing that the contractors

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shall and will, at their own expense, make such temporary provision as may be necessary for the protection of persons or lands, buildings, or other property, or for the uninterrupted enjoyment of all rights of persons or corporations, in and during the performance of said works.

For these reasons I think the appeal should be allowed and the action dismissed with costs.

ANGLIN, J.—The plaintiffs sue to recover damages for injuries to a cofferdam erected by them in the Montreal River caused by the defendant in driving pulpwood logs during the spring freshet of the year 1911.

On evidence warranting that conclusion, Middleton, J., found that the destruction of the cofferdam "was brought about by the defendant's logs," but absolved him from liability on the grounds that in driving the river he was exercising a statutory right conferred by the Rivers and Streams Act (now ch. 130 of the R.S.O. 1914), with due caution and in a usual and reasonable manner and that the damage sustained by the plaintiffs was therefore not "unnecessary damage" within the meaning of sec. 4 of that statute, which the defendant had apparently invoked (though he now contends that it does not apply) and the learned Judge regarded as applicable.

In the Appellate Division the majority of the Court (Meredith, C.J.O. and Magee and Hodgins, JJ.A.) held the defendant liable on the ground that the plaintiffs in carrying out their contract with the government of Canada had a paramount right to construct and maintain the cofferdam which the defendant in the exercise of his right of driving was bound to respect, at least to the extent of taking all practicable precautions to avoid doing injury to the structure—even such as would involve expense, delay and risk of partial failure of the drive—and that the injuries sustained being ascribable to failure to take such precautions amounted to "unnecessary damage" within sec. 4 of the Rivers and Streams Act, and apparently would be actionable apart from that statutory provision.

Garrow and Maclaren, JJ.A., dissented on the grounds that the rights conferred by the Rivers and Streams Act as pre-Confederation legislation, which parliament has not qualified or modified, are not subordinate to, but are co-ordinate with, the rights of persons acting under Dominion legislation for the improvement of navigation; that, although the building of the cofferdam by

the plaintiffs had the sanction of parliament as incidental to the construction of the works for the improvement of navigation which they had undertaken, the exigency of their contract did not justify or require that the cofferdam should remain in the river during the spring freshet; and that, while the defendant would be liable for wilful injury to it, and might be answerable for injury due to negligence, the evidence shews neither the one nor the other.

It becomes necessary, therefore, to determine the status of the plaintiffs in regard to the work in question and to consider to what restriction, if any, the exercise by the defendant of his statutory right of driving was subject.

That the jurisdiction of the Dominion Parliament to legislate in respect of matters affecting navigation is paramount (B.N.A. Act, ch. 91 (10)), and that the authorization of works for the improvement of navigation falls within that power is unquestioned. By the Public Works Act (R.S.C. ch. 39, sec. 9), the Minister of Public Works is given the management, charge and direction *inter alia* of "works for improving the navigation of any water." By sec. 12, he is required to direct the construction of public works (to be) constructed at the expense of Canada, and by sec. 13, it is declared that, except for necessary repairs and alterations, nothing in the Act shall authorize him to cause expenditure not previously sanctioned by parliament. By implication, parliament, in this legislation, has authorized and empowered the Minister of Public Works to direct and cause the construction of "works for improving navigation" for which it may provide that public moneys of Canada shall be expended. By 9 & 10 Edw. VII. (D.), ch. 1, sch. C, and 1 & 2 Geo. V. (D.), ch. 2, sch. C, public moneys were appropriated by parliament for "Montreal River improvements above Latchford." Upon the evidence in the record I agree with the learned Chief Justice of Ontario that the erection of the conservation or regulation dam, for which Messrs. Lowery and Goring had contracted with the Government of Canada, through the Minister of Public Works, was part of the Montreal River improvements above Latchford, for the construction of which the expenditure of public moneys of Canada had been authorized by parliament, and, as such, had been undertaken by the Minister under the sanction of Dominion legislation. The construction of a cofferdam as a proper means for the carrying out

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of that work was within the authorization and I am, with respect, unable to agree with the view of Garrow and Maclaren, JJ.A., that its maintenance from one working season to another in order to complete the work was not likewise authorized.

If the driving rights of lumbermen had been derived from post-Confederation provincial legislation, or if the Dominion Parliament had declared them to be subject to the rights of persons engaged in carrying out works sanctioned by it for the improvement of navigation, I should agree with the learned Chief Justice of Ontario that they were subordinate to the plaintiffs' right to maintain their cofferdam and must be so exercised as not to infringe that paramount right.

But since, as Garrow, J.A., points out, the privileges asserted by the defendant were declared or conferred by a pre-Confederation statute, and have been left unmodified by the Dominion Parliament, I think they are on an equal footing with those possessed by the plaintiffs in carrying out their contract with the Minister of Public Works. Sanctioned respectively by legislatures each endowed with plenary and exclusive authority over the subject-matter with which it dealt, derived from the same source —the Imperial Parliament—the several rights of each of the parties litigant are on the same plane, and, in my opinion, must be exercised with due regard to those of the other.

If the 200-ft. channel left between the plaintiffs' cofferdam and the nearest of the south side piers was "a convenient opening in a dam or other structure" within the meaning of sec. 4 of the Rivers and Streams Act even after the waters of the river had entirely submerged the cofferdam, I would agree with the learned Chief Justice of Ontario and Magee and Hodgins, JJ.A., that the injury done to the cofferdam was "unnecessary damage" within that section and, as such, not within the authority to drive conferred by the statute on the defendant. With the latter Judge I think that,

> the statute . . . includes both damage unnecessarily caused during the normal and usual process of driving as well as that which arises, though inevitably, from a method of operation, originally improper, unnecessary or negligent.
>
> The respondent (defendant) may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

I gravely doubt the applicability of sec. 4 of the Rivers and Streams Act, however, to the circumstances of the case at bar. Yet, although the plaintiffs' cofferdam may not have been a "structure" within the protection of that section, its presence in the river under the sanction of Dominion legislation in my opinion imposed upon the exercise by the defendant of his driving rights a restriction almost, if not precisely, the same as that to which sec. 4 would, if applicable, have made them subject. There was, no doubt, a correlative obligation on the part of the plaintiffs not unnecessarily or unreasonably to hamper or interfere with the exercise of the defendant's rights: *Hewlett* v. *Great Central R. Co.*, 32 Times L.R. 373, [Reversed [1916] 2 A.C. 511].

A perusal of the evidence has satisfied me that the defendant's employees acted with reckless indifference to, and an entire disregard of, the plaintiffs' rights. They proceeded on the assumption that they had an absolute and unqualified right to drive their logs, using whatever means they might find most convenient and best adapted to accomplish that purpose regardless of the effect of employing such means upon the plaintiff's rights or of the damage to their property which might ensue. I am convinced that the men in charge of the defendant's drive knew that the cofferdam was in the river and knew or should have known that the method of driving which they adopted would imperil its existence. I am also satisfied that, although to do so would have entailed delay and expense and possibly the detention of a portion of his logs until the following season, it was not impracticable for the defendant's men to have driven the river in such a manner that the plaintiffs would have sustained no injury.

If the formation of a side jam extending from the piers of the railway bridge 600 ft. up the river over the cofferdam and on to MacNeill's Point was not deliberately brought about by the defendant's men, as I incline to think it was, they certainly made no attempt to prevent it. Upon the evidence I think it was practicable to have prevented it. A perfectly proper and reasonable method to employ under ordinary conditions to facilitate the driving of rapids such as those above Latchford, the presence of the plaintiffs' cofferdam rendered the formation of this side jam improper and unreasonable because it involved unnecessary danger to the cofferdam. Again, when breaking the side jam in the sweeping process, instead of first removing the logs above and

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over the cofferdam, which probably might have been done, though at greater expense, the defendant's men followed the usual, and, in ordinary circumstances, not improper course of breaking the jam from below, thus allowing the mass of logs above the cofferdam to press down upon it with great force and violence. The damage complained of was due either to the formation of the side jam over and above the cofferdam, or to the pressure upon it occasioned by the method pursued in breaking it. In both these operations there was, in my opinion, an unjustifiable disregard of the plaintiffs' rights. To quote Hodgins, J.A., again:—

> The respondent (defendant) may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

But it is said that the plaintiffs should have protected the cofferdam with an adequate glance-boom, whereas the glance-boom which they hung from MacNeill's Point, apparently for the protection of a green cement pier, was insufficient to safeguard the cofferdam. There was nothing to indicate to the plaintiffs that the river would be driven in a manner that would render such protection of the cofferdam necessary. Before the defendant's drive of comparatively small pulp-wood began, Gillies's drive of 40,000 large logs had all gone down without the formation of a side jam or any other inconvenience or detriment to the plaintiffs. If the defendant's men proposed to drive his pulpwood so as to bring about the formation of a side jam and thus endanger the cofferdam it was at least their duty to have notified the plaintiffs in order that they might have an opportunity, if possible, to provide an adequate glance-boom to protect the cofferdam. Moreover, I am not satisfied on the evidence that even a glance-boom such as the defendant's witnesses describe would have saved the cofferdam.

On the whole case I think the proper conclusion is that in the management of their drive the defendant's men utterly disregarded the plaintiffs' rights, ignoring the golden rule expressed in the maxim *sic utere tuo ut alienum non lædas*. For the consequences, which should have been anticipated, the defendant should be held accountable.

I would dismiss the appeal with costs.

BRODEUR, J.—The Dominion Parliament voted in 1910 a sum of $25,000 "for Montreal River improvements above Latchford." Those works consisted in the construction of dams for which a contract was made by the Department of Public Works with the plaintiff-respondent. In the carrying on of the work the contractors had put in two cofferdams, one on the south side of the river and the other on the north. No question arises as to the cofferdam on the south, the claim being entirely in respect of damages to the cofferdam on the north.

During the fall and the winter of 1910, one of the three piers which were to be erected in the place where the cofferdam on the north side was put was built. The two others were to be built in the spring.

During the spring of 1911, the level of the water rose above the cofferdam, which became entirely covered. In the fall previous, however, the superintendent of the defendant-appellant had visited the works and knew of the existence of that cofferdam and of the one pier which had been built. He must have known also that two other piers were to be built in the space covered by that cofferdam.

The defendant-appellant had a very large quantity of logs to drive in that river. Those logs were in 16 booms of 50,000 each.

The logs reached the place about May 18, and the water was then running between 3 and 4 ft. over the cofferdam. The logs stuck on the pier of a railway bridge which was a few hundred feet below and piled back and formed a jam on both sides of the river. There was left in the centre of the stream a channel of about 25 ft. wide through which all the logs ran. When all the logs were removed, it was found that the cofferdam had been destroyed.

I do not think there is any doubt as to the jam being the cause of that destruction. It remains to be seen, however, who should stand the loss which has been incurred.

It is claimed by the plaintiffs that the driving of the logs was negligently done and the damage could have been avoided by reasonable care either in stationing men at the bridge so as to keep the jam from forming, or by ceasing to open new booms until after they had cleared below and thus avoiding the formation of side jams.

The six Judges in the Courts below who heard the case were

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equally divided. The action was dismissed by the trial Judge but that judgment was reversed by the Appellate Division by a majority of three to two.

The main ground of the Court of Appeal is that the cofferdam having been placed under the authority of the Parliament of Canada, the rights exercised by the defendant under the Rivers and Streams Act to drive his logs were subordinate to the right of the Dominion contractors, the Parliament of Canada having exclusive authority to make laws with respect to navigation. I am unable to agree with that proposition.

The Rivers and Streams Act, which is to be found in the R.S. of O., contains provisions which were in the law long before Confederation.

It provided that the lumbermen would have the right to float and transmit timber down all rivers, and that no person could place any obstruction in those rivers in order to prevent the passage of timber.

It was provided also that if it became necessary to construct any dam in order to facilitate the floating of timber, any person was authorized to construct those dams without doing any unnecessary damage to the river or to its banks.

The lumbermen were also given the right to go along the banks of the river for the purpose of assisting the passage of the timber without doing any unnecessary damage to the banks of the river and it was also provided that where there was a convenient opening in a dam for the passage of timber, no person should injure or destroy that dam or do unnecessary damage to it.

Those rights of the lumbermen existed at the time of Confederation and could not be considered as inferior to the rights which the federal authorities possess to deal with navigation or with the improvement of navigation.

The question then in this case resolves itself, according to my view, as to whether the defendant-appellant has done unnecessary damage.

It appears that the jam on the two sides of the river was created by the logs which were contained in the first 3 or 4 booms, and at one time even the middle channel was closed. Efforts then were made by the appellant to open that middle channel and those efforts were successful and instead of removing the logs

which were jammed on both sides of the river he opened the other booms and let the logs of those booms go down. That necessitated, of course, a stronger pressure on the cofferdam and was, according to my view, the cause of damage which was not necessary.

If immediately after the middle channel had been opened the appellant had driven the logs which were in the jam on the two sides of the river, the damage done to the cofferdam could have been avoided or the damage would have been less. But that would have required some more work and some more expense which the appellant did not feel inclined to do and incur.

The plaintiffs and the defendant were both having rights and duties with regard to the use of that river. The plaintiffs, as builders of the dam, were bound to see that the construction of that dam would not interfere to any unreasonable extent with the driving of the logs. The defendant had the right to drive his logs into that river, but he should have done it in such a way that unnecessary damage should not be caused to the builders of the dam.

He does not seem to have discharged that duty which the law imposed upon him and should then be liable for the damage which he unnecessarily imposed upon the plaintiffs.

It was urged by counsel for appellant, that the clause of the contract between the government and the contractors providing that the contractors

> shall and will at their expense make such temporary provisions as may be necessary for the protection of persons or lands, buildings or other property or for the uninterrupted enjoyment of all rights of persons or corporations in and during the performance of the said works

has not been carried out.

I am unable to agree with that proposition.

A glance-boom had been erected, which perhaps it was not necessary for the constructors to do, but was put up all the same in order to prevent the logs from passing over the cofferdam. It was not to be expected that a jam would take place below the cofferdam and would reach it and if such jam has taken place, as I have said, it is only due to the negligence of the appellant. The plaintiffs had done what they had contracted to do.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed.

[Leave to appeal to Privy Council granted July, 1917.]

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NELSON v. CANADIAN PACIFIC R. Co.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. March 10, 1917.

RAILWAYS (§ IIA—10)—SWITCH STAND TOO NEAR RAILS—INJURY TO SWITCHMAN.

A railway company is not liable to a switchman for injuries sustained in consequence of their placing a switch stand too near the rails, in the absence of evidence that the placing of the switch in that manner was not according to proper railway practice.

[*Mallory* v. *Winnipeg Joint Terminals*, 22 D.L.R. 448, 25 Man. L.R. 456, 18 Can. Ry. Cas. 277 (annotated) affirmed in 29 D.L.R. 20, 53 Can. S.C.R. 323, followed.]

Statement.

APPEAL by defendant from the judgment of Haultain, C.J., in favour of the plaintiff, in an action for damages for personal injuries sustained by the plaintiff through being pushed off a ladder on one of the defendants' cars, while engaged in switching. Reversed.

J. A. Allan, K.C., for appellant; *P. M. Anderson*, for respondent.

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LAMONT, J. (dissenting)—As to the facts of the accident itself there is no dispute. The plaintiff had, for 2 months prior to October 8, been employed as a switchman in the defendants' yards at Moose Jaw. On the night of October 8, which was a somewhat dark night, the plaintiff and his foreman were riding on the side of a box-car, engaged in switching. On the side of the car there was a ladder, while underneath there was an iron footing, fashioned in the manner of a big stirrup, about 2 feet from the ground. Both men had their feet in the stirrup and were holding on to the ladder with their hands. The foreman directed the plaintiff to get off at No. 4 switch and switch the end car on to that track. As they approached the switch, the plaintiff turned so as to face in the direction in which the car was going. He held his lantern in his left hand, while, with his right, he clung to the ladder. He removed his left foot from the stirrup, ready to step to the ground immediately he passed the switch stand. As they were going by, he was struck by the switch stand and knocked under the car, which ran over his right leg and mangled it so badly that it had to be amputated at the knee. In addition he received injuries to his left leg and shoulder.

The plaintiff testified that riding on the side of the car as he was doing was a recognized proper way of going to the switch, and that stepping off after the switch stand was passed was the

proper way. No contradiction of these statements was made by the defendants' witnesses.

The switch stand against which the plaintiff struck was 4 ft. 3 ins. high, measured from the top of the rail; the rail being 5 ins. high. The stand was situated 4 ft. 7½ ins. from the gauge side of the rail. The car on which the plaintiff was riding projected 2 ft. 6¼ ins. over the gauge side of the rail; the ladder added another 4 inches to this width, leaving a space of only 21¼ inches between the ladder and the stand, through which the plaintiff had to pass. The switch stand in question was of the standard pattern used by the defendants in their Moose Jaw yards, where they had some 400 of them in use. The defendants called it a low switch stand.

The plaintiff claims his injuries were due to the negligence of the defendants. The negligence alleged was:—

(*a*) By placing the said switch stand No. 4 at the said switch so close to the rails that it was, to the knowledge of the defendant company, but unknown to the plaintiff, dangerous to employees engaged in operating trains at, near, or through the said switch; (*b*) by erecting, placing, and maintaining at the said switch an intermediate switch stand nearer than 6 feet from the gauge side of the nearest rail; (*c*) by erecting, placing and maintaining the said switch, a structure over 4 feet high, nearer than 6 feet of the gauge side of the nearest rail.

At the trial, which took place before the Chief Justice, the plaintiff, in support of (*b*) and (*c*) put in evidence order No. 12,225 of the Board of Railway Commissioners, dated November 9, 1910. The material part, so far as this case is concerned, being:

(*b*) No semaphores, signals, poles, high or intermediate switch stands, or piles of material, erected or placed in future, shall be nearer than 6 feet from the gauge side of the nearest rail.

(*c*) No structure over 4 feet high shall hereafter be placed within 6 feet from the gauge side of the nearest rail without first obtaining the approval of the Board.

(*d*) Where semaphores, signals, poles, high or intermediate switch stands, or piles of material are nearer than 6 feet from the gauge side of the nearest rail, the same shall be dealt with as follows:—

(1) Semaphores, signals, poles, or high or intermediate switch stands shall, within 2 years from this date, be either removed or changes made so that the same shall not be nearer than the said 6 feet; or high and intermediate switch stands shall be changed to low or dwarf signals or switch stands.

The order does not contain any indication of the height which a switch stand must have to come within the classes designated as "intermediate."

The plaintiff testified that the stand in question was an inter-

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mediate one and that the minimum height of an intermediate stand was 4 ft. measured from its base to its top. Witnesses for the defendants, who were employees of the company, testified that a low switch stand was one which measured 4 ft. or less from the top of the rail to the top of the stand, and that an intermediate stand was one which measured over 4 ft. and up to 8 ft. In rebuttal, the plaintiff called two engineers employed on the G.T.P. Railway, who testified that an intermediate switch stand was one between 3½ ft. and 5 ft., measured not from the top of the rail, but from the base of the stand.

The defendants put in evidence order No. 22,878 of the B.R.C., containing a diagram showing minimum clearance for all *structures*, except bridges and those over which the special approval of the Board is extended. On the diagram there is this reference: "side clearance required by B.R.C. order, No. 12,225, dated November 9, 1910," and the diagram opposite this shows that 4 ft. structures are those which are 4 ft. measured from the top of the rail, making it clear that in measuring the height of a structure referred to in order No. 12,225, which is not over 4 ft. high, the measurement is to be taken from the top of the rail.

On this evidence, the Chief Justice held that the switch stand in question had not been maintained contrary to the order of the Board, and therefore, there was no evidence to submit to the jury on the allegations of negligence (*b*) and (*c*) contained in the plaintiff's particulars of damage, but that there was evidence to submit under the first allegation.

The jury found that the defendants were guilty of negligence in putting the switch stand too close to the rail; that this negligence caused the plaintiff's injuries; and that the plaintiff was not guilty of contributory negligence, and they awarded him damages amounting to $11,300 and judgment was entered for that amount. From that judgment the defendants now appeal.

The chief arguments on behalf of the appellants were: (1) that this was a low switch stand, and that as the order of the B.R.C. placed no restrictions on the right of the railway to place a low switch stand near the rail, a jury could not be allowed to find the company guilty of negligence in so doing, and (2) in any event, they could not find it to be negligence without expert evidence that it was not good railway practice to place it where it was.

Although there was some argument as to whether or not the switch stand in question was a low or an intermediate one, there was no cross notice on the part of the plaintiff against the withdrawing of the acts of negligence alleged in particulars (*b*) and (*c*) from the consideration of the jury. That question, therefore, cannot in my opinion be said to be before us.

The appeal is against the finding of the jury that the defendants were guilty of negligence in placing the stand so close to the rail. In the absence of a cross notice, we must consider the stand to be a low one. Being a low stand it does not, under order No. 12,225, require to be placed 6 ft. distant from the rail. Nothing is said as to where is should be placed. The defendants contend that, under these circumstances, they can place it where they like without being chargeable with negligence. That argument followed to its logical conclusion means that they were entitled to place the stand closer to the rail than they did. Instead of placing it 4 ft. 7½ ins. away, they might have placed it at a distance of only 3 ft. from the rail. This would leave a clearance of only a couple of inches between the stand and ladder on the car, in which case an employee performing his duty, as he had a right to do, by riding on the side of the car, would necessarily be brushed off as the car passed the stand.

Can it be said that, under such circumstances, the company would not be guilty of negligence? I do not think so. I do not think an employer can place his employee in a position where he must necessarily be injured while performing his duty in the recognized manner and escape liability therefor. At any rate, the onus would be on the employer to justify such action.

The contention of the defendants, that they can place a low switch stand where they like, is, in my opinion, too broad a statement of their right. It must be limited, and the limitation to which I think it is subject is this: they may place it wherever they find it convenient so to do, provided they can still perform the obligations resting upon them, one of which is that every employer must provide a reasonably safe place in which his employee may perform the task assigned to him. The question here is, was the stand so close to the rail that it was dangerous? The jury have found that it was.

The defendants contend that the jury is not entitled to find the placing of it 4 ft. 7½ ins. from the rail to be negligence, in the

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absence of expert evidence that such position was contrary to good railroading, and they cite: *C.P.R. Co.* v. *Smith*, 31 Can. S.C.R. 367; *G.T.R. Co.* v. *McKay*, 34 Can. S.C.R. 81; *Phalen* v. *G.T.R. Co.*, 23 D.L.R. 90, 51 Can. S.C.R. 113; *Mallory* v. *Winnipeg Joint Terminals*, 29 D.L.R. 20, 53 Can. S.C.R. 323; *Zufelt* v. *C.P.R. Co.*, 23 O.L.R. 602.

These cases, as I read them, establish that a jury is not entitled to find a defendant guilty of negligence: (1) where the alleged negligent act is authorized or permitted by statute or the Board of Railway Commissioners; (2) where the alleged negligent act is proven to be in accordance with good railway practice, that is: the practice adopted by prudent and cautious railway companies, and (3) where the question of negligence depends upon whether or not the alleged negligent act is in accordance with good railway practice and there is no evidence that it is contrary to such practice. I do not think these cases go further than this.

In the present case, the placing of the switch stand at a distance of 4 ft. 7½ ins. from the rail is not, in my opinion, shewn to have been authorized or permitted by either the statute or the Board, nor was it proved to be good railway practice. It was the practice of the Moose Jaw yards; but the practice of one isolated point cannot, without more, justify the inference that it is the universal practice or in accordance with good railroading. Even in the Moose Jaw yards it was not universally adopted, for the evidence shows that stands—ten to fifteen—of the same height as the one in question were placed 6 ft. from the rail; the reason being that when the company were putting in these stands in 1912, they did not have any of the short attaching rods handy, and they put in the longer ones and these have remained in operation ever since.

Then, as to (3), was there evidence before the jury that it was not in accordance with good railway practice to have the stand placed where it was? I certainly think there was. There was the evidence of the plaintiff, himself a railwayman, who testified that the stand was too close; that the space between it and the car was not "sufficient for a man to get by." There was also the fact that the space through which the plaintiff's body had to pass was only 21¼ inches; and it was his duty to step off immediately after the car had passed the stand, and that, to do this safely, he must be facing in the direction in which the car was going, necessitating a space for the full width of his body. Further, in determining

whether or not the space was sufficient, the jury, in my opinion, might take into consideration the probability that, with his foot in the stirrup under the car, and his hand on the ladder 4 inches out from the car, the plaintiff might not be able to keep his body pressed close to the ladder.

With all this uncontradicted evidence before them, the jury in my opinion were entitled to find that the space allowed between the stand and the car was not reasonably sufficient and that a stand so close was obviously dangerous.

A stand that is obviously dangerous is *primâ facie* contrary to good railway practice, and if that *primâ facie* case is not rebutted the plaintiff is entitled to succeed. The defendants put in no evidence to rebut the plaintiff's evidence that the space was not sufficient, nor to show that it was in accordance with good railway practice to have the stand at that distance from the rail.

The plaintiff's witnesses shewed that on the G.T.P. Railway switch stands, 4 ft. high, were placed at a distance of 6 ft. from the rail.

Where a plaintiff submits evidence justifying the conclusion that the stand was obviously dangerous, the onus is on the defendants to justify or excuse the placing of it in that position. This onus the defendants made no attempt to discharge.

Furthermore, upon what points could expert evidence be usefully given in the case? To my mind it would have to be as to whether or not 4 ft. 7½ ins. from the rail was the universal or usual or proper place for 4 ft. switchstands, or, that it would be impossible or at least inconvenient to have them placed further back, or, that it was reasonably safe for a prudent switchman where it was. There was evidence that it was not the practice on the G.T.P. Railway to place 4 ft. switchstands within 6 ft. of the rail; that it was not even the universal practice even in the Moose Jaw yards, where stands—ten to fifteen—were placed 6 ft. from the rail. The fact that these have been in operation since 1912 is some evidence from which a jury might infer that it was not impossible nor inconvenient to have the stands placed 6 ft. from the rail. As to whether having them 4 ft. 7½ ins. away was dangerous, I do not think expert testimony was necessary to enable the jury to reach a conclusion.

The appeal, therefore, in my opinion should be dismissed.

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Elwood, J.

ELWOOD, J.:—The plaintiff was a switchman in the employ of the defendant in Moose Jaw, and had been so employed for about 2 months prior to the accident, in consequence of which this action is brought. On the night of the accident the plaintiff was working as a member of a switching crew and prior to the accident was standing on the stirrup below the ladder on the side of a refrigerator car, and in getting ready to get off, for the purpose of turning No. 4 switch, was hanging sideways from the ladder by his right hand with his right foot on the stirrup beneath the car. He was struck by switch stand No. 4 and knocked off the refrigerator car and the wheel of the following flat car passed over his right thigh. Switch stand No. 4 was 3 ft. 9⅜ inches or 3 ft. 10 inches high from the top of the rail and was 4 ft. 7½ ins. distant from the gauge side of the nearest rail. It is the standard switch stand in use on the defendant's system, at least in Moose Jaw yard, and is known as the low or yard switch. There are approximately 400 of such switches in use in the Moose Jaw yard. The jury at the trial found there was negligence on the part of the defendant in placing said switch too near the rails, and judgment was given for the plaintiff for damages. From this judgment the defendant appeals.

Order No. 12,225 of the Board of Railway Commissioners for Canada is entitled: "In the matter of the application of the Trainmen's Association of Canada, for a revision of order No. 5,888 dated December 16, 1908, making provision for the protection of railway employees: File 1,750." *Inter alia* this order provides as follows:—

8. (*b*) No semaphores, signals, poles, high or intermediate switch stands, or piles of material, erected or placed in future, shall be nearer than 6 feet from the gauge side of the nearest rail.

(*c*) No structure over 4 ft. high shall hereafter be placed within 6 feet from the gauge side of the nearest rail without first obtaining the approval of the Board.

(*d*) Where semaphores, signals, poles, high or intermediate switch stands, or piles of material are nearer than 6 ft. from the guage side of the nearest rail, the same shall be dealt with as follows:—

(1) Semaphores, signals, poles, or high or intermediate switch stands shall, within 2 years from this date, be either removed or changes made so that the same shall not be nearer than the said 6 ft.; or high and intermediate switch stands shall be changed to low or dwarf signals or switch stands.

By order No. 22,878 of the Board of Railway Commissioners for Canada entitled: "In the matter of the Canadian Pacific

Railway Company's Plan No. Q—7—43, dated Montreal, August 12, 1914, showing minimum clearance for all structures except bridges, and those for which special approval of the Board is obtained, on file with the Board, under File No. 1750-98." The Plan No. Q—7—43 was approved by the Board. That plan has, as part of it, the following:—"C.P.R. Co. minimum clearance for all structures except bridges, and those for which special approval of the B.R.C. is obtained".

From a perusal of this plan I think it is apparent that only structures which are 4 ft. or over in height, measuring from the top of the rail, are required to be placed 6 ft. from the gauge side of the nearest rail, and bearing in mind the purpose for which order No. 12,225 was made I am of the opinion that the intention of the Board was not to fix any minimum clearance for structures under 4 ft. in height from the top of the rail, but that it was to be left to the railway company to erect such structures in accordance with proper railway practice. It will be noted that by sec. 8, sub-sec. (*d*) 1 of order No. 12,225, high or intermediate switch stands shall either be removed or changes made so that the same shall not be nearer than 6 ft., or they shall be changed to low or dwarf switch stands.

The Board have apparently not indicated what stands shall be taken as high or intermediate or low or dwarf, but it seems to me that so far as the defendant company at least is concerned, plan Q—7—43 shews that a stand which is not over 4 ft. high from the top of the rail would be at least a low stand.

There was evidence to shew that the G.T.P. R. Co. has a low stand, 3 ft. 6 ins. high, but that, to my mind, does not affect the question.

There was no evidence of any expert, or, in fact, of any person tending to shew that the placing of the stand in question of the height and where placed was not proper railway practice.

In *G.T.R. Co.* v. *McKay*, 34 Can. S.C.R. 81, at 97, Davies, J., is reported as follows:—

> In my judgment parliament has by the 187th section of the Railway Act vested in the Railway Committee of the Privy Council the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level. . . . I cannot think that these powers, so full, so complete, and so capable of being made effective, can, if exercised, be subject to review either as to their adequacy or otherwise by a jury, *nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter*

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away from the jurisdiction to which parliament has committed it and vest it in a jury.

In *Mallory* v. *Winnipeg Joint Terminals*, 22 D.L.R. 448, at 453, 25 Man. L.R. 456, 18 Can. Ry. Cas. 277 (affirmed in 29 D.L.R., 20, 53 Can. S.C.R. 323), Perdue, J., is reported as follows:

The question as to whether all switch rods should be covered for the protection of railway employees is one of very great importance. The form of the protection to be adopted, if protection is to be made obligatory, would necessitate the assistance and advice of experts and the most careful consideration by the legislature or body possessing the power to compel the adoption of the device. Should it be left to a jury to say that defendants were negligent because they adopted the course followed by every railway company in Canada, and left the switch rods uncovered? It appears to be that the matter is essentially one to be dealt with by parliament or the Railway Board, so that the device to be adopted will be put in general use by all railways, and it will not be left to the conjecture of a jury to pronounce upon the necessity for, or the sufficiency of, the protection in each case.

In *Phelan* v. *G.T.P. R. Co.*, 23 D.L.R. 90, at 95, 51 Can. S.C.R. 113, at 133, 18 Can. Ry. Cas. 233, Anglin, J., says:—

It is not within the province of jurymen to constitute themselves experts on such a technical question of proper railway practice, and, without any evidence to warrant such a course and against all the evidence before them, to find that the method of inspection prescribed is improper.

Having come to the conclusion that the Board of Railway Commissioners did not intend to provide any minimum clearance for structures 4 feet or under, measuring from the top of the rail, and there being no evidence that placing the switch where it was was not according to proper railway practice, the above quotations that I have made, and particularly from *G.T. R. Co.* v. *McKay*, and *Mallory* v. *Winnipeg Joint Terminals*, seem to me particularly in point. And I am therefore of the opinion that there was no evidence to go to the jury of any negligence on the part of the defendant. It seems to me further, that the evidence shews clearly that there would have been no danger to the plaintiff if he had not gotten ready to get off before reaching the switch. If he had waited until after he had passed the switch before getting ready to get off he would have been in perfect safety. There was no evidence that if he had waited until after passing the switch, he would have been in any danger from any of the succeeding switches.

In my opinion, therefore, the appeal should be allowed with costs, and there should be judgment entered dismissing the plaintiff's action with costs.

Brown, J.
McKay, J.

BROWN and MCKAY, JJ., concurring with ELWOOD, J.

Appeal allowed.

MURPHY v. MONCTON HOSPITAL.

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New Brunswick Supreme Court, Chancery Division, Grimmer, J. December 8, 1916.

COMPANIES (§ IV A—35)—HOSPITAL—ELECTION OF TRUSTEES—CHARTER—BY-LAW.

The powers of a hospital board under its incorporating Act, as to the election or appointment of trustees for the management thereof, cannot be varied by a by-law; though empowered to make the necessary by-laws therefor, it cannot legislate for an increase of its membership nor fix any qualification for voters outside of the corporation, nor to sanction persons taking part in the business of the hospital who were not members of the body corporate, unless expressly or impliedly authorized by the charter.

Statement.

ACTION for a declaration that a resolution rescinding and annulling plaintiff's election as trustee of the Moncton Hospital is *ultra vires* and illegal, and for an injunction to restrain the defendants from acting on the said resolution, or preventing him from acting as a trustee or from excluding him from the meetings of the board. Dismissed.

M. G. Teed, K.C., for defendant; *James Friel*, for plaintiff.

Grimmer, J.

GRIMMER, J.:—The Moncton hospital was incorporated by 58 Vict. ch. 61 (1895), which declared the object of the corporation was the equipment, maintenance, managing and operating a hospital in the city of Moncton and a training school for nurses in connection therewith.

Sub-sec. 1, of sec. 1, provides that the persons named in sec. 1, together with a physician of the city of Moncton and a person to be appointed by the city council, and their successors, shall constitute the "trustees" of the hospital, in whom the management and control shall be vested.

By an Act passed in 1902, 11 Edw. VII. ch. 77, relating to the Moncton Hospital, it was provided that, in addition to the trustees provided by sec. 1 of 58 Vict. ch. 61, the county council of the municipality of Westmorland should appoint or elect one trustee at a regular meeting, who should hold office for one year after his election or appointment or until re-appointed or another person is appointed in his stead.

By an Act passed in 1903 further relating to the Moncton Hospital, it was provided that in addition to the trustees provided by sec. 1 of 58 Vict. ch. 61, two trustees should be appointed or elected by the county council of the municipality of Westmorland, such trustees to hold office for one year after election or appointment or until re-appointed, or another person or persons

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is or are appointed in his or their stead, ch. 77 of 2 Edw. VII. being repealed thereby.

By ch. 80 of 6 Geo., V., 1916, it is further provided that the City of Moncton may from time to time appoint 3 persons as trustees of the hospital, and the municipality of Westmorland three, who shall respectively hold office for 1 year, or until re-appointed or others are appointed in their stead. Also that the president and secretary of the Ladies' Hospital Aid of said city shall be trustees of the hospital while holding such offices, and that the persons acting as trustees at the coming into force of the Act, together with 2 persons appointed by the city in addition to the present city representative and the president and secretary elect of the Ladies' Hospital Aid, shall constitute the trustees of the Moncton Hospital and the management and control thereof shall be vested in the said trustees.

All Acts or parts of Acts inconsistent with or repugnant to this legislation are declared repealed.

Thus we find the personnel of the corporation is in the trustees who are the body politic and corporate and have all the general powers and privileges incident to a corporation by law in this province, and in whom alone the entire management and control of the said hospital is vested.

In the charter no provision was made for the retirement of the trustees therein named, and a vacancy could only be created by death, resignation or refusal to act. Upon the happening of either of these events, the vacancy so created was filled by the remaining trustees who by the Act were declared competent to appoint suitable persons to fill the vacancies as they occurred.

To change this condition of affairs the Act 1 Edw. VII. ch. 39 was passed, which provided that three of the trustees to be chosen by lot should retire each year, but should be eligible for re-election or re-appointment and that the trustees elected or appointed to succeed the retiring trustees should hold office for 4 years, also that thereafter, except in case of the medical staff and city council appointments or elections of trustees, should be for the term of 4 years. Thus provision was made for a rotation in the office of trustees and it will be noticed that throughout the legislation in respect to the trustees the words appointment or election or re-appointment or re-election are used in every case where provision

is made for any change in the constitution of the board. Also that there is no provision for a board of directors as is found in some hospital legislation, but the entire management and control is vested in the trustees, and no others.

Having traced the formation of the board of trustees I now come to a discussion of its powers to make by-laws, which is the matter involved in this suit. Sec 4 of the original Act enacts as follows:—

The corporation may make such by-laws, rules and regulations as may be deemed necessary for the management of the affairs of the said hospital and training school for nurses, and the choice, duties and powers of the officers thereof, provided that the same are not inconsistent with the laws in force in this province, nor repugnant to the provisions of this Act.

Provision having been made for the retirement of three trustees each year as stated, this section was amended by 1 Edw. VII. ch. 39, sec. 3, and the words "the annual election or appointment of trustees to succeed retiring trustees" were inserted in the third line of the section, thus giving the corporation, meaning the trustees, power to make such by-laws, rules and regulations as may be deemed necessary for the annual election or appointment of trustees to succeed retiring trustees. In this amendment it will be observed the words "election or appointment" are again used.

Some time after this amendment, by-law 13½ of the hospital was passed, which provided that at the annual meeting of the board of trustees an election of three trustees should be held to succeed the retiring trustees; that the election should be by ballot and that the meeting should be thrown open to all persons who were eligible to vote. It declared the persons entitled to vote to be: (*a*) The trustees remaining in office, including the representatives of the city council and of the medical staff. (*b*) All persons who shall have contributed to the funds of the hospital previous to May 31 in each year not less than $5.

On May 16 last this by-law was amended and made to read as follows:—

Sec. 13½, pages 11 and 12.

(*a*) The trustees remaining in office, including the representatives of the city council of the municipality of Westmorland, representatives of the Ladies' Aid, and of the medical staff. (*b*) All persons who shall have contributed to the funds of the hospital previous to the annual election in each year a sum not less than $1. (*c*) All persons who shall have contributed to the funds of the hospital at any one time a sum not less than $25.

The validity of this by-law is attacked and has become the

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paramount question in this suit. It arises in this way. After the adoption of the amended by-law, the secretary of the Board by publication in the city papers gave notice that the annual meeting would be held on June 14, at 8 o'clock p.m., for the election of officers, medical staff, trustees, and such other business as might properly be brought before the meeting. In this notice he stated the qualification of those entitled to vote for trustees as set forth in the amended by-law.

At the time appointed, contrary to the usual custom, quite a large number of persons attended, among whom was the plaintiff, who, with some 37 others, immediately before the meeting, made their first contribution to the funds of the hospital, viz., $1 each, for the purpose of acquiring qualification as voters under the by-law and according to the notice. The meeting convened and in due course three of the trustees retired. An election to fill their places was held, and three new men, viz., the plaintiff and McManus and Belleveau, were declared elected, the 38 new contributors taking part and voting in the said election.

A meeting of the board of trustees was then held and a president, vice-president and treasurer were elected. The meeting then adjourned until a later day. When this adjourned meeting was held a resolution was passed declaring the election of the plaintiff and McManus and Belleveau as trustees rescinded and annulled. None but trustees voted in this resolution. The meeting then proceeded to and did elect 3 trustees in the places of those whose election had been declared void, and McManus, the defendant—Hamilton—and Belleveau, were declared elected, the plaintiff being left out. On this occasion also none but trustees were allowed to vote. Some of those who had paid one dollar to qualify and were present were not permitted to vote, among them the plaintiff. At the same meeting the defendant Hamilton was elected secretary of the Board, and one Chapman, treasurer—and other business was transacted.

The plaintiff thereupon brought his suit seeking a declaration that the resolution passed at the June meeting of trustees rescinding and annulling his election as a trustee on June 14 is *ultra vires* and illegal, and for an injunction to restrain the defendants from acting on the said resolution or preventing him from acting as a trustee or from excluding him from the meetings of the board.

What, then, is the power or authority under the charter in the trustees in respect to by-laws? Whatever it is must be found in sec. 4 of the incorporating Act as amended by sec. 2 of the amending Act of 1901.

Examining this, in so far as this case is concerned, it is found the trustees have by it authority to make by-laws, rules and regulations for the annual election or appointment of trustees to succeed retiring trustees. In this language the words "annual election or appointment" are significant. The body politic and corporate is "the trustees," no other. As in the case of other hospitals there are no directors to assist the trustees, or from whom they may be elected, and save as mentioned and provided in the amending Acts, no provision is made for any increase in the Board. As passed it would seem that the trustees named in the original Act were appointed for life, unless they chose to resign or refused to act. Under the changed legislation, however, they now hold office for a definite term, viz., 4 years. But how, when and by whom are the vacancies created by the retiring trustees to be filled up? In my opinion, under the Act of Incorporation, this can only be done by the remaining trustees. So far as any temporary vacancy is concerned, the Act distinctly provides it shall be competent for and the duty of the remaining trustees to appoint suitable persons as the vacancies occur. The apparent intention of the legislature was to vest the full control and management of the hospital in the trustees, the body politic and corporate, and the true test of all by-laws is the intention of the legislature in granting the charter and the apparent good of the corporation. The use of the words "appoint" and "re-appoint" to my mind further signifies and illustrates the intention of the legislature. Unless this is the case the introduction into the Act of these words is not only useless but is unfortunate, in that they are likely to lead to misconception and produce confusion. If the vacancies in the Board, either temporary or caused by the annual retirement of the trustees, can be filled by appointment, can it be successfully contended the appointment may be made by any others than the trustees? The power to appoint must be and is in the corporation only, and no act of theirs, no by-law approved by them could change the purpose and intention of the legislature. Pursuing this argument further it follows that the trustees cannot

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make any by-law in respect to the annual election of the Board save such as is competent for them to make under the power conferred upon them, and which does not infringe on the charter. The Act of the legislature creates the Moncton Hospital, an artificial being, imparts to it its power, designates its object and purpose, prescribes its mode of operation, and is its constitution, and all laws in contravention of it are void. The power to make by-laws is unquestionably an incident of every corporation, and it is rarely left to implication, but is usually, as in the present case, conferred by the express terms of the Act of the legislature. While this is so and while municipal charters and incorporating Acts are sometimes silent as to the power to pass by-laws, where it does so happen, the corporation has the power incidental to all corporations, to enact appropriate by-laws. It is also established that since all the powers of a corporation are derived from the law and its charter, it is evident that no ordinance or by-law of a corporation can enlarge, diminish or vary its powers. Neither the King's charter nor any by-law can introduce an alteration in rules which have been prescribed to a corporation by an Act of Parliament. It is also an established doctrine in the Courts of England that every corporation has the implied or incidental right to pass laws, accompanied, however, by the limitation that every by-law must be reasonable, and not inconsistent with the charter of the corporation, nor with any statute of Parliament, nor with the general principles of the common law, thus reaffirming in no uncertain way the well-known doctrine that the law of a country, being as well for the proceedings of corporations as for the conduct of individuals, all by-laws contrary to the common or statute law of the country, are void. A distinction is also drawn and pointed out by the writers on corporation law between private and public corporations, and it has been held a private corporation such as this is can only make by-laws to bind its own members, and touching matters that concern its own private affairs, and it cannot, by means of a by-law, alter the constitutional method of election so as to alter the result or effect of an election, for to do so would be to alter the constitution itself. *The Queen* v. *The Master, etc., of the College of God's Gift in Dulwich* (1851), 17 Q.B. 600 (117 E.R. 1411), was relied upon as an authority that persons who are not

members of the corporation may be authorized by by-law to vote at elections. An examination of the case, however, shews it to be quite different from the present, and distinguishable therefrom, particularly in that the corporate body as created by letters patent or royal charter, and power was therein given to the founder of the college, one Alleyne, to make, found, erect, create and establish the same, and that it should be maintained, governed and ruled according to such ordinances, statutes and foundation, as should be made, set down, established and ordained by the said Alleyne in his lifetime, etc. It was held the right contended for was authorized by the constitution itself, and that while the corporation must be created by the Crown, it could also delegate to a private person the right of declaring of what members of the corporation shall consist, what shall be their qualifications, and in what manner the corporation shall be kept up. In the present case the corporation is created by Act of Parliament and as already pointed out, neither the King's charter nor any by-law can introduce an alteration in rules which have been prescribed to the corporation by such an Act.

The result of my deductions from the law and authorities applicable to the present case, is that the power in the Moncton Hospital to enact a by-law relating to the annual election of trustees refers, and I so find, to the mode or manner of procuring or securing (if these terms may be used) the trustees, for instance, by appointment or election, and if the latter course is followed, then by ballot or otherwise, but no authority is conferred upon the corporation to increase its membership nor to fix any qualification for voters outside of the corporation, nor to sanction persons taking part in the business of the hospital, who are not members of the body corporate.

I therefore find that by-law 13½ and the amendment thereto is void, being beyond the powers conferred upon the trustees by statute, and therefore repugnant to the provisions of the Act. It is decided in the *Ashbury Railway Carriage Co.* v. *Riche* (1875), L.R. 7 E. & I. App. 653, which is cited with approval in *Att'y-Gen'l* v. *Great Eastern R. Co.* (1880), 5 App. Cas. 473, that when there is an Act of Parliament creating a corporation for a particular purpose and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken

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to be prohibited. Therefore, as the power to make this by-law was never expressly or impliedly given, in my opinion, no amount of user or ratification by the corporation can make it good.

The plaintiff's claim will be dismissed and the application for an injunction refused, but in view of the circumstances which produced the litigation, without costs. *Action dismissed.*

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REX v. NOLAN.

Nova Scotia Supreme Court, Drysdale, J. April 20, 1917.

1. JUSTICE OF THE PEACE (§ I—2)—OFFICIAL TITLE IN PROCEEDINGS.
It will be assumed that a town magistrate signing as magistrate "in and for" the town a warrant of commitment which is headed with the name of both town and county, did so in the town although the warrant does not formally state that the warrant was there given.

2. LIMITATION (§ III J—151)—OF TIME FOR PROSECUTION—THREE MONTHS AFTER OFFENCE.
The requirement of the Nova Scotia Temperance Act, 1910, ch. 2, sec. 36, that a prosecution shall be commenced "within three months *after* the alleged offence" would authorize an information on March 1st for an offence committed on the previous 1st day of December.

Statement. MOTION for discharge under *habeas corpus*, made on behalf of William Nolan who was convicted by the Stipendiary Magistrate for the town of Truro for a second offence against the provisions of the Nova Scotia Temperance Act, 1910, and amendments, and sentenced to three months in the Colchester jail. The application was made on two grounds:

1. Because the warrant of commitment did not shew that it was signed and sealed at "Truro" or any place in Colchester County within the magistrate's jurisdiction.

2. Because the offence charged in the information, conviction and warrant of commitment stated that it had been committed "within three months previous to the first day of March, 1917 (the date of the information herein)."

Argument. *J. J. Power*, K.C., for the applicant. The warrant simply states: "Given under my hand and seal this 13th day of March, A.D. 1917, L. G. Crowe, stipendiary magistrate in and for the town of Truro." The offence disclosed is possibly beyond the limitation period, viz., three months. See sec. 36, N.S. Temperance Act, 1910; *R.* v. *Boutilier*, 8 Can. Cr. Cas. 82, and *R.* v. *Wambolt*, 14 Can. Cr. Cas. 160.

W. J. O'Hearn, K.C., for the License Inspector, *contra*. Assuming the warrant to be defective there is a good conviction behind it, as the omission complained of does not there occur.

Sec. 1124 Code applies. If not, under common law a bad commitment can never defeat a good judgment. Hurd on Habeas Corpus, p. 411 *et seq.*; *Ex parte Gibson*, 31 Cal. 621; *R.* v. *Boutilier* is founded on *Reg* v. *Ida Adams*, 24 N.S.R. 559. There the date of information was not given. Here it is, viz., March 1st. See sec. 36 as regards complaint three months *after*. This means possibly three months and a day.

DRYSDALE, J.—Drysdale, J.

Application under the Liberty of the Subject Act. Two points were made as against the validity of the commitment herein.

1. The first point strenuously argued was that the warrant did not shew on its face that it was made within the jurisdiction of the stipendiary of Truro. The warrant is headed, "County of Colchester, Town of Truro," and at the foot is signed as "given under my hand and seal this 13th day of March, 1917. L. G. Crowe, stipendiary magistrate in and for the town of Truro." I am of opinion this clearly shews it was made by the magistrate in Truro, consequently within his jurisdiction. It is not only headed Truro, but signed as made by the magistrate in Truro. It was argued that the words after the name were merely words descriptive of his office. Giving full force to this contention when the officer describes himself as sitting as a magistrate in and for Truro, a fair reading of the words mean that he is giving the document under his hand and seal in Truro. In this respect, I think this commitment valid.

The second point was that in reciting the conviction, it appears the offence convicted for was under an information, charging keeping liquor for sale within three months, previously to the first day of March (the date of the information herein). It was contended this was a charge not allowed by law inasmuch as by sec. 36 of N.S. Laws, 1910, ch. 2, the prosecution shall be commenced within three months after the alleged offence, and this information covered a range of enquiry not within the section. I test this point in a simple manner. The information charges an offence within three months next before the laying of the information, that is to say, an enquiry can cover the three months next before and would cover an enquiry over and as to the first of December, 1915, not further back. If an offence were committed on the first of December aforesaid, an information laid on March 1st would

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be "within three months after the alleged offence," to use the words of sec. 36.

This being so, the information is clearly good in law, and I think the point not well taken. I refuse the prisoner's application herein. *Discharge refused.*

SUMNER v. McINTOSH.

Saskatchewan Supreme Court, Haultain, C.J. January 22, 1917.

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VENDOR AND PURCHASER (§ I C—13)—RESTRICTIVE COVENANT OR EASEMENT —REFERENCE TO PLAN.

A building restriction contained in a registered plan does not operate as a negative covenant or easement enforceable against and amongst all subsequent purchasers of lots described by reference to the plan; to constitute it such there must be a direct provision to that effect in the agreement or conveyance, and the easement must be created in accordance with provisions of the Land Titles Act.

Statement.

ACTION by vendor for specific performance of the agreement of sale.

A. M. McIntyre, for plaintiff; *J. Milden*, for respondent.

Haultain, C.J.

HAULTAIN, C. J.:—The plaintiff is the registered owner of the land in question in this action. In the certificate of title granted to her, the land is described as being the whole of lots 15 and 16, and a portion of lot 17 (more particularly described) in block 6 in the City of Saskatoon "according to a plan of record in the Land Titles Office for the Saskatoon Land Registration District as Plan 'F.J.'

Plan F.J. was registered by the original owners of the sub-division, which includes the lots in question, before the plaintiff or her immediate predecessors in title became interested in the lots. On the plan, and through the lots in question, and the other lots in the sub-division, there is a line drawn parallel to the eastern boundary of the lots, and 25 feet from that boundary. Above the line on the plan there are written words to the effect that no building is to be erected east of the line, that is, within 20 feet of the eastern boundary of the lots which abut on a street called Saskatchewan Crescent.

By an agreement in writing, under seal, dated January 1, 1913, the plaintiff agreed to sell, and the defendant, Carrie McIntosh, agreed to buy the above mentioned lots.

Clause 4 of the agreement is as follows:

4. In consideration whereof and on payment of all the said sum of money, with interest as aforesaid, in manner aforesaid, the vendor doth

covenant, promise and agree to and with the purchaser to convey and assure or cause to be conveyed or assured to the purchaser the parcels of land with the appurtenances as aforesaid by a transfer under the Land Titles Act, subject to the conditions and reservations contained in the original grant from the Crown, prepared by the vendor's solicitors at the expense of the purchaser.

The defendant, Robert McIntosh, is a party to the agreement, and covenants to pay the purchase money according to the terms and at the times set out in the agreement.

According to the evidence there was a substantial house on the property, also other buildings, and there was also about $5,000 worth of furniture in the house, which was included in the sale. There is no mention of the furniture in the agreement. The defendants took possession of the property in June, 1913, and resided in the house until December, 1914. The defendants have made default in their payments, and this action is brought for specific performance of the agreement.

The defendants resist specific performance on the ground that the plaintiff is not in a position to give title in the terms of the clause above set out. This objection must depend upon the significance or effect of the plan as above described. The defendants contend that the words on the plan with regard to building are equivalent to a restrictive covenant running with the land, and enforceable as against them by the original owners as well as by any other purchasers of lots in the subdivision. They further set out that this restriction was fraudulently concealed from them when the agreement was made, and that they had no knowledge of its existence.

The defendant, Robert McIntosh, acted throughout the whole transaction as agent for his wife, and the evidence clearly establishes that at the time the sale was being negotiated, frequent reference was made to the plan and the description of a portion of the property, which is by metes and bounds, was checked over by him on a blue print of the plan. This defence, therefore, is not available to the defendants. The defendants also defend on the ground of mistake, alleging that they were not aware of the alleged restriction until long after the agreement was entered into. This defence cannot prevail in view of the facts as I found them. *Tamplin* v. *James*, 15 Ch.D. 215.

This narrows the question down to the effect of the words on the plan.

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In England, generally speaking, a map or plan is not a necessary part of the abstract, except for the purpose of identifying or verifying the parcels. Williams, Vendor & Purchaser, p. 94.

In *Blackburn* v. *Smith* (1849), 2 Ex. 783, 18 L.J. Ex. 187, Parke B., said:—

> With respect to the identity of the land, we think that the abstract referring to a map or plan in one of the deeds abstracted affords sufficient means of identification. We are not aware that a map or plan is ever deemed to be necessary as part of an abstract.

This is considered by Mr. Williams, as referred to above, and by Dart, Vendor & Purchaser (7th ed.), p. 339, as being too broad a statement in the case "where a deed contains no substantive description of the property, but conveys it merely, or as respects its details, by reference to the plan."

In *Fewster* v. *Turner* (1842), 6 Jur. 144, 11 L.J. Ch. 161, it was held that a sale plan accurately describing the existing state of the property would not carry the case higher than a view of the property by the purchaser.

I cannot agree with the contention that the reference to the plan in this case is made for anything more than for the purposes of description. The sections in the Land Titles Act with regard to plans of subdivisions make no provision for matters of this sort, and the main object of registering a plan is to provide for an accurate description and measurement of the various lots included in it, and roads, streets, squares, and other reservations set apart for public use.

It can never, in my opinion, have been intended that owners of land by inscribing such words on a registered plan could thereby create a negative covenant in the nature of a negative easement enforceable against and among all subsequent purchasers of lots described by reference to the plan. In order to create such an easement, there should be a direct stipulation to that effect in the agreement or conveyance, and the easement should be created in accordance with the Land Titles Act. See *Re Jamieson Caveat*, 10 D.L.R. 490, 6 S.L.R. 296.

Outside of the fact that the lots are described in the present agreement by reference to the plan, there is no reference whatever to any restriction in the agreement or on the title, and, as has been already mentioned, the vendor has covenanted without any qualification to transfer the property by transfer under the Land

Titles Act, subject to the conditions and reservations contained in the original grant from the Crown. Further than that, Mrs. Sumner, the plaintiff, is the registered owner of the lots, with a title subject only to the implied reservations and conditions contained in sec. 66 of the Land Titles Act. She is, therefore, in a position to give title to the property in the terms of the agreement, unless the memorandum on the plan has the effect contended for.

I am, therefore, of the opinion that the plaintiff is entitled to have the agreement performed. I will therefore order:—1. Taxation of the plaintiff's costs of action. 2. A reference to the local registrar at Saskatoon to ascertain the amount of purchase money and interest due to the plaintiff. 3. Deposit by the plaintiff with the local registrar of her duplicate certificates of title and a proper transfer of the land to the defendant Carrie McIntosh. 4. Payment into Court by the defendants of the amount certified by the local registrar, and the plaintiff's taxed costs and costs of reference, within three months from the date of the certificate. 5. If the above amounts are paid into Court as ordered, the transfer and duplicate certificate of title will be delivered to the defendant, and the plaintiff will be at liberty to apply on notice for payment out to her of the moneys in Court.

I also find that the plaintiff is entitled to a lien upon the property in question in respect of the purchase money, with interest at the rate of 8% per annum, and also for the plaintiff's costs; and, in case of default being made in such payment as aforesaid, the plaintiff is to be at liberty to apply to this Court to enforce such lien.

Liberty to apply generally at any time is reserved to all parties.

Judgment for plaintiff.

OTTO v. ROGER AND KELLY.

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Ontario Supreme Court, Sutherland, J., March 21, 1917.

DRAINS AND SEWERS (§ II—10)—*Ditches and Watercourses Act, R.S.O. 1914, ch. 260—Drain crossing lines of dominion railway—Railway Act, R.S.C. 1906, ch. 37, sec. 251 (4)—Insufficient Outlet—Action to restrain engineer and contractor from Proceeding under Award—Remedy by Appeal to County Court Judge—Dismissal of Action.*]—Action by J. R. Otto, the owner of land in the 3rd concession of the township of South Easthope, against John Roger,

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the township engineer, and Thomas Kelly, the contractor for certain drainage or ditching work directed, by an award under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, to be done in the township, to restrain the defendants from proceeding with the work upon the plaintiff's land and for damages.

R. S. Robertson, for plaintiff.

G. G. McPherson, K.C., for defendant Roger.

W. G. Owens, for defendant Kelly.

SUTHERLAND, J.:—This action arises out of an award made under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, and dated the 29th January, 1916. It purports to award and apportion the work and the furnishing of material among the lands affected and the owners thereof according to the engineer's estimate of their respective interests in the work; and the clause therein referring to the plaintiff herein is as follows: "J. R. Otto, owner of lot No. N. pt. 38 and lot 37 in the 3rd concession of the township of South Easthope, shall make and complete from stake 32 x 00 to stake 47 x 42 and shall furnish . . . feet of . . . inch tile, all of which according to my estimate will amount in value to $45; and I fix the time for the performance of such work and providing said material on the 1st day of July, A.D. 1916, at the furthest." It further awards and apportions the maintenance of the work among the various parties, and, in so far as the plaintiff is concerned, as follows: "J. R. Otto, owner of lot No. N. pt. 38 and lot 37 in the 3rd concession of the township of South Easthope, shall maintain from stake 24 x 21 to stake 47 x 42." The award apportions the engineer's fees and charges among the parties, and as to the plaintiff as follows: "J. R. Otto, N. pt. 38 and 37, $8."

The plaintiff in his statement of claim says that he has long been the owner of lot No. 38 above mentioned, and that on or about the 5th October, 1916, the defendant John Roger, the engineer of the said township, assumed to let to the defendant Kelly a contract for certain drainage work upon his lands, and a few days before the commencement of this action by writ issued on the 23rd October, 1916, the latter, acting under instructions from Roger and under the assumed authority of said contract, unlawfully entered upon the plaintiff's lands and began to dig a ditch or drain upon the same, although forbidden by the plaintiff. He also says that the defendant Kelly has dug upon his

land not only a portion of the work included in the contract referred to, but also another section of the same ditch.

Paragraphs 6 and 7 of the statement of claim are as follows:—

"The defendants in the several matters aforesaid claim to act under the authority of an award which they allege has been made by the defendant Roger under the Ditches and Watercourses Act, but the plaintiff says that no valid award has been made with respect to the said work, and that the alleged award is null and void, and confers no jurisdiction upon the defendant Roger to let the said contract or to authorise the said work, and affords no warrant for the acts of either of the defendants.

"The plaintiff further says that the proposed ditch in course of construction is not provided with a sufficient outlet, but will, if constructed, bring water to the plaintiff's lands from both its extremities, and will thereby greatly damage the plaintiff's lands."

He asks an injunction and damages.

The defendant Roger pleads that he is the engineer under the said Act, duly appointed by the municipal council of the said township to carry out the provisions thereof; that, pursuant to a requisition for drainage, he made and filed with the clerk of the township an award for drainage of the lands mentioned therein, pursuant to the provisions of the Act, and the lands of the plaintiff were therein declared benefited by the proposed drain, and the plaintiff ordered and directed to erect and construct his proper proportion thereof; that the plaintiff had due notice of the making and filing of the award, and did not, nor did any of the parties concerned, appeal therefrom, and the same became valid and binding; that the other parties interested in the award, prior to this action, and with the knowledge of the plaintiff, constructed their respective portions of the work, and the plaintiff is therefore estopped from claiming that the award is invalid; that, by reason of the neglect of the plaintiff to construct the portion of the work directed by the award to be performed by him, this defendant, after due notice, let a contract to his co-defendant to perform it, and its performance was necessary for the said drainage work, and that the outlet for the drainage work is in the central drain, a municipal drain in the township, and forming the outlet for all the lands mentioned in the award, and is a proper and sufficient outlet.

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The defendant Kelly, in his statement of defence, refers to the award as apparently one in accordance with the provisions of sub-sec. (3) of sec. 16 of said Act; to the fact that no appeal from the award was made by the plaintiff or any of the other owners affected; that the defendant Roger as the engineer inspected the ditch and found that part thereof apportioned to the plaintiff not completed in accordance with the award; and, under sec. 28 of the said Act, let the work and supplying of material apportioned to the plaintiff to this defendant, the lowest and only bidder for the work. He further pleads that he was employed by another land-owner concerned, named P. W. Heinbuch, to construct his portion of the ditch, and that on the 8th October, 1916, he, as the agent or servant of the said Heinbuch, entered upon the plaintiff's lands for the purpose of constructing that part of the ditch apportioned to Heinbuch, and completed the same within a few days thereafter, and that he then proceeded to construct, upon the plaintiff's land, the part of the ditch apportioned to him, and constructed about one-half thereof, when, on the 24th October, 1916, he was served with the writ of summons and an injunction order herein, and ceased work.

He further says that he entered upon the plaintiff's lands only for the purpose of performing the work referred to, and under and pursuant to the said award, and submits his rights thereunder to the Court.

By sec. 3, clause (*f*), of the said Act, "'Engineer' shall mean the persons appointed by a municipal council as engineer to carry out the provisions of this Act."

Section 5, sub-sec. (1), provides that "the council of every local municipality shall by by-law, Form 1, appoint a civil engineer, Ontario land surveyor or other competent person to be the engineer to carry out the provisions of this Act, and he shall be and continue an officer of the corporation until another engineer is appointed in his stead who may continue any work already undertaken."

Section 6, sub-sec. (1), provides that "every ditch constructed under this Act shall be continued to a sufficient outlet" etc.

Section 8, sub-sec. (1), provides that an owner of land who requires the construction of a ditch shall, before the filing of the requisition provided for by sec. 13, serve upon the owners or

occupants of the other land to be affected a notice naming a day and hour and also a place convenient to the site of the ditch for all owners to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work and the supply of material for its construction.

If at such meeting no such agreement is arrived at, it is provided by sec. 13 that, within five days thereafter, the owner requiring the ditch to be made may file with the clerk of the municipality a requisition naming therein all parcels of land that will be affected by the ditch and the owners thereof, and requesting that the engineer appoint a time and place in the locality to attend and make an examination as provided by a further section.

Section 14 provides that the clerk shall transmit a copy of the requisition by registered post to the engineer, who shall notify the clerk in writing appointing a time and place at which he will attend in answer to the requisition; that the clerk, on receipt thereof, shall file the same with the requisition, and send a copy of the notice of appointment to the owner making the requisition, who shall, at least four clear days before the time appointed, serve upon the other owners a notice requiring their attendance at such time and place.

Section 16, sub-sec. (1), provides that "the engineer shall attend at the time and place appointed by him and shall examine the locality, and if he deems it proper, or if requested by any of the owners, may examine the owners and their witnesses present and take their evidence, and may administer an oath to any owner or witness examined by him." And sub-sec. (3) provides that, if the engineer "finds that the ditch is required he shall within thirty days after his first attendance, make his award in writing, Form 6, specifying clearly the location, description and course of the ditch, its commencement and termination, apportioning the work and the furnishing of material among the lands affected and the owners thereof, according to his estimate of their respective interests in the ditch, fixing the time for performance by the respective owners, apportioning the maintenance of the ditch among all or any of the owners so that as far as practicable each owner shall maintain the portion on his own land; and stating the amount of his fees and the other charges and by whom the same shall be paid."

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Section 19, sub-sec. (2), provides: "The engineer forthwith, after making the award, shall file one part thereof and of any plan, profile or specifications with the clerk of each of the municipalities, and the same may be given in evidence in any legal proceedings by a copy certified by the clerk."

Sub-section (3): "The clerk, upon the filing of the award, shall notify each of the persons affected thereby within the municipality of which he is clerk, by registered letter or personal service, of the filing of the same, and the part of the work to be done and material to be furnished by the persons so notified as shewn by the award," etc.

And sec. 21, sub-sec. (1), provides: "Any owner affected by the award, within fifteen clear days from the date of the mailing or service of the last of the notices of the filing of the award, may appeal therefrom to the Judge."

Sections 22 and 23 of the Act are as follows:—

"22. No award shall be set aside for want of form only or for want of strict compliance with the provisions of this Act, and the Judge, instead of setting aside the award, may amend it or the other proceedings or may refer back the award to the engineer, with such directions as the Judge may deem necessary.

"23. An award shall, after the time limited for an appeal to the Judge and after the determination of appeals, if any, by him where the award is affirmed, be valid and binding, to all intents and purposes, notwithstanding any defect in form or substance either in the award or in any of the proceedings prior to the making of the award."

This Act would appear to be one intended to simplify and make as inexpensive as possible local drainage works, and the tendency of legislation with respect to such matters seems to have been in the direction of preventing, if possible, litigation, and making an award, when once made and after the time for appeal therefrom has elapsed, binding upon parties who have had notice of the proceedings and of the award, notwithstanding a failure to comply strictly with the provisions of the Act, or defects not merely in form but in substance in the award or the proceedings prior to the making thereof.

The defendant Roger was well acquainted with that part of the township of South Easthope in question herein, having pre-

viously taken levels and acted as engineer in connection with other drainage work therein. He was called at the trial, and gave it as his opinion that the outlet furnished to the central drain was a proper and adequate one, provided that the central drain, which he said was six inches deeper than the bottom of the ditch in question, were kept in repair. He admitted that, in place of himself attending to meet the land-owners on the ground, he had sent his assistant, who had been with him for about eleven years.

There had been, on a portion of the ground through which the drain in question passes, a former drain, which the engineer intended to utilise in its construction, and in his instructions to his assistant, before the latter went on the ground, he had mentioned this to him. The assistant when on the ground had traced out the proposed course of the drain and put in stakes to indicate it.

The plaintiff testified at the trial that, when the assistant was on the ground, he (the plaintiff) had objected to the course of the drain and the outlet, had indicated to the assistant that the fall of the land was in a different direction than towards the proposed outlet, and that the proper outlet was to be found by carrying the proposed drain to the east and south into the central drain, at a point where it runs, not east and west, but north and south, and where the bottom of said central drain is lower.

The evidence of the engineer was not altogether satisfactory on this question. It was to the effect that the central drain, if in good condition, was low enough to form an outlet for the drain in question. When pressed as to whether it would be a sufficient outlet, he seemed to avoid the word, and contented himself with saying that he would not say it would not be sufficient.

The engineer was not able to recollect that his assistant had reported to him the alleged objections and suggestions made on the part of the plaintiff, and so of course could not say that he had taken them into consideration.

The purpose of this action is to prevent further work on the drain in question; and, though damages are claimed, they are admittedly trivial and merely incidental.

It was objected at the trial on the part of the plaintiff that, as the award directed the Grand Trunk Railway Company to do certain things and pay certain sums, this in itself made it a

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nullity, unless that company had agreed to be bound, or the approval of the Board of Railway Commissioners for Canada had previously been obtained, under the Railway Act of Canada, R.S.C. 1906, ch. 37, sec. 251, sub-sec. (4). The statement of claim does not refer to this as an objection to the award, and no amendment was granted permitting it to be set up. It was not shewn at the trial that there was any agreement on the part of the railway company to be bound by the award, or that the approval of the Board had been obtained. It was shewn, however, that the drain in question crosses the right of way of the Grand Trunk Railway Company by a culvert nearer the head or starting-point of the drain than the lands of the plaintiff, and that a portion of the drain upon or through the said company's lands had been already constructed without any objection on the part of the railway company, so far as anything disclosed at the trial shewed.

In *Miller* v. *Grand Trunk R.W. Co.* (1880), 45 U.C.R. 222, it was held that the defendants, a railway company, were not subject to the provisions of the Ditches and Watercourses Act, R.S.O. 1877, ch. 199. I quote from the judgment of Hagarty, C.J., at p. 223: "The sole question presented for our decision on this demurrer is, whether the defendants are subject to the provisions of ch. 199 of R.S.O., called 'The Ditches and Watercourses Act.' It begins by declaring: 'This Act shall not affect the Acts relating to Municipal Institutions, or the Acts respecting drainage, as this Act is intended to apply to individual and not to public or local interests, rights or liabilities.'" And he concluded his judgment by saying: "On the whole, I think the defendants do not come within the statute." Armour, J., in a short concurring judgment, said: "I have also come to the conclusion that the Act, R.S.O. ch. 199, applies only to individuals, and not to corporations, except as provided by the 13th section. I see no reason why the Legislature should not extend this very beneficial Act to corporations as well as to individuals; and, notwithstanding the argument of the defendants' counsel, so powerfully addressed to the nerves, I think corporations such as the defendants should form no exception."

The second objection is, that, while sec. 6 of the statute requires that the ditch shall be continued to a sufficient outlet, the one provided is not of that character.

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The third objection, and the one on which most stress was laid in argument, is, that it was obligatory on the part of the engineer himself, under sec. 16 (1) of the Act, to attend personally at the time and place appointed by him and examine the locality; and that, having failed so to do, he had no power to make an award at all. Sub-section (3) of sec. 16 is to the effect that, if he "finds that the ditch is required, he shall, within thirty days after his first attendance, make his award in writing." It is contended on the part of the plaintiff that this is an incurable defect and vitiates the award.

In *In re Robertson and Township of North Easthope* (1888), 15 O.R. 423, on a motion to quash a by-law providing for the assessment of certain owners of land for the cost of drainage work for the benefit of their land, under sec. 570 *et seq.* of the Municipal Act, 1883, Street, J., at p. 431, dealt with a somewhat similar objection as follows: "The final objection is, that the engineer appointed by the council did not himself do the work, but delegated to his son the duty of inspecting the properties affected and of assessing amongst them the cost of the drain. If this were made out, it would probably be a fatal objection to the validity of the by-law, and one to which effect should be given. The duties imposed upon the engineer are, to a certain extent, judicial in their character, and are such as he alone should perform. He is not, it is true, required to do with his own hand all the work from its inception to its completion, and he is at liberty, if he deem proper, to employ assistants; but the work of examining and assessing the several parcels of land affected, for their due proportion of the cost of the drain, should be done by himself or under his immediate direction The engineer here employed his son to assist him, but he swears that he himself made an inspection of each lot, and estimated how much each would be benefited by the ditch. He seems to have divided its length into sections, and to have charged the land in each section at a fixed sum per acre, as representing the amount of benefit it would derive from the work. This part of the work seems to have been done by himself, though the actual calculation upon the basis thus established seems to have been made by the son. But that was a mere matter of calculation, involving nothing beyond a knowledge of the multiplication table, and was a part of the

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work which might properly be delegated to an assistant by the engineer employed."

His judgment refusing to quash the by-law in question was reversed in appeal (1889), 16 A.R. 214, but on the ground (Hagarty C.J.O., p. 216) "that a majority of the land-owners of property to be benefited by the drainage by-law, had not petitioned for it; that, in other words, the ground-work and foundation of the jurisdiction of the council did not exist."

In the Ditches and Watercourses Act, as found in R.S.O. 1887, ch. 220, no sections were incorporated similar to secs. 22 and 23 in the existing Act, namely, R.S.O. 1914, ch. 260. They are first found in the Act of 1894, 57 Vict. ch. 55, secs. 23 and 24. The two sections as then enacted were carried into R.S.O. 1897, ch. 285, and there read as follows:—

"23. No award made by an engineer under this Act shall be set aside by the Judge for want of form only or on account of want of strict compliance with the provisions of this Act, and the Judge shall have power to amend the award or other proceedings, and may in any case refer back the award to the engineer with such directions as may be necessary to carry out the provisions of this Act.

"24. Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the Judge, and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act."

By the Ditches and Watercourses Act of 1912, 2 Geo. V. ch. 74, the said sections (23 and 24) were amended and replaced by secs. 22 and 23, which are precisely the same in language as the two sections similarly numbered now found in the revision of 1914 and already quoted.

The Judge of the County Court is the one designated and contemplated by the statute to deal with an award, when made, and in case any party thinking himself aggrieved thereby desires to appeal therefrom.

By sec. 21, sub-sec. (9), he is empowered on an appeal to ex-

amine parties and witnesses on oath and to inspect the land and to require the engineer to accompany him, and may alter or affirm the award and correct errors therein; and, by sec. 22, he may, instead of setting aside the award, amend it or the other proceedings, or may refer back the award to the engineer, with such directions as he may deem necessary.

The present sec. 23 provides that an award, after the time limited for an appeal to the Judge has elapsed, shall be valid and binding notwithstanding any defect in form or substance either in it or in any of the proceedings prior to the making of the award. This last paragraph is now wide and far-reaching. I think it covers and was intended to cover the objections hereinbefore referred to. The plaintiff says that he contemplated appealing from the award, but through ignorance or inadvertence failed to do so within the time provided by the Act. He does not say he was misled.

While, by sec. 6 of the present Act, (1) "every ditch constructed under this Act shall be continued to a sufficient outlet," etc., and while it does not, as it seems to me, conclusively appear from the evidence adduced at the trial that the outlet provided for the drain in question to the central drain, in the existing condition of the latter drain, is a sufficient outlet, if the plaintiff had appealed from the award to the County Court Judge, and had brought to his attention the fact that the engineer had not personally attended "at the time and place appointed by him" to examine the locality, as required by sec. 16, and in his award had failed to provide a sufficient outlet, which might be provided by carrying the drain in an easterly or easterly and southerly direction, as already mentioned, it was competent for the County Court Judge, under sec. 22 of the Act, to "refer back the award to the engineer, with such directions" as he should deem necessary, if he did not see fit to set aside the award itself. Most of the cases to which I have referred were decided prior to the amendment to sec. 3, found in the Act of 1912.

I am unable to come to the conclusion that I should give effect to any of the objections. The plaintiff could have got every reasonable remedy he was entitled to by an appeal from the award to a County Court Judge, and that was the tribunal indicated and provided by the Act. Instead of doing so, he permitted

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the work to go on until that portion of it to be done on his own property was about to be performed, and then brought this action.

I am unable to see that he is entitled to the relief asked, and the action will therefore be dismissed with costs.

Action dismissed.

Re BAYLISS and BALFE.

Ontario Supreme Court, Clute, J. January 17, 1917.

DEEDS (§ II E.—50)—*Conveyance in contemplation of marriage —Trust to uses of wife.—"Heirs and assigns for ever"—Fee-simple —Statute of Uses—Vendors and Purchasers Act.*]—Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that an objection made by the purchaser to the title to certain land, the subject of a contract for sale and purchase, was not a good objection.

F. F. Treleaven, for vendor; *E. E. Gallagher*, for purchaser.

CLUTE, J.:—The objection to title is in respect of a deed dated the 26th October, 1886, made in anticipation of marriage. The deed recites that a marriage is intended shortly to be solemnised between James Noyes, the grantor, and Maude Clara Towersey, and that upon treaty of the intended marriage it was agreed that James Noyes should grant and convey the lands and premises to Joseph Towersey, the father of the intended bride, "his heirs and assigns, to the uses hereinafter declared and contained concerning the same;" the said grant and conveyance to be made in lieu of dower. The indenture witnesseth that, "in consideration of the said intended marriage and solemnisation and consummation thereof and of the covenants and conditions hereinafter contained, and of the sum of one dollar, the party of the first part doth grant unto the said party of the third part (father of the bride), *his heirs and assigns for ever*," the lands in question, "to have and to hold unto the said party of the third part, his heirs and assigns, unto and to the use of the said party of the first part (the husband), his heirs and assigns, until the solemnisation of the said intended marriage and from and after the solemnisation thereof unto and to the uses of the said party of the second part (the bride), her heirs and assigns, for her own sole and separate use and benefit for ever and as her separate

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estate and property and free and clear and absolutely discharged of from all control, estate, right, claims and demands, of the said party of the first part."

The marriage was solemnised, and the wife, Maud Clara Noyes, went into possession of the said premises, and has been in possession and in receipt of the rents and profits of the same ever since, and no question has ever been raised in respect of her title.

James Noyes, her husband, died, and Maud Clara Noyes subsequently married her present husband, Bayliss, and is now Maud Clara Bayliss.

The vendor contends that the conveyance of the 26th October, 1886, was and is a good and valid conveyance to her in fee simple of the lands and premises in question, and as such she has a right to convey the same to the purchaser.

The purchaser objects that, owing to the wording of the conveyance and grant "unto the said party of the third part, his heirs and assigns for ever," that is, to Joseph Towersey, her father, nothing passed to Maud Clara Towersey, and that no trust was created, and that the instrument was ineffective to convey any estate to the vendor, and relies upon the case of *Langlois* v. *Lesperance* (1892), 22 O.R. 682 (special case), in support of his contention. In that case Jean Oliver Langlois granted certain lands "unto Fabien Lesperance and his heirs for ever," the habendum being: "To have and to hold unto the said Fabien Lesperance and his lawful wife, for and during their natural life and the life of the survivor of them; and from and after the demise of both, to have and to hold unto their lawful heirs and assigns, to and for their sole and only use for ever." The Chancellor said that the case was governed by the old law as laid down in Viner's Abridgment, Grants (K.*a*) 16: "If land be given to the baron, habendum to him and his wife, and to the heirs of the two bodies, the *feme* takes nothing by this grant, because she was not mentioned in the premises of the deed;" and he held that the estate vested in the husband in fee simple.

This case is, I think, clearly distinguishable from the case relied on. The deed was made in consideration of marriage, and also with the view of barring any future dower which the wife might have in the husband's lands, and after the solemnisation of the marriage unto and to the uses of the party of the second

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part (that is, the wife), her heirs and assigns. Under the Statute of Uses, immediately upon the marriage the uses by the operation of the statute became merged in the legal estate. This is so whether designated in the instrument as a use or a trust. If a conveyance or devise be to A. and his heirs in trust for B. and his heirs, the possession will be executed in B. To prevent the legal estate being executed in the *cestui que trust* it is necessary to vest in the trustee not only the ancient common law fee, but also the primary use, as by conveying or devising "to the trustee and his heirs to the use of the trustee and his heirs:" Lewin on Trusts, 12th ed., pp. 5, 233.

The fact that the grant is for her separate use does not prevent the operation of the statute: *Williams* v. *Waters* (1845), 14 M. & W. 166. The use need not be executed the moment the conveyance is made, but may go into operation upon some future contingency, as where, as in this case, a marriage is contemplated. See Halsbury's Laws of England, vol. 24, pp. 277, 281, paras. 501, 506; Gilbert on Uses and Trusts, 3rd ed., pp. 184, 185, note (9).

I find that the objection to the title is not well taken, and that, notwithstanding the form of the deed, the vendor has a good title in fee simple to the lands in question. It may be further stated that from occupation and receipt of rents and profits a perfectly good title could be made under the Statute of Limitations, if that were necessary, which I think it is not.

Under the circumstances, I make no order as to costs.

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ALSOP PROCESS Co. of CANADA v. J. P. FRIESEN & SON.

Exchequer Court of Canada, Cassels, J. June 7, 1917.

PATENTS (§ II C—20)—PROCESS PATENT—IMPORTATION—ANTICIPATION—CLAIMS AND SPECIFICATIONS.

The importation of apparatus to carry out a process patent is not within the prohibition of the Canada Patent Act (R.S.C. 1906, ch. 69, sec. 38); an attack on a patent on the ground of illegal importation may be made by way of defence.

[See annotation following case.]

Statement.

STATEMENT of claim filed on behalf of the plaintiff against the defendants, claiming an injunction to restrain the defendants, from infringing the letters patent sued upon and for damages.

R. McKay, K.C., and *Gideon Grant*, for plaintiff.

F. B. Fetherstonhaugh, K.C., and *Russel S. Smart*, for defendants.

Cassels, J.

CASSELS, J.:—The action came on for trial before me at Toronto on April 17, and following days. The letters patent in question sued upon, is a patent dated May 20, 1902, No. 75,953. The plaintiff is the assignee of this patent.

At the trial the following admission was filed:—

The following facts and matters are admitted and are to be considered as if proved in the usual way by competent *viva voce* evidence given at trial:

(a) That if there is any invention described in the said letters patent No. 75,953, which is not admitted by the defendants, but denied, and if the said invention is new, which is also not admitted by the defendants, but denied, then said invention was made by John Andrews and Sidney Andrews.

(b) That the allegations as to title contained in par. 5 of the statement of claim are as therein stated.

(c) The defendants, since the issue of the said patent No. 75,953, and prior to the issue of the writ in this action, installed and had in operation at their mill at Gretna, Manitoba, a bleaching device or machine, and shown in Canadian Patent No. 104,114, granted on March 12, 1907, to one McNorgan, which device or machine is used in the process of ageing, conditioning, and bleaching flour according to the specifications and claims of plaintiff's Canadian Patent No. 75,953.

The specification of the patent in question, except as to the claims, is identical with the specification of the English patent granted to John Andrews and Sidney Andrews in England.

The claims of the patent in question differ in one respect from the English patent. The English patent not merely is a patent granted for the process, but there is also a grant for the machine used in carrying out the process.

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The Canadian patent is limited to a patent for the process merely.

As I have mentioned, the specifications of the Canadian patent, with the exception of the claims which I will have to deal with later on, are identical with the specifications of the English patent; and the claim No. 3 of the specification of the Canadian patent is identical with claim No. 2 of the English patent, in respect to which the extended litigation in England took place. I will have to refer to these English decisions.

It will be well to note that the patentee in the Canadian patent has brought himself within what are termed the licensing clauses of the Patent Act, R.S.C. 1906.

The patent is one for the process of bleaching flour. It is unnecessary for me to analyze minutely the specifications of the patent, as this has been fully gone into in the various English decisions to which I am about to refer. It would simply mean recopying the language of the various Judges who have carefully analyzed the specifications and explained the legal meaning thereof.

The first case, which may be called the revocation case, was tried before Kekewich, J., on the 1st, 2nd, 6th, 7th, 8th, 13th, 14th, 15th and 16th days of March, 1906, and is styled "In the Matter of Andrews' Patent." A full report of this case is to be found in 23 R.P.C. 441.

A very strenuous attack was made against the patent. Very full arguments by very able counsel, and a very exhaustive judgment was given by Kekewich, J. That Judge deals very fully with the meaning of the specification. He appears to have given a broader meaning to the specification than was intended.

Construing the specification in the manner in which the Judge construed it, he came to the conclusion that the invention in question was disclosed in a previous patent granted to one Frichot, No. 21,971 of 1898, and that the patent is bad and must be revoked.

An appeal was taken from this judgment to the Court of Appeal in England, and a very lengthy argument took place before Vaughan Williams, Farwell and Buckley, L.JJ. The argument lasted for 9 days, ending on March 26, 1907, and again their Lordships dealt exhaustively with the question as to the meaning of the specifications. Their Lordships took a different view from that taken by Kekewich, J., as to the proper construc-

tion to be placed upon the specification, and came to the conclusion that Frichot's patent referred to was not an anticipation of the Andrews' patent and the judgment of Kekewich, J., was reversed, and the validity of the patent sustained. Infringement having been admitted, judgment was pronounced in favour of the patentee.

The defendants being dissatisfied with the judgment of the Court of Appeal, appealed to the House of Lords, and this appeal which occupied five days, terminating April 7, 1908, was dismissed with costs. It is reported in 25 R.P.C. 477. Counsel appearing were very prominent at the bar, and particularly versed in patent law. In this latter appeal to the House of Lords the meaning of the specifications was fully dealt with, the House of Lords coming to the same conclusion as the Judges in appeal.

Prior to the decision of the House of Lords, an action was brought by *Flour Oxidizing Co. Ltd.* v. *Carr & Co. Ltd.*, 25 R.P.C. 428. This action was tried before Parker, J., on January 20, 21, 22, 23, 24, 27, 28, and 30, and February 1 and 22, 1908. New evidence was adduced, and certain further anticipations were relied upon. The case was elaborately argued by very prominent counsel, and an exhaustive judgment was delivered by Parker, J., upholding the patent. One would have thought after these various decisions that acquiescence in the validity of the patent might have been looked for, but a further contest took place before Warrington, J., in the case of *Flour Oxidizing Co. Ltd.* v. *Hutchinson*. A lengthy trial took place lasting 22 days ending on April 28, 1909, 26 R.P.C. 597. Further anticipations were produced and elaborate arguments from eminent counsel were heard, and judgment was pronounced in favour of the validity of the patent.

The reasons for judgment of Warrington, J., are voluminous and deal with the nature of the invention. A perusal of these authorities will show the views of the Judges in England, as to the construction to be placed upon the specification.

While the defendants in the present case may not be technically bound by the decisions in the cases to which I have referred, except as to questions of law, it would require a strong argument to induce me to come to a different view as to the construction of the specifications from that held by the House of Lords and these eminent Judges.

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The evidence for the defence, and the arguments against the validity of the patent with two exceptions are practically the same as that given in the English cases. I find it difficult to see how the various letters patent referred to before me can possibly be treated as anticipations if the Frichot patent previously referred to was not an anticipation.

Parker, J., in his judgment referred to, at pages 458 and 459, deals with the question as to prior anticipations and what prior patents should show.

Dr. Milton Lewis Hersey, who is an analytical and consulting chemist, and whose qualifications are detailed in his evidence, was called on the part of the defendants, and he admits in his evidence that no single patent relied upon discloses the whole invention. He singles out parts from each patent as showing a portion of the invention claimed, but admits that no patent covers the whole thing. He puts it in this way. I stated to him

> if you take these patents (referring to the patents produced on behalf of the defendants) up to the present time, each one describes a process for a purpose said to be accomplished by the patentee; none of them describes the particular process said to be accomplished by the patentee; none of them describes the particular process set out in Andrews' patent. (He stated)—No one patent covers the whole thing throughout.

On his cross-examination he is examined in detail as to each of the patents produced by the defendants relied upon as destroying the patent, and it would seem that, according to the views held by the English Courts, and according to my view of what is clear patent law, no one of these patents anticipates the patent in question.

In the case before Warrington, J., Hands, Fox, Johnston, Byrne, Bay, Hogarth and Frichot, were all dwelt upon. All of these 7 patents are the ones relied upon in the present case. The defendants in the case before me produced 9 patents of which 7 of them are the ones referred to in the particulars before Warrington, J. I think the evidence of Mr. Werner, given on behalf of the defendants, correctly distinguishes these various alleged anticipations from the patented invention of Andrews. It is common knowledge that in most patented inventions for combinations, each element in the combination may be old; in fact in most cases this is admittedly the case, but while each element may be old, to bring them together in combination is the invention, and it is clear law that a combination of old elements, if it pro-

duces a new and beneficial result, and is not anticipated, is the valid subject matter of a patent. It has been so held by the House of Lords, and is almost elementary law in patent cases.

In my view of the case, the defendants have utterly failed to impeach the validity of the Andrews' patent on the ground of prior invention. The proof before me in favour of the defendants' contention is weaker than that before the English Courts.

The defendants contend that the patent is void because the specification does not in detail show the quantity of the nitrous gases required in the process. This would be a question of evidence whether a man skilled in the art could ascertain it. The point was raised in all of the English cases, and has been determined in favour of the patentee: and the defendants in the case before me adduce no evidence of any skilled miller to show that there was any difficulty in this respect.

A further point was argued by Mr. Fetherstonhaugh that the patent should be avoided because it enabled the patentee to pass off a low grade flour for a high grade flour. I think there is nothing in this contention. His own client Mr. Friesen, puts it in this way:—

Q. Does this bleaching process bring the low grade flour to the same appearance as the high grade? A. No, but it improves it in appearance a good deal. Q. But anyone would know it was a low grade flour? A. Yes. Q. No matter whether it was bleached or not? A. Yes.

It is also contended on the part of the defendants that the flour put through the Andrews' process becomes dangerous to health by reason of the nitrites left in the flour after the process. I think the defendants fail on this point. Their main witness, Dr. Charles F. Saunders—(I give him precedence over Dr. Wiley who, while possessing a world-wide authority in matters of dietetics, gave evidence of little or no importance, so far as the questions at issue before me are concerned)—is the Dominion Cerealist. He explained his duties as being in regard to the protection and testing of the different varieties of grain, as to their suitability for the very purposes for which they are intended. He details his qualifications and his titles. I may state that the flour while being treated by the particular process, is only in contact with the gas for about 11 seconds. Dr. Saunders was called as a witness for the defence. He is asked this question:—

Q. It is alleged that one advantage of this process is that you can utilize the bleached flour immediately, whereas the other you have to keep it two or three months before it can be used?

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His answer is:—

A. So far as colour is concerned I think that is correct.

He further states:—

From the commercial point of view the baking-qualities are improved in regard to colour, but not otherwise.

And on cross-examination he is asked:—

Q. That is to say, the product as a whole when baked and handed to the public would be regarded by the man receiving it as an improved product? A. Yes, the average man.

He also testifies that a loaf baked from this flour "would be a much more presentable loaf than if it had not been bleached."

He was also asked the following question: Q. I understand that you did consider very carefully the question as to the use of the artificial bleaching process, and that your conclusions were stated at least once that I know of, that in your view at any rate so far as the colour, the flour was improved?

He answers:—

A. Not in my personal view, but in the commercial view. I would not prefer it, but the public would as a whole, provided they didn't know how it was done.

He is asked the question in view of the contention that the object of the invention is illicit.

Q. Then your view was that there was no harmful result at all from it (referring to the process)? A. I couldn't say that there was any harm in regard to anything left in the flour. Q. It is also said that good breadmaking flours are not lowered when they are bleached? A. That is true. Q. And there is no amount of nitrites left or anything of that kind, from a food standpoint? A. That is my view.

Dr. McGill is the Chief Analyst of the Inland Revenue Department at Ottawa. He is also called on the part of the defendants. This last witness seems to have procured an order in Council requiring bleached flour, which contains a greater quantity of nitrites than that defined, to be marked as bleached flour, but the percentage is, as I understand, in the Andrews' process less than that defined in the order in council. Counsel undertook to furnish a copy of this order in council, but have not done so, as I am informed.

Mr. McGill states:—

My recommendations to the department which resulted in the order in council, were based upon the assumption that oxides of nitrogen, if they remained in the flour, were highly objectionable material.

He is asked the question:—

Q. Assuming that these people using the bleaching process complied with those directions, it would be all right, would it? A. Provided that no excess of poisonous oxides of nitrogen remain in the flour. My recommendations were based on the conclusion that the changes produced in the flour

itself were without injury to health. Q. If they keep within your standard it is all right? A. Yes. Anything beyond that would be dangerous. Q. That is because the bleached flour would be likely to absorb more; but if they keep within the standard and bleach it, there is no harm? A. Quite so.

I think it clear that the invention is a valuable invention. I think it clearly proved that the bleached flour is in no way harmful; and, I think this is proved by the defendants' own witnesses, to whose evidence I have referred. It has been very extensively used, and it has been a commercial success. It enables the flour to be used immediately instead of having to keep it for 2 or 3 months in order to age it before it can be placed upon the market. This, of itself, is a matter of considerable importance from a commercial point of view.

I do not think the Adulteration Act, R.S.C. 1906, ch. 133, relied upon by Mr. Fetherstonhaugh, has any application. Sec. 3 is as follows:—

Food shall be deemed to be adulterated within the meaning of this act,—

(*a*) If any substance has been mixed with it so as to reduce or lower or injuriously affect its quality or strength.

The evidence before me makes it quite clear that nothing of the sort happens by reason of this bleaching process.

(*f*) if it contains any added poisonous ingredient or any ingredient which may render such an article injurious to the health of persons or cattle consuming it.

The evidence before me shows that nothing of the sort happens.

(*h*) if it is so coloured or coated or polished or powdered that damage is concealed, or if it is made to appear better or of greater value than it really is.

Nothing of the sort happens through the using of this process.

Mr. Fetherstonhaugh also relied on ch. 85, R.S.C. 1906, entitled Inspection and Sale. He relied upon sec. 176, which reads as follows:—

Every person who wilfully mixes or blends with any foreign substance any flour or meal by him packed for sale or exportation shall, for such offence, be liable to a penalty, etc.

There is not the slightest evidence adduced which would bring into application this section of the statute. I think the argument based upon the alleged fraud fails.

A further defence which Mr. Fetherstonhaugh strenuously argued is that by reason of the importation by the patentee of a machine used in the process, the patent is avoided under the provision of sec. 38 of the Patent Act, R.S.C. 1906, ch. 69. This section provides:—

Every patent shall, unless otherwise ordered by the Commissioner as

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hereinafter provided, be subject, and expressed to be subject, to the following conditions:—

(*b*) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported.

I decided the question at the trial but Mr. Fetherstonhaugh has asked me to further consider it, as the question has been bothering him for several years. I thought perhaps I had better end his trouble by deciding the question at the trial and did so; but since the trial I have given it further consideration, and see no reason to change the views which I then expressed.

In the case of *Smith* v. *Goldie*, 7 A.R. (Ont.), 628, the late Chancellor Spragge held that a defendant in a patent action could set up importation in contravention of the Patent Act as a defence. In the Court of Appeal and also in the Supreme Court, the Judges seemed to be of opinion that this defence was not properly a matter for defence, that it was something that should be raised in an independent proceeding. At the time of the decision of *Smith* v. *Goldie*, the tribunal was the Commissioner of Patents. Since then the jurisdiction is given to the Exchequer Court.

I take it for granted that since the decision in *Power* v. *Griffin*, 33 Can. S.C.R. 39, by the Supreme Court, it is open to a defendant to raise the question as a defence to an action. The statute expressly confers upon the patentee the right to plead any defence, default, etc.

Power v. *Griffin* was not the case of importation, but a case of non-manufacture within the prescribed period required by the statute. It seems to me the effect of that decision makes it clear that it is open to a defendant to raise by way of defence that the patent has been avoided by importation of the invention. I think, however, that it is necessary for him to prove the defence.

I have pointed out before, and it is a matter that has to be borne in mind, that the patentee does not claim the machine, he merely claims the process. It is open to anyone to manufacture the machine. Anyone who buys the machine would have to obtain the right to use the process before he could ulitize the machine.

According to the evidence the process is valuable and exten-

sively used. A man might invent a particular machine which would surpass all others in the market, and in that way obtain a large market from those who had the right to use the process. How could such a manufacturer be prevented by the patentees under the patent in question from manufacturing and selling such a machine? Could any Judge be asked to restrain such manufacture or sale by reason of the patented invention being covered by the process patent? I think not. If not, how can it be reasonably argued that importation of the machine not covered by the patent is the patented invention? Mr. Fetherstonhaugh states that there has never been a decision on this point, and has asked me to pass upon it, and therefore I deal with it.

The only remaining point that requires consideration is the question raised, although not dwelt upon, as of any importance, the difference between the claims in the Canadian patent and those in the English patent. In his argument before me, Mr. Fetherstonhaugh thought that this was not of much moment. He seems to agree with me that the other claims of the Canadian patent were practically the same. That is the way it struck me. I said:—

But the question does arise, suppose a man takes a patent for 5 claims, four of which are useless, what is the effect on his patent? *Mr. Fetherstonhaugh*—Our law here is not the same as in England, my Lord, if one claim of the patent fails the whole patent does not fail, it is good for the remaining claims in any event.

Further on he stated that the question as to whether the patentee should have disclaimed does not arise in this case. In answer to a question put by me, he said:—"As far as I can see I don't think so anyway."

The clauses of the Patent Act referred to are secs. 29 and 33.

In the case of *Johnson* v. *Oxford Knitting Co.*, 25 D.L.R. 658, 15 Can. Ex. 340, I had occasion, at 659, to refer to the proper method of construing the specification and claims of a patent. The case of *Edison-Bell Phonograph Corp.* v. *Smith* (1894), 10 T.L.R. 522, there referred to, was a case before the Court of Appeal in England, and the language quoted is that of Lord Esher, the Master of the Rolls. I think it of such importance that I quote it again in these reasons:—

The first question was, what was the proper mode of construing a patent? The rules of construction were the same as would be applied in the case of any other written instrument. It was not in accordance with the true canons of construction to read the claim alone without the specification. The whole document must be looked at to see what the claim was. In *Arnold* v. *Brad-*

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bury, L.R. 6, Ch. App. 706, it was contended that the claim, when read alone, was too large as including something which could not be patented, and that therefore the patent was bad. Lord Hatherly, however, said that the specification must be read first to see what the inventor had described as the thing to be patented. He said:—"I do not think that the proper way of dealing with this question is to look first at the claims, and then see what the full description of the invention is; but rather first to read the description of the invention, in order that your mind may be prepared for what it is the inventor is about to claim." Therefore, in order to construe the instrument, the description of the invention must be looked at to see whether the claim went further than the specification, That rule had been followed in subsequent cases. That was the true rule, and it was the same as was applicable to any other instrument. In the present case there was an elaborate and detailed specification of what the inventor wished to patent. It was an invention of certain improvements in phonograph machines. He described those improvements minutely. It was not suggested that the descriptions in the specifications were too large. The objects and the means of carrying out those objects were described. Then the claims were headed with a statement that the inventor, "having now particularly described and ascertained the nature of this invention, and in what manner the same is to be performed," claimed, etc. Claim No. 1 was the one chiefly contested. It was said that it was too wide. But in the specification the inventor had pointed out the exact manner in which he would carry out the object stated, and any one reading the claim reasonably would come to the conclusion that all he meant to claim was what he had previously described and shown. Therefore the claim was not too large, and the patent was not bad upon that ground.

Now, construing the patent in the light of this decision, it seems to me impossible to contend that the patentee was claiming by any of the other claims gases of a noxious nature. I think practically the claims mean the same thing, particularly if you import the doctrine of equivalents. The specifications as I have pointed out have been dealt with over and over again by the English Courts. The meaning of them seems now quite clear, and if there was any doubt about it, as Mr. Fetherstonhaugh conceded, the clauses of the Patent Act referred to would still leave valid and untouched the main claim in question.

Judgment should issue in favour of the plaintiff as prayed, with a reference to the registrar to assess the damages. The defendants must pay the costs of the action.

Judgment for plaintiff.

Annotation. **Annotation—Patents—Essentials of utility and novelty—Process patent.**

As stated in the judgment, the invention for which the patent in suit was granted has been the subject of extended litigation in England. It has also been litigated in the United States and France. The decision of the Circuit Court of Appeal for the eight Circuits in the United States, under title of *Naylor et al.* v. *Alsop Process Co.*, reported in 168 Fed. Rep. 911, is very much in point as quite similar defences were there raised.

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The defence of lack of utility was dealt with in the judgment of the Circuit Court of Appeal, in the following words:—

"Very little evidence was adduced at the trial in support of the defence relating to the utility of the invention. But, since the argument of the cause, the decision rendered by the Secretary of Agriculture on December 9, 1908, wherein it was held that complainants' process of bleaching flour is a violation of Food and Drugs Act, June 30, 1906, ch. 3915, 34 Stat. 768 (U.S. Comp. et. Supp. 1907, p. 928), has been brought to the notice of the Court by counsel. Conceding, without deciding, that such a decision might properly have been introduced in the trial Court as evidence, it cannot be brought to this Court for that purpose, nor can it be availed of here as a decision of controlling authority. It may be that complainant's bleaching is simply the whiteness of the whited sepulchre, a mere cover for adulteration and fraud. It is urged in argument that whiteness has long been regarded among purchasers of flour as an index of the wheat from which the flour is made, and of the strength of the flour for bread making and other domestic uses, and that artificial bleaching not only adulterates the flour, so as to make it less wholesome, but also enables the millers and merchants to palm off on the consumer flour made from inferior grades of wheat and possessing inferior strength for flour of better origin and quality, because, by the bleaching process, they are able to give to flour of all kinds the same outward appearance. The difficulty with this defence in the present case is that it has not been litigated. For a proper determination of these grave issues the Court must be instructed by evidence upon two important questions; First, as to adulterations, the Court must be informed by scientific experts as to what elements are introduced into the flour by this process, and their effect upon it as an article of food; second, as to fraud, the Court must be informed by proper evidence touching the influence of colour as an index of the quality and source of flour, and whether or not bleached flour is, in fact, used as a means of defrauding the consumer. We have no evidence to guide us upon either of these subjects. The defendants have the burden of proof, and their defence must fail. These matters must be left for decision in a case where they are properly litigated. In the absence of the objectionable features just referred to, the process plainly involves patentable utility. It saves the expense of storing flour, and prepares it for immediate use in the domestic arts. Whiteness has long been a desirable quality in flour, and has been the controlling motive in the milling business. The whole system of bolting simply removes the darker portions of the wheat. Furthermore, as a matter of taste, whiteness in flour constitutes utility, within the patent law, as much as whiteness in sugar or yellowness in butter."

A defence of lack of utility is always a difficult one to sustain, probably because it does not lie well in the mouth of a defendant who makes use of an invention, to say that it is not useful. (*Clark* v. *Adie* (1877), 2 App. Cas. 315).

A late definition of utility as the term is understood in England was given by Buckley, J., in *Welsbach Co.* v. *New Incandescent etc. Co.*, [1900] 1 Ch. 843, 17 R.P.C. 237, at p. 252:

"Utility, in patent law, does not, as I understand it, mean either abstract utility, or comparative or competitive utility, or commercial utility. It was described by Grove, J., in *Young* v. *Rosenthal*, 1 R.P.C. 34, as meaning an invention better than the preceding knowledge of the trade as to a particular

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fabric. I adopt this definition if the word "better" be understood as meaning better in some respects and not necessarily better in every respect, so that, for instance, an article which is good, though not so good as that previously known, but which can be produced more cheaply by another process, is better, in that it is better in the point of cost, although not so good in the point of quality . . .

"Again I may take another test of utility, namely, that an invention is useful for the purposes of the Patent Law, when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before, or to express it in another way, that an invention is patentable which offers the public a useful choice."

The test of utility stated by Buckley, J., is adopted, though it would seem with a possible modification, by Lord Salvesen in *Kelvin* v. *Whyte, Thomson & Co.* (1907), 25 R.P.C. 177, at p. 192: "In my opinion, it is not necessary that I should decide, even if I were competent to do so, whether the grummet ring suspension or the complainers' latest is the most satisfactory. It is enough if the new suspension affords a useful choice to persons who require compasses." See also *Wilson* v. *Wilson Brothers Bobbin Co., Ltd.* (1911), 28 R.P.C. 733, 741 C.A.; *Presto Coat Collar Co.* v. *Levy Brothers* (1911), 28 R.P.C. 363.

In the case of an improvement some advantage of a substantial nature must be shown over what has gone before, *per* Vaughan Williams, L.J., in *Ward Bros.* v. *Hill*, 20 R.P.C. 189; per Halsbury, L.C., in *Badische etc.* v. *Levinstein*, 4 R.P.C. at p. 462.

"If several processes or variations are claimed each must be useful" (Moulton on Patents, p. 81), *Simpson* v. *Holliday* (1866), L.R. 1 H.L. 315; *Morgan* v. *Seaward* (1836), 1 W.P.C. 170; *R.* v. *Cutler* (1847), 3 Car. & K. 215; *Wilson Bros. Bobbin Co.* v. *Wilson & Co.* (*Barnesley*) *Ltd.*, 20 R.P.C. 1 (H.L.)

Lord Westbury, L.C., in *Simpson* v. *Holliday*, L.R. 1 H.L. 315, said: "For example, if a specification describe several processes or several combinations of machinery, and affirms that each will produce a certain result, which is the object of the patent, and some one of the processes or combinations is wholly ineffectual or useless, the patent will be bad, although the mistake committed by the patentee may be such as would be at once observed by an ordinary workman." This law was followed by Fletcher Moulton, L.J., in *Vidal Dyes Syndicate* v. *Levinstein Ltd.* (1912), 29 R.P.C. 245, at 272. In the case of *Badische etc.* v. *La Société des Usines du Rhône*, 15 R.P.C. 359, a chemical patent was held bad because the specification referred to the use of any kind of autoclave whereas only an iron autoclave could be used in the process.

"If" said Buller, J., in *Turner* v. *Winter*, 1 W.P.C. 82, "the patentee says that, by one process, he can produce three things and he fails in any one, the consideration of his merit, and for which the patent was granted, fails, and the Crown has been deceived in the grant." Quoted by Parker, J., in *Re Alsop's Patent*, 24 R.P.C. at p. 753.

"An invention which is useful only to commit fraud has no patentable utility." *Klein* v. *Russell* (1873), 1 Wall. 433.

The English cases raise the question "useful for what?" and give the answer: "for the purposes set forth in the patent." (Lane) *Foz* v. *Kensington & Knightsbridge Electric Lighting Co.* (1892), 9 R.P.C. 413, 417. "If it is not useful for such purposes the patent is void." *Simpson* v. *Holliday* (1886),

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L.R. 1 H.L. 315; *Turner* v. *Winter* (1787), 1 W.P.C. 77; *Bloxam* v. *Elsee* (1827), 1 Car. & P. 558; *United Horseshoe and Nail Co.* v. *Swedish Horsenail Co.* (1889), 6 R.P.C. 1, 8. If the patentee has set forth a number of purposes for which the invention is alleged to be useful, and it turns out that the invention is not useful for them all, it will nevertheless be valid unless the purposes for which it is useless were the principal ones, and it can be said that the statements of the patentee are substantially misleading and false in suggestion.

Stirling, L.J., in *Ward Bros.* v. *James Hill & Sons* (1903), 20 R.P.C. 189, at 202, said: "But then it is said that the specification contained a representation that the invention which is the subject of claim 2 would be useful if it was worked automatically, and consequently on the authority of the case of *Bloxam* v. *Elsee* (6 B. & C. 169), that inasmuch as it was not useful when worked automatically the patent was invalid. It does seem to me that if the specification contained such a representation, the consequence which is contended for would follow, but I cannot find any such representation in the specification."

Parker, J., in *Re Alsop's Patent* (1907), 24 R.P.C. 733, referring to utility for purpose specified at p. 753, said: "Want of utility in this sense must however, in my opinion, be distinguished from want of utility in the sense of the invention being useless for any purpose whatever . . . Further, there may be cases in which the result which the patentee claims to have produced can in fact be produced, but the patentee has gone on to detail the useful purposes to which such result can be applied and that in fact the result produced cannot be applied to one or more of such purposes. In such a case I do not think the patent is necessarily void, provided there are purposes for which the result is useful. If it be avoided it can only be because it contains a misrepresentation so material that it can be said the Crown has been deceived." (See also *Lyon* v. *Goddard* (1893), 11 R.P.C. 354; *Lewis* v. *Marling* (1829), 10 B. & C. 22 ; *Haworth* v. *Hardcastle* (1834), 1 Bing. N.C. 182, 190, 131 E.R. 1087).

The question of insufficiency or misleading specification is closely tied up with that of lack of utility. Fletcher Moulton at p. 91 of his work on patents says: "if the patentee mentions a class of bodies as coming within the ambit of his patent or as suitable for use in carrying it out and some of such bodies are not suitable, the patent is bad for insufficiency unless either there is some indication given which would lead to the workman rejecting the unsuitable bodies, or a competent workman would have the knowledge necessary to enable him to select those bodies which were suitable."

A specification must not be so ambiguous that fresh experiment is necessary. *Badische* v. *Levinstein* (1887), 4 R.P.C. at 462; *Vidal* v. *Levinstein* (1912), 29 R.P.C. 245; *Plimpton* v. *Malcolmson* (1876), L.R. 3 Ch. D. 531 at 576.

In *Crompton* v. *Ibbotson* (1828), 6 L.T. (O.S.) 214, "Where the patentee had made experiments and found that only one particular kind of cloth would do for the web of a printing machine, and then said in his specification: "The cloth may be made of any suitable material, but I prefer it should be made of (naming the particular material)" the patent was bad.

The question of novelty is one on which evidence is more important than law. In Canada, the applicant for a patent must be the first inventor throughout the world, and not merely in Canada. *Smith* v. *Goldie*, 9 Can. S.C.R. 46.

Annotation.

In *Meldrum* v. *Wilson*, 7 Can. Ex. 198, the patentee used a solution of hydrochloric acid to remove a deposit of carbonate of lime from pickled eggs. It was held to be no invention as the result was to be expected from known properties of the acid.

In considering novelty the question of mechanical equivalents are frequently raised. Vaughan-Williams, L.J., in *Re Andrews*, 24 R.P.C. 349 at 366, in reply to the argument that the doctrine of mechanical equivalents does not apply to chemical patents said: "I cannot agree. The doctrine does apply in cases where having regard to the subject matter, it can be truly asserted that one of two or more chemical substances is well known as producing the same effect on the same subject matter." (See the cases collected in Frost on Patents, 3rd ed., p. 369-370).

The success of an invention is frequently regarded by the Court as indicating novelty. The judgment in *Naylor* v. *Alsop*, says: "The patent law has its proper place in the realm of actual industrial life and not in the limboes of parchment casuistry. The merit of a patent is to be determined, not by its standing in dialectics, but by its actual effect in the art to which it belongs. Judged by that test, the Andrews invention was revolutionary. Within 5 years after its discovery it had been generally applied in the milling business, both in this country and abroad. It accomplished a new and desired industrial result simply, cheaply and efficiently. In the presence of such an experience, speculative arguments based on the prior art can seldom prevail."

"Large sales and increasing popularity, however, cannot be accepted as certain proofs of novelty when the article sold by the complainant differs in many respects from the article shown in the specification." *Christy* v. *Hygeia Pneumatic Bicycle Saddle Co.*, 93 F. 965 (C.C.A.).

The judgment of *Alsop* v. *Naylor* sustained the patent on the grounds of novelty as follows:—

"Nitrogen peroxide is a dark brown gas, deepening in color as the temperature is increased. It has a peculiarly repulsive odor, and is poisonous when inhaled. While it sometimes bleaches, it more frequently imparts color. This is especially true as to proteids, which are an important constituent of flour. It will turn corn-meal and other corn products and rice products yellow. Tobacco is made darker by it. All the experts, those for the defendant as well as those for the plaintiff, agree that it was impossible, at the time the patent in suit was taken out, to foretell the effect of nitrogen peroxide upon a complex substance like flour. Reasoning by analogy, most of them say that the natural inference would have been that it would taint the flour and color it yellow. Dr. Keiser, one of the experts for complainant, names several bleaching agents, among them nitrogen peroxide, which he said he would have supposed, reasoning by analogy, would bleach flour; but he also states that it would be impossible to tell what other effects they might produce. The whole argument of counsel for defendants, in support of their defence that the patent is void for want of novelty, is based upon reasoning by analogy. The foundation of this reasoning is that at the time of the Andrews invention, it was well known that numerous substances could be bleached by several well-known chemical compounds; some being bleached by one, and some by another. That was the general art, and it is contended that the Andrews invention was simply the selection of the best of several well-known agents for the accomplishment of the desired result. This reasoning is fallacious. It was not known that any of the recognized bleaching agents could be suc-

Annotation.

cessfully used in bleaching flour. The accomplishment of that result involved three features: First, an agent that would bleach flour; secondly, an agent that would accomplish this result without injuring the flour; third, an agent that could be applied to the flour in the usual milling processes. No bleaching agent was known that would accomplish these results. Frichot's was the only attempt that had thus far been made, and he had succeeded only as to the first feature. Science and experience alike warned against the use of nitrogen peroxide. Ozone is the most innoxious of all the bleaching compounds, and it had been found to taint the flour. Nitrogen peroxide, while it sometimes bleached, more often imparted colour, and was at the same time one of the most offensive and deadly of gases. It is not true, therefore, as counsel for defendant contends, that the discovery of the nitrogen peroxide process was simply a selection of one of several well-known agents. All that was well known was that there were several agents that would bleach. It was not known that any of the agents could be used commercially to bleach flour. The mere knowledge that there are known chemical agents that accomplish such a general function as bleaching does not advance us a step with such a complex substance as flour and one so susceptible of taint. If it had been known that flour could be bleached commercially by one or more of the ordinary chemical bleaching agents, then the selection of nitrogen peroxide might or might not be the mere selection of a known agent, such as would lack patentable novelty. That would depend upon the advantages that nitrogen peroxide disclosed in the art over other known agents. If those advantages were distinct and conspicuous, a process embodying them might be entitled to the benefit of the patent laws, although it has been discovered that other agents would accomplish the same result in a less successful manner. But the complainant in the present case occupies a much more favourable position. Here it has not been discovered that flour could be commercially bleached by any chemical agent. The complainant was the first to discover a successful process for accomplishing that result. His act was not a selection of a known agent in the art of bleaching flour, but was the discovery of the only agent that has yet been found to accomplish that result successfully in the milling industry."

"It should be borne in mind in considering this subject that reasoning by analogy in a complex field like chemistry is a very much more restricted than in a simple field like mechanics. This distinction has been frequently recognized by the Courts.

"Of course, a discovery to be patentable must have the attributes of invention; but the mental operation is somewhat different in one who invents a machine and one who discovers a process of exclusion, which has been deemed sufficient to sustain patentability, and the patent law abounds in instances in which patents have been upheld where the inventor stumbled upon the discovery in total oblivion of the reason why effect followed cause." *Badische* v. *Kalle* (C.C.), 94 Fed. 163.

We shall not lengthen this opinion by quoting extracts from decisions to illustrate this principle. It was explained and enforced in the following cases: *Celluloid Mfg. Co.* v. *Zylonyte Co.* (C.C.), 35 Fed. 301; *Union Tubing Co.* v. *Patterson Co.* (C.C.), 23 Fed. 79, 82; *King* v. *Anderson* (C.C.), 90 Fed. 500, 504; *Electric Smelting Co.* v. *Carborundum Co.*, 102 Fed. 54, 56, 70 C.C.A. 480; *U. S. Mitus Co.* v. *Midvale Co.* (C.C.), 135 Fed. 103, 107; *Tannage Co.* v. *Donallan* (C.C.), 23 Fed. 811, 816; *Thomas Co.* v. *Electric Co.* (C.C.), 11 Fed. 923.

Annotation.

The defence that the patent is invalid by reason of the importation of apparatus to carry out process, is one which is peculiar to Canadian law. There is considerable difficulty in applying sec. 38 to process patents.

Three views have been advanced as to process patents as regards manufacture: 1. That the section has no application. 2. That the patentee is obliged to work the patent so that anyone may obtain the product resulting from the operation of the process for a reasonable price. 3. That the patentee must allow the process to be used by anyone for a reasonable price—in other words, that he must grant licenses.

The section says that "every patent" shall be subject to the condition. It would seem therefore that the intention may have been to include process patents within its operation. One object of the section is to encourage and protect Canadian labour and industry. It has therefore been argued that inasmuch as a process is an intangible thing which can not be manufactured, no question of Canadian labour or industry can arise and the legislature never intended that a process patent should be subject to the condition. It must be observed, however, that another object of the Act is to limit the monopoly of the patentee so that he may obtain a revenue from his invention, but shall not prevent the public from obtaining the use of it. To hold that a process patent is not subject to the section is to give the patentee an absolute monopoly in his invention with the right to work it or not as he sees fit, and the right to prevent any other person from using it upon any terms.

In *Hambly* v. *Allbright & Wilson* (1902), 7 Can. Ex. 363, at 386, Burbidge, J., used the following language: "Now this provision presents the difficulty that the language used is not apt or appropriate where the invention is an art or process as it may be. One does not construct or manufacture a process and no one can obtain a process or cause it to be made for him at a manufactory or establishment. In the present case the phosphorus made by the process for which the patent issued is the same as that made chemically. The invention is useful because phosphorus may be made more cheaply in the way discovered by the patentee. The only advantage that can possibly accrue to the people of Canada, for the grant given, is that during its existence they may get phosphorus cheaper than they otherwise would, and that after the grant has terminated the invention may be free to all. The only way that advantage could be secured in the present case without allowing the importation of phosphorus made in accordance with the process protected by the patent, would be to impose upon the patentee or his assignees, the obligation to make it, or cause it to be made in Canada, according to that process, so that anyone desiring to do so could obtain it at a reasonable price. But as stated there is the difficulty, and it is a real one, that parliament has not so provided in apt and clear terms."

This is the only case in which the question is discussed at any length. This case can scarcely be said to decide that the section applies to a process, but only that if it does then there is no forfeiture unless it is shown that someone has been refused the use of the process for a reasonable price. Moreover, the cases cited by the learned Judge held that no patentee is bound to manufacture unless there is a demand, and the fact that the Supreme Court in *Power* v. *Griffin*, 33 Can. S.C.R. 39, overruled these cases, notwithstanding a further re-enactment of this section, detracts greatly from any value there might otherwise be in the decision.

The view that the patentee is obliged to furnish the product of a process

is difficult to sustain. The Act speaks only of the invention and the product is not the invention. Annotation.

The third suggested interpretation that licenses must be granted, obtains some support from the words of Maclennan, J., in *Hildreth* v. *McCormick* (1907), 39 Can. S.C.R. 499, 10 Can. Ex. 378, at 505, where he said:

"Mr. Cassels asked how the sections could upon that construction be made to apply to a patent for a process. I see no difficulty even in that case, for even there the person desiring to use the invention is entitled to acquire it absolutely, and not merely to take a lease of it." See also Fisher & Smart on Patents, p. 146.

The decision in *Alsop* v. *Friesen* is the first to definitely dispose of the contention that importation of apparatus to carry out a process patent is not within the prohibition of the statute. RUSSEL S. SMART, B.A.M.E.

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S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. June 22, 1917.

COSTS (§ II—28)—TAXATION—SLANDER ACTION—IMPERIAL STATUTE—21 JAC. CH. 16.

The provisions of the Judicature Act and of the County Courts Act (N.B.) override the statute of 21 Jac., ch. 16, sec. 6, in respect of costs in actions for slander, and where the amount of damages awarded to the plaintiff is only one dollar, the costs are taxable on the County Court scale.

APPEAL from a judgment in an action for slander, tried at the Northumberland Circuit Court, before Crocket, J., with a jury, in which a verdict was entered for the plaintiff for $1 damages. On the taxation of costs, the defendant contended that, under the Statute of 21 Jac. ch. 16, sec. 6, which had been held applicable to this province, the plaintiff was entitled to costs equal in amount only to the amount of damages recovered. The registrar decided against this contention, and ordered the costs taxed on the County Court scale. Statement.

THE REGISTRAR: This is an action for slander in which the jury awarded the plaintiff $1 damages. On the taxation of costs the defendant objected that the Statute of 21 Jac. ch. 16, sec. 6, having been held applicable to this province, the plaintiff was entitled to only so much costs as damages recovered, and asked that all the items of the bill except the gross sum of $1 be struck out and disallowed. It is a question whether prior to the passing of the Judicature Act, 1909, the costs in an action for slander brought in the Supreme Court which might have been brought in the County Court and in which damages less than 40 shillings had been recovered would be limited to the amount of damages recovered, for under C.S. 1903, ch. 111, sec. 379, it is expressly

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provided that in any action in the Supreme Court, where the amount recovered is within the jurisdiction of the County Court, costs shall be allowed according to the table of fees in County Courts and no more. At present I see no reason why the provisions of this section should not apply to an action for slander. That chapter of the Consolidated Statutes, 1903, having been repealed, the question now is, what costs the plaintiff is entitled to under the Judicature Act, and whether under order 65 of that Act the provisions of sec. 6 of the Statute of Jac., adopted as the practice of this Court, has been changed. The English Courts have held that the corresponding section in their Act, coupled with sec. 33 of the English Act (a general repealing section), is inconsistent with and repeals the Statute of Jac.: *Garnett* v. *Bradley* (1878), 3 App. Cas. 944.

There is no corresponding repealing section in our Act, and it is contended that, as the decision of *Garnett* v. *Bradley* was based on order 65, coupled with sec. 33, it does not apply. It is not, I think, necessary for me to consider whether the case of *Garnett* v. *Bradley* would have held that the statute was repealed by order 65 if the Act had not contained a repealing section, though I am inclined to think it would not have been so held, for in this case there is no question of an order repealing a statute, for we have no statute on the subject.

The question is, whether the practice as provided by sec. 6 of the Statute of Jac. in respect to costs in actions of slander, adopted as the practice of this Court, has been changed by O. 65, r. 1, of that order, provided that, subject to the provisions of the principal Act and rules, all costs incident to all proceedings in the Supreme Court where any action, cause, matter or issue is tried with a jury shall follow the event, unless the Judge by whom such action, cause, matter or issue is tried, or the Court shall for good cause otherwise order. It seems to me that it was intended by this rule to alter and that it in terms does alter the practice and determine that the costs in any action tried with a jury shall follow the event, unless otherwise ordered for good cause.

Mr. Winslow contends that, as this action might have been brought in the County Court under r. 12 of O. 65, the plaintiff is entitled to no more costs than he would have been entitled to had he brought his action in the County Court, and, as r. 1

of O. 65 only applies to the Supreme Court, the plaintiff is only entitled to costs to the amount of damages recovered. Assuming this to be the correct result, if rule 1 does not apply to actions of this character, I think the provisions of rule 1 are extended to costs in the County Courts by 5 Geo. V. ch. 25, sec. 7, repealing sec. 78 of C.S. 1903, ch. 116.

For these reasons I have taxed and allowed the plaintiff's costs under O. 65, r. 12, as amended by the Acts of 1914, ch. 38, sec. 6, at $72.55, being, in my judgment, the costs that might have been recovered if the action had been brought in the County Court.

J. J. F. Winslow, for defendant, in support of appeal.

R. B. Hanson, K.C., for plaintiff, *contra*.

The judgment of the Court was delivered by

WHITE, J.:—This case comes before the Court by way of review of taxation of costs, having been referred by Crocket, J. The action is for slander, and was tried at the Northumberland Circuit. The jury found for the plaintiff, and assessed the damages at $1. The plaintiff did not obtain, nor, so far as appears, did he apply for, an order of the Judge under O. 65, r. 12, of the Judicature Act, entitling him to Supreme Court costs. White, J

The defendant contends that the Statute of James I. (21 Jac. ch. 16, sec. 6), which, as was determined in *Wood* v. *MacKay* (1880), 20 N.B.R. 262, became part of the practice of this Court at the time of its formation, still continues in force here, notwithstanding the provisions of the Judicature Act.

On the other hand, the plaintiff contends that the effect of O. 65, and especially of r. 1 thereunder, is to override the Statute of James, because that statute is inconsistent with the order referred to, which has here all the force of law. In support of this the plaintiff cites and relies upon the case of *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, where it was held that the effect of O. 65, under the English Judicature Act of 1875, the provisions of which are followed closely by those of O. 65 in our own Act, was to repeal the Statute of James referred to.

In answer to this the defendant claims that in *Garnett* v. *Bradley* the decision went, to some extent at least, upon the ground that by sec. 33 of the English Judicature Act it is expressly enacted that there shall be repealed "any enactment inconsistent

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with this Act or the principal Act," whereas our Judicature Act does not contain a corresponding enactment. But in *Garnett* v. *Bradley*, Lord Blackburn, in the course of his judgment, said, at page 965: "Now, my Lords, an Act saying that all statutes inconsistent with itself shall be repealed really goes no farther than the general law."

It is quite clear by the judgment of the House of Lords in that case that they held the Statute of James to be repealed because its provisions were inconsistent with those of the English Judicature Act. The same reasoning which led the House of Lords in England, in *Garnett* v. *Bradley*, to hold the Statute of James repealed there, makes it clear that since the coming into force of our Judicature Act the Statute of James no longer governs the practice of our Court.

The defendant contends, however, that by the provisions of O. 65, r. 12, already referred to, it is provided that the plaintiff "shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court," and that the practice of the County Court, based upon the Statute of James, continues unaffected by the provisions of the Judicature Act, 9 Edw. VII. ch. 5.

By sec. 55 (3) of that Act, as originally passed, it was provided as follows: "Nothing in this Act contained shall affect the existing procedure and practice of the County Courts"; but by the Act 5 Geo. V. ch. 25, sec. 2, that sub-sec. (3) of said sec. 55 is repealed.

The only remaining point, therefore, to be considered is whether the effect of the provisions of sec. 78 of the County Courts Act, as amended and enacted by sec. 7 of the Act Geo. V. is to make the practice of the Supreme Court, established by O. 65 of the Judicature Act, applicable to County Courts so far as to override the practice heretofore existing there, based upon the Statute of James.

That the provisions of sec. 78 do have that effect cannot, I think, be questioned by us, in view of the decision of this Court in *Warman* v. *Crystal* (1901), 35 N.B.R. 562. It was there held that the Imperial Statute, 43 Eliz. ch. 6, authorizing a Judge to certify to deprive the plaintiff of costs, was in force in this province and made applicable to County Courts by sec. 68 of

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the County Court Act, 1897, which corresponded to sec. 78 of the present County Courts Act.

The same reasoning which, in that case, led this Court to hold that the Statute of Eliz. was in force in County Courts, we think, governs here, and requires us to hold that the provisions of the Judicature Act, in over-riding the Statute of James so far as it directly affects the Supreme Court practice, must, by virtue of sec. 78 of the County Courts Act, be held to override the practice of those Courts founded upon such statute.

Pursuant to agreement between parties there will be no costs on this application. *Judgment accordingly.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 5, 1917.

CONTRACTS (§ II D—145)—CONSTRUCTION—WORDS AND PHRASES—"AND" —"SO."

Where the literal meaning of a contract leads to no inconsistency, absurdity or injustice, and the text is unambiguous and grammatically correct, the word "and" cannot be read as "so."

APPEAL by the plaintiffs by way of stated case of Clement, J. Reversed. Statement.

R. L. Reid, K.C., for appellant; *L. G McPhillips*, K.C., for respondent.

MACDONALD, C.J.A.:—What is sought in this appeal is to restore to its literal meaning a term used in a written contract. The Judge read "and" as if it had been written "so." There is, in my opinion, no ambiguity in the text, nor is it grammatically incorrect; nor does the literal reading of it, in my opinion, lead to any inconsistency, absurdity or injustice. It provides protection to workmen and those supplying material to the contractor. The municipality in letting a contract for a municipal work appears to have been desirous of safe-guarding those who should work upon the premises, and those who should supply material for use thereon. Now there is nothing absurd about that, nor is there anything singular or unusual in including in contracts, particularly where the work is of a public character, provisions safe-guarding loss of wages by workmen employed by the contractor, or loss of materials by those supplying them. Macdonald, C.J.A.

Apart from all this, the language is so plain as to admit of only one meaning, and I am not at liberty to change that language

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unless the reading of it in its ordinary sense would lead to consequences such as are mentioned in Maxwell on Statutes, 5th ed., at p. 372.

I would therefore allow the appeal.

Martin, J.A.

MARTIN, J.A.:—I find myself unable to take the view that we would be justified in changing the wording of the contract in the manner suggested by the Judge below. He attempted to get over the difficulty by changing the word "and" to "so," but that, with all due respect, produces a result which is neither effective nor grammatical, and to accomplish his object two words are necessary, viz., "so as" to protect, etc.

The only possible ground suggested for any uncertainty in the contract is in the use of the word "such" in the later expression "payment of such debts," but I am of opinion that it may fairly and reasonably be held from the context to cover "all liens, claims and demands" as mentioned in the preceding paragraph and is not intended to exclude the same. This view is supported by the copy of the judgment, *Re Canadian Mineral Rubber Co.*, of the Master in Ordinary in Ontario that has been handed up to us and the reports of the affirmation of his decision in 10 O.W.N. 456, 11 *ib.* 135.

The appeal therefore should, I think, be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I am unable to take the same view of the meaning of the contract as the trial Judge.

It seems to me the words are plain and unambiguous, even considering the whole of the contract.

The appeal should be allowed.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—This is an appeal from the judgment of Clement, J., upon a special case stated for a judgment of the Court on the facts set out in the special case, and involves the construction and consideration of a contract entered into by George H. Webster with the garnishee, the corporation of the District of Burnaby, for the construction of a service reservoir. The appellant is a judgment creditor of the contractor Webster for material supplied during the construction of the reservoir and there are other claimants who have claims for labour and materials in respect of the work performed under the contract. The respondent, the Union Bank of Canada, claims all moneys due by the corporation to the contractor under an assignment thereof.

It is conceded that the respondent is entitled to the moneys in question, if it be that the corporation cannot insist upon withholding the moneys until all moneys due for materials and labour in respect of the contract are first paid and satisfied, it not being insisted upon that the absence of the final certificate solely shall be an answer to the claim of the respondent.

A surety company's bond was given by the contractor for the faithful performance of the contract, *i.e.*, that of the United States Fidelity and Guaranty Co. The material provisions of the contract and surety bond, indicating what the relations and obligations imposed upon the contractor were, may be gleaned by the following provisions from the contract and surety bond respectively *as contained in the contract*:—

And provided that before any certificate is issued by the engineer authorising any payment under this contract, the contractor shall, when and so often as required by the engineer, produce satisfactory evidence that all just claims and demands of his workmen and other employees, or of parties from whom materials used in the construction of the said work may have been purchased, or produced, are fully satisfied, *and*, that the materials furnished and the work done are fully released from all liens, claims and demands.

And provided, that, if during the progress of the work, it appears that the contractor's bills for material or labour are not being paid the corporation shall have the right to withould from the contractor's payments the sum or sums sufficient to protect itself against all loss from mechanics', workmen's, or other possible liens, and to apply the said sum, or sums, to the payment of such debts.

And provided that the contractor shall keep a proper payroll and shall produce same, and all receipts for inspection by the engineer, or any other authorized person of the corporation when called upon.

Provision *as contained in the surety bond*:—

Whereas by agreement, bearing date June 11, 1912, the above bounden principal has contracted and agreed with the above named, The Corporation of the District of Burnaby, to furnish all material, and do all work necessary for the construction of a service reservoir for the municipality of Burnaby in accordance with the tender, plans and sections, specifications, general conditions of contract, and schedule of quantities annexed to the said contract and made part thereof as mentioned therein, all of which are herein called the contract.

And whereas, under the said contract, the principal agreed to give to the said, The Corporation of the District of Burnaby, a surety company's bond satisfactory to the corporation for $2,612.50, for the faithful performance by the principal of the said contract and for the prompt payment for all materials and labour used in connection with the said work, and to protect and save harmless the said, The Corporation of the District of Burnaby, from all claims for damages to persons or property in connection therewith, or otherwise howsoever, and from injury to, and loss of materials paid for by the corporation either partially, or in full, before the completion of and acceptance of the said work and the above bounden surety has consented to furnish such bond.

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Now the condition of this obligation is such that if the above bounden principal shall well and truly, and faithfully in all respects, perform, execute, and carry out the said contract, and all the terms and conditions thereof, and shall promptly pay for all materials and labour used or employed in connection with the said work and indemnify, protect and save harmless the said corporation from all claims for damages to persons or property in connection with the said contract, or incidental to the carrying out of the said work by the said principal, and from injury to and loss of materials paid for by the corporation, either partially or in full, before the completion and acceptance of the said work and shall at all times indemnify the corporation from all loss, costs, expenses, actions, claims, or liens arising out of the said contract or the work which the principal has engaged himself to perform, or the supply of materials therefor, or the failure of the principal to complete the said work according to the terms of this contract, then this obligation shall be void otherwise to remain in full force and effect.

Clement, J., held that the word "and" appearing in the provision as contained in the contract above set forth should be read as "so"—*i.e.*, as follows: "*So* that the materials furnished and the work done are fully released from all liens, claims and demands." It is admitted that if any liens were capable of being imposed against the corporation's property the time has elapsed for so doing and no liens are now capable of being imposed. It is clear that there is no privity of contract or legal liability upon the part of the corporation to the materialmen or the labourers in respect of the contract. Under O. xxxiv., r. 1, I am at liberty "to draw from the facts and documents stated in the case any inference, whether of fact or law, which might have been drawn therefrom if proved at the trial" and I draw the inference that what was intended to be provided against was protection to the corporation from liens, claims and demands legally enforceable against the corporation as such, not claims or demands that the material men or the labourers might have as against the contractor. It is also a matter of inference that the corporation in acknowledging the receipt of the assignment of the moneys from the contractor to the respondent agreed to pay all moneys due to the contractor in respect of the contract to the respondent, the bank, and in consequence thereof the bank financed the contractor in the carrying out of the work. The assignment and the acknowledgment thereof by the corporation read as follows:—

Vancouver, B.C., Nov. 5, 1912.

Please pay to the order of The Union Bank of Canada all money due me or which may be due me. Value received, and charge to account of George H. Webster.

By these presents I assign to said bank all my interest in the debt of chose in action arising out of my contract with your corporation, for construction of

Service Reservior No. 2, on Royal Oak Road, Burnaby, and in all moneys due or accruing due to me in respect thereof, which note, the bank is empowered to receipt and fully discharge my claim against the corporation.

To The Corporation of the District of Burnaby,
W. Griffiths, Edmonds, B.C. GEO. H. WEBSTER.

I beg to acknowledge having received the original or above order, contents of which have been noted and filed for payment as accounts mature, as per our letter of November 13, 1912. ARTHUR G. MOORE, G.M.C.

The judgment of Clement, J., as entered and which is under appeal, is in the following terms:—

It is ordered that the garnishee do pay into Court the sum of $2,176.58, less its costs, in the garnishment herein, and such payment into Court, to be taxed, such payment to constitute a good and valid discharge of the garnishee of all liability in respect of the contract entered into between it and the defendant on June 11, 1912, for the construction of Service Reservior No. 2.

And it is further ordered that judgment be entered for the claimant for the said sum of $2,176.58, less the said costs of the garnishee, and for the claimant's costs of suit against the plaintiff, pursuant to the said special case; and that the said sum of $2,176.58, less the said costs of the garnishee, be paid out of Court to the claimant.

This being a stated case there is of course no question of credibility of witnesses, but as I have pointed out the Judge was entitled to draw, as I am entitled to draw, any inference whether of fact or law; now the duty upon the appellant was to establish that the Judge went wrong in the decision to which he came. In my opinion this has not been established—*Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q.B. 38, at 39.

The appellant (notwithstanding the careful and able argument of counsel for the appellant) has not satisfied me that the decision of Clement, J., was wrong. On the contrary, in my opinion, it was absolutely right; and it follows that, in my opinion, the appeal should be dismissed. *Appeal allowed.*

GILBERT v. WEAVER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 15, 1917.

PRINCIPAL AND AGENT (§ III—36)—COMPENSATION FOR SERVICES RENDERED —INSURANCE ADJUSTMENT.

One employed to effect the adjustment of an insurance claim, but who merely assists in the prosecution of the claim, and is not the instrumentality whereby the negotiations and settlement are made, can only recover for the value of the services rendered, and not upon his retainer.

Statement.

APPEAL by defendant from the judgment of Simmons, J., awarding plaintiff $750 in an action to recover for services rendered by him to the defendant at her request and for negotiating settlement with certain insurance companies of a loss sustained by her in the destruction by fire of certain of her property. Varied.

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Walsh, J.

G. S. McCarter, for appellant; *H. P. O. Savary*, for respondent.

The judgment of the Court was delivered by

WALSH, J.:—The plaintiff's evidence which the trial Judge has accepted is that, because of his experience in such matters, he was asked by the defendant to bring about an adjustment of her loss with the companies carrying the risk on the destroyed property, they having repudiated their liability. He at first refused to have anything to do with it but, finally, because of the defendant's insistence, took it up on the agreement that he was to be paid $500 for his services if a settlement was reached regardless of the amount of the settlement. When this arrangement was made, he seems to have actively and aggressively gone to work to accomplish something for the defendant. He drafted the proofs of loss and when objections were made to them he met them. He had several interviews with the representatives of the various insurance companies interested, in the course of which he earnestly tried to reach a settlement of the defendant's claim, but they refused to negotiate the matter at all and therefore nothing came of his efforts. When it became apparent that he could accomplish nothing in that way, he advised the defendant to bring an action against the companies, and he went with her husband, who was acting for her, to a firm of solicitors who, under their instructions, started proceedings to recover the amount of the loss. His activities, thereafter, were confined to interviews with the defendant's husband and their solicitors, in which he assisted them to the extent of his ability in the prosecution of the claim. He appears to have been very assiduous in his attention to the matter, and to have been of some assistance to the solicitors in getting the actions in good shape for trial. It was while they were in progress that the agreement upon which he sues was made. He says that the defendant urged him to hurry the trials, and promised that if he did that he, the plaintiff, would be paid $750 if as much as $10,000 was secured, and this the plaintiff agreed to. The plaintiff admits and the trial Judge holds that this new agreement superseded the original arrangement. After this arrangement was reached, a settlement of the defendant's claim against the insurance companies was made for $6,500 without the plaintiff's knowledge or consent, and, because of this it is said, and it has been held that the defendant is liable to pay this sum of $750, the defendant's act

in making the settlement having prevented him from earning it under the terms of his agreement.

With respect, I think this is not the proper view of the plaintiff's rights or the defendant's liability. It is admitted that the plaintiff's right to be paid $750 depended upon the recovery by the defendant either by judgment or settlement of at least $10,000, and that event never happened.

The plaintiff was unquestionably employed, originally, to bring about a settlement of this claim, and in this he failed. His retainer was continued after the commencement of the actions, but more in an advisory capacity to the defendant's solicitors than as a mediator between the defendant and the companies. He had no negotiations with the insurance people looking to a settlement after the actions were started. He communicated two or three times with one of them at the request of the defendant's solicitor for information about the different policies and the dates, but that is all he had to do with them. It does not appear to have been expected that he would interest himself in any further negotiations with the companies. The intention obviously was that his services as an insurance expert would be placed at the disposal of the defendant and her solicitors so that the best possible results might be accomplished. The plaintiff's version of the arrangement under which his remuneration was to be increased to $750 was simply that he was to hurry along the trials of the action. I do not think there was anything in all of this to disable the defendant from making a settlement upon her own terms without thereby making herself liable to pay $750 to the plaintiff. He was not given an exclusive right to negotiate a settlement, he had none under way and there is nothing to indicate the slightest possibility that a settlement which would have entitled him to be paid $750 was prevented by what the defendant did. I think the most that the plaintiff can claim is the value of the services which he rendered to the defendant, and in the circumstances I think he is entitled to that amount but no more. Negotiations for a settlement of this claim took place before action in which the sum of $150 was discussed. Though there is a strong difference of opinion between the parties as to what actually did take place in these negotiations, I am satisfied that if the plaintiff had then been offered $150 in cash he would have accepted it, and if the defendant had then had $150

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in cash to offer he would have offered it. That sum appeals to me as being about the right amount.

I would, therefore, allow the appeal by reducing the plaintiff's judgment to $150 and giving the defendant the costs of the appeal as success in it is substantially with her. I would make no direction as to the costs below, which will therefore be taxed under rule 33 of the rules as to costs.

In view of this result I have thought it unnecessary to consider the question as to whether or not this action is one to which the Volunteers and Reservists Relief Act applies. Under this judgment the probability is that money will be payable by the plaintiff to the defendant, but if not the amount payable to the plaintiff will be so small as to make the payment of it a matter of no difficulty whatever. *Appeal allowed.*

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REARDON v. FRANKLIN, et. al.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley, and Drysdale, JJ. March 10, 1917.

1. CONTRACTS (§ I C—29) — CONSIDERATION — SALE OF SHARES—NOTE—SPECIFIC PERFORMANCE.

An agreement between individuals to have shares in a company issued, and the shareholders made directors, in consideration for a promissory note, to be paid out of the dividends, is not *nudum pactum*, and will be specifically enforced.

2. PARTIES (§ II A—87)—NECESSARY AND PROPER—CORPORATION—SALE OF SHARES.

In an action to enforce a sale of shares between a shareholder and a third person, the company may be joined as a proper though not necessary party, in order that the formalities requisite for the transfer may also be enforced.

Statement.

APPEAL from the judgment of Chisholm, J., in favour of plaintiff in an action against the defendant Franklin and the Strand Theatre Co. Ltd., claiming: (*a*) an accounting of the dealings of the defendant Franklin with the assets of the company; (*b*) a decree that plaintiff and one Hobrecker were entitled to certain shares in the capital stock of the company and to be elected directors of the company and that the defendant Franklin be directed to refund to the company all moneys wrongfully taken by him for services in connection with the organization and management of the company; (*c*) that a receiver be appointed to receive and distribute the earnings of the company.

The Strand Theatre Company Ltd. was joined as a party defendant but as against the company, whose joinder the trial Judge thought was unnecessary, the action was dismissed by him with costs.

F. H. Bell, K.C., for defendant Franklin (appellant).

T. W. Murphy, K.C., for Strand Theatre Co.

H. Mellish, K.C., for plaintiff (respondent).

The judgment of the Court was delivered by

GRAHAM, C.J.:—It appears that in February, 1916, the plaintiff and the defendant Franklin became interested in a venture to operate a theatre in Halifax. Reardon had a plot of land in a very suitable place for one, and was a painter, glazier, etc. Franklin had been concerned in operating a theatre in partnership with his brother-in-law from which he had retired owing to a disagreement. Moreover, it is the fact that this kind of theatre was likely to be a good paying venture.

The evidence is conflicting but as between the plaintiff and the defendant Franklin and Mack, I have no hesitation in finding the disputed facts in favour of the plaintiff, as the trial Judge did.

Reardon, who owned the lot, leased to the Eastern Amusement Co. (now the Strand Theatre Co.), but wholly controlled by Franklin, "All the ground floor or flat of the building or portion of building to be erected by the lessor (Reardon) and placed and situate upon the rear portion of the lot of land owned by the lessor and situate on, etc.," describing the lot, "to be used by the said lessee as a theatre or place of public amusement, for the exhibition of moving pictures, etc."

The lease was for 10 years from August 1, 1915, with a right of renewal for a further term of 5 years.

The rental was $6,000 a year for the first 5 years, $7,000 for the next 5 years and $8,000 a year for the renewal period.

Reardon proceeded with the work of construction. Partly by force of city requirements as to fireproof buildings and partly by request of the defendant Franklin, considerable changes in construction were made, enhancing the cost, as found by the Judge, from $25,000 to $40,000 in round numbers. The plaintiff afterwards bore one-half of this cost. Meanwhile, of course, the rental had been fixed and would last during the whole period of the lease.

Turning to the charter of the company. The capital of the company is $10,000 divided into 100 shares of $100 each. The defendant Franklin, in the first instance, before any shares were issued to anyone, agreed with the plaintiff that no outsiders

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would be taken into the concern; he agreed with Reardon to sell to him 20% of the shares of the company, $2,000 par value, from the capital stock of the company, at the price of $4,000. That was double par value. Also he agreed that one Otto Hobrecker, with whom Reardon had made a previous agreement for a part of his shares, was to be taken in, and that he would issue certificates for one-quarter of these shares to him at the same price. It was further agreed that Reardon and Hobrecker were to be directors of the company. It appears that the fact that Franklin was not receiving any salary for his services was taken into account in the price asked for the shares. Later, it appears, a few shares were sold to one Mack at Franklin's instance at four times par value. The dispute was principally in respect to what were the terms of the sale of the Reardon shares.

The plaintiff went on with the construction of the theatre building partly through a firm of contractors. His part was to build the bare building. The Strand Theatre Co. was to decorate and paint and supply the equipment for a theatre. Now, Reardon's business being that of a painter and decorator, he did the painting and decorating. In respect to Reardon's version of the agreement there are corroborative circumstances. On January 31, 1916, he rendered his account for the work, amounting to $3,096.10 for the painting and decorating as follows:—

To Strand Theatre Co., Ltd:—

To varnishing, painting and decorating interior of theatre, bronzing decorations, etc., bronzing dadoes; time for men, night work and holidays included	$1,438.32
Special decorators' time	198.00
Hotel expenses, etc.	35.65
Materials for painting, varnishing, decorating, bronzing, staining, shellacing, etc.	890.88
Lincrusta dadoes, and freight, telegrams	533.25
	$3,096.10

And on January 17, 1916, he took this account to Franklin:—

Messrs. Strand Theatre Co.

In account with Frank Reardon:

Jan. 31.	Account per invoice rendered		$3,096.10
	CREDITS.		
Dec. 31, 1915.	Ck.	$500.00	
Jan. 10, 1916.	Ck.	137.70	
Feb. 11		500.00	
			1,137.70
			$1,958.40

It shews with these credits a balance of $1,958.40. The importance of these credits is marked.

Reardon says that these credits were payments made to him on account of the work and material in painting and decorating. In cross-examination Franklin was confronted with the fact that there was one at least of the payments of $500 previously paid on account of the painting and decorating and was obliged to resort to the statement that that payment was an ordinary loan.

Franklin denies that the shares were sold in this way to Reardon. Sold they were. He has to adhere to that. He had already given sworn testimony in the action of Herschorn, his former partner, and St. Mary's Association. That was October 12, 1915. There was an examination before a referee on that date. Franklin then testified: "Shareholders at present are F. Reardon, $2,000; Otto Hobrecker, $500; Fred B. Mack $500; and myself $2,500. . . . No stock given to anybody on the lease. All shares paid for in cash."

Judging by this paragraph in his letter to his sister:—

I hope you are fully enjoying your stay in New York. We here are all well, and hope that you, too, may be enjoying good health. I miss you here very much just now, as a question of considerable importance has cropped up between your brother H., and myself, as to Meyer's share of the new venture; you see the party who is building the new theatre insists upon me, and me only, as the one to whom he rents, and refused several offers of cash security from other people just to get me, and of course I think that Meyer should pay for his share if he wants it, as I cannot assume responsibility and give away whatever I may make out of it, without getting some return at any rate. I think I could manage well enough with Meyer if H. would keep his sound advice out of it, as he has the effect of scaring Meyer into the belief that I am trying to take advantage of him which you know is not my intention. I put all sentiment aside and look at the matter as a strictly business proposition, and it cannot be dealt with satisfactorily in any other manner. What say you, Hannah? You see I am handicapped by a clause in our agreement wherein neither of us can enter into any other business without the consent of the other party. I was not aware of this clause being in the agreement, but you know that most anything can be overcome, and this as well, by simply explaining matters to the owner and have him consent to the transfer of the lease from me to a company; thus I would not appear as the owner, etc. However, my intention is to do everything aboveboard, and if Meyer wants a share I believe he is entitled before another, but naturally he should pay something for it, even as he had to in our present venture.

His ability to overcome a difficulty of that kind was well avowed. In this case he anticipated being confronted with his former testimony no doubt. He starts the idea that true it was

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in September some time he had sold the shares to Reardon but as a consideration for this work of painting and decorating, but he alleges that this sale was rescinded or cancelled afterwards. He says Reardon brought his account for the painting and decorating and asked for payment; that a conversation to this effect took place, namely, that he pointed out to Reardon that if he gave him a note for the amount of this account he (Reardon) would be breaking the agreement and that Reardon would not get the promised shares; and that in effect, Reardon and he rescinded the agreement about the shares and that he (Reardon) took the notes for the painting and decorating. It is true that Franklin has the corroboration of Mack, the company's manager, as to the conversation attending the alleged rescission or cancellation in respect to the shares. But the plaintiff has the corroborative testimony of Hobrecker that he was present at the time of the payment of one of these sums and he says: "Mr. Reardon simply asked Franklin if he could give him another $500 if he had it to spare on account. Franklin said, "Certainly, we have about a thousand in the bank; I guess we can give you a little."

It appears from the testimony that even after the alleged cancellation in February, Reardon was promised the shares by Franklin.

The Judge has found in favour of the plaintiff; and while the latter has no corroborative testimony as to part, the circumstances of the account and of the testimony in the other action, and the inherent probabilities of the case are in favour of the plaintiff's version, and I see no reason for disturbing the findings of the Judge; in fact, I agree with them.

But Franklin raises a legal point; he contends that according to Reardon's statement of the agreement to issue to Reardon these shares, that agreement cannot be enforced against him because there was no consideration; that the shares were only to be paid out of dividends and that would be a *nudum pactum*.

I think, however, that this is not the proper construction to put on the whole transaction. In my opinion, the agreement was not a *nudum pactum*, and its performance can be specifically enforced. There has been at least a part payment by means of the Hobrecker note; the plaintiff testifies that promissory notes were to be given by him for 20% of the shares, 5% of which were

for Hobrecker. Franklin avowedly took notes for Mack's shares. He took a note of $1,000 from Reardon indorsed by him for the shares which went to Hobrecker. His statement, "Mr. Reardon was to obtain the note, indorse it and I would indorse on top of that, and discount in my bank, and I did and used the funds," is far fetched. Why have Reardon in that matter if Franklin's story is true? The plaintiff is corroborated by Hobrecker.

It appears that Mr. O'Connor's evidence in the first case has been put in here. He was the solicitor of Franklin. He says:—

I have been notified that the cash has been paid for shares, and asked to issue certificates to amount of $5,000 to F. Reardon, Franklin, Hobrecker, and F. B. Mack. Have been too busy to attend to it. The company has received no money for shares.

This $1,000 note is sufficient consideration on account of the whole amount of the price of the shares. Of course the amount of the consideration, as long as it is sufficient in law, is not material. But in respect to the whole transaction take the balance of the price, the $3,000, for which a note was to be given by Reardon, I think there is consideration and that the $3,000 note by itself could be enforced.

Of course the fact that the note was not given was, as Reardon says, owing to the fact that the certificates of shares were not delivered, and that was due to the absence at Ottawa of O'Connor, Franklin's solicitor. But it is not material that the note was not given or the certificate not made out: *Cooper* v. *Bay State Gas Co.*, 127 Fed. Rep. 127; *Kiely* v. *Smyth*, 27 Grant Ch. 220. The fact that the notes were agreed to be paid for out of dividends is, in my opinion, sufficient consideration where according to the hypothesis the dividends, that is, the fund out of which the note was to be paid, was in the control of Franklin. Franklin also was to hold this note. There is no objection in law to have incorporated in the note the statement that it is to be paid out of the dividends, and thus not have the question arise as to whether parol testimony could be given if the ordinary note was not taken. It will, no doubt, be non-negotiable, but that does not affect the validity of the instrument. In *Abrey* v. *Crux*, L.R. 5 C.P. 37, at 43, there is a dictum of Willes, J. In dealing with the case in hand he said:—

Nor is it like the agreement in *Free* v. *Hawkins*, 8 Taunton 92, which was set up for the purpose of postponing the time for payment out of a fund within the control of the maker of the note, and not, as here, under the control of the plaintiff, and providing for a means of payment for the bill.

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And at p. 44:—

This, however, is a case in which I should have wished to uphold the agreement, not, perhaps, exactly as is put in the plea, viz., an agreement to provide a fund out of which the bill was in a certain event to be satisfied, but rather as a pre-arranged mode of payment of the bill out of the proceeds of the securities mentioned, with an agreement that until the plaintiff should have made these securities available it was not to be a bill enforceable against the defendant at all. I see nothing in that which is at all inconsistent with any principle of law.

I must not be understood as dissenting in any way from the view of the trial Judge as to what he said about the consideration. It is strange, after the relations existing between these parties as to this company and these shares, that the question of consideration should come up. After the work and services of the plaintiff in respect to the venture, including those mentioned by the trial Judge, his mere attendance as a *de facto* director at the meetings of the *de facto* directors in connection with it, one would hardly expect the question of consideration to be questioned.

It is quite clear that specific performance can be maintained in these circumstances: *Cheale* v. *Kenward*, 3 DeG. & J. 27.

I am also of opinion that the plaintiff has established the agreement of Franklin that he and Hobrecker were to be directors of the company consequent on their being shareholders.

The judgment order contains a declaration to that effect. I think the remedy by restraining order was available to the plaintiff. That is, to restrain the defendant from wrongfully excluding them from acting as directors and discharging their duties as such: *Pulbrook* v. *Richmond Co.*, 9 Ch.D. 610; *Turnbull* v. *West Riding Club*, 70 L.T. 92; *Grimday* v. *Briggs*, [1910] 1 Ch. 444-453.

It appears that the company in this case was joined as a defendant. The trial Judge dismissed the action as against it. I think it is quite usual when an action is brought to carry out a sale of shares between a third person and a shareholder to join the company in order that any of the formalities requisite for the transfer, as far as the company is concerned, may also be enforced. I do not say that in all cases the company is a necessary party. *Williams* v. *Krohn*, 66 Fed. Rep. 661. But here it is proper. We have heard his counsel very fully on that subject.

The appeal of the defendant Franklin will be dismissed with costs and the judgment order varied by adding a restraining order as herein indicated and also to restrain him from selling the shares

of the company other than the plaintiff's and Hobrecker's, to be transferred to them, and from doing the illegal acts complained of; and the appeal of the plaintiff will be allowed with costs and the company will be restored to the record as a party defendant. I believe no relief is asked for as against the company and it should have the cost of appearing below. *Judgment varied.*

BUTLER v. CITY OF SASKATOON.

Saskatchewan Supreme Court, Newlands, J. April 5, 1917.

MUNICIPAL CORPORATIONS (§ II D—140)—MODE OF ACQUIRING LAND—BY-LAW—RESOLUTION—SEAL.

Under the City Act (Sask.) no by-law is required to enable a municipality to acquire land or to enter into an agreement for that purpose; it may be done by a resolution, which impliedly gives the clerk the authority to affix the corporate seal on a document in the words of the resolution.

Statement.

ACTION for specific performance of an agreement for the purchase of land entered into by a municipality. Sustained.

J. F. Frame, K.C., for plaintiffs.

H. L. Jordan, K.C., and *H. E. Sampson*, K.C., for defendant.

Newlands, J.

NEWLANDS, J.:—On February 3, 1916, the City of Saskatoon put an advertisement in the Saskatoon *Phoenix*, asking for tenders for suitable sites for establishing material yard, stores, incinerator, etc., at some central location in the city. On February 9, 1916, Messrs. Bence, Stevenson & McLorg, solicitors for the plaintiffs, wrote the city offering them lots 21 to 27, inclusive; and lots 17 to 20 inclusive, both in block 6, in the City of Saskatoon, according to plan 10, for the sum of $56,000 in city debentures, payable at the end of 3 years, bearing interest at 7%. A report was made on the tenders received by the city commissioner, and he recommended the acceptance by the council of this offer. On April 7, the city clerk wrote to Bence, Stevenson & McLorg the following letter:—

Dear Sirs,—Referring to your letter of February 9 last, to the city commissioner, I am instructed by the finance committee to inquire from you if your clients would be prepared to accept a lower price for lots 21 to 27 inclusive and lots 17 to 20 inclusive, both in block 6, plan Q10, than that quoted in your said letter.

In submitting new offer, kindly quote alternative prices for the property to be paid for on the following terms: (*a*) By thirty-year five per cent. City of Saskatoon debentures. (*b*) Cash upon the city selling its debentures to raise the required funds; said sale to be made within, say, a year; interest to be paid on the purchase price in the meantime at the rate of 6% per annum payable half-yearly.

If at all possible I would like to have you reply in time for the council meeting to be held Monday evening, the 10th inst. A. LESLIE, City Clerk.

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In reply to this, Bence, Stevenson & McLorg said:—

We observe by the public press that the council offered the owners of the adjoining property, known as the Cadwell site, the sum of $40,000 in debentures, which is at the rate of 71.1c. per sq. ft. We, therefore, presume that such rate will be considered reasonable by the council for our clients' property, which property we believe to have advantages in location, trackage, etc. On this basis we are instructed to offer the city the whole or either parcel of the property referred to in our former letter at the rate of 71.1c. per sq. ft., payable in thirty-year five per cent. City of Saskatoon debentures. In the alternative, we offer the whole property for $49,075 cash, or lots 21 to 27 inclusive for $29,465 cash, or lots 17 to 20 inclusive for $19,610 cash—payable in any case within 3 months from this date, with interest at the rate of 6 per cent. per annum. This cash rate is on the same basis as the debenture offer calculating the debentures as being marketable so as to net our clients 82c. on the dollar.

On April 10, 1916, the council of the city passed the following resolution:—

It was resolved that the amended offer, as contained in Bence, Stevenson & McLorg's letter, dated April 10, to sell to the city lots 17 to 27, both inclusive, block 6, plan Q10, at 71.1c. per sq. ft., payable in 30-year 5% City of Saskatoon debentures or $49,075 cash, be accepted, subject to the approval of the Local Government Board being obtained to the expenditure and the by-law to raise the funds required receiving the assent of the burgesses when submitted, the city to have the option of paying for the property in either debentures or cash.

And on April 12, the city clerk sent the following letter to Bence, Stevenson & McLorg:—

Dear Sirs,—Referring to your letter of the 10th inst., quoting amended price for lots 21 to 27 inclusive and lots 17 to 20 inclusive, block 6, plan Q10, I am instructed by the city council to advise you that your offer is accepted upon the following conditions: (*a*) That the consent of the Local Government Board can be obtained to the proposed expenditure. (*b*) That a by-law to raise required funds meets with the approval of the burgesses upon being submitted. (*c*) In accepting your offer the city reserved the right to pay for the property in thirty years 5% City of Saskatoon debentures at the rate of 71.1c. per square foot or for the total amount of $49,075 cash.

Kindly advise me if your clients are prepared to close with the city on the above mentioned terms. A. LESLIE, City Clerk.

This letter was under the seal of the corporation.

In reply to this, Bence, Stevenson & McLorg wrote a letter accepting the offer.

On June 1, 1916, the Local Government Board granted permission to the City of Saskatoon to raise by debentures the said sum of $60,000, and on August 26, 1916, McKay, J., sent a certificate to the city council stating that the by-law submitted to the ratepayers for the purpose of raising the money to pay for the incinerator site had been passed by a majority of the votes of

the burgesses. This by-law had been given two readings at previous sittings of the council, and on September 5, 1916, it came up for a third reading, but was defeated. The by-law was never passed.

This action was brought by the plaintiffs to enforce the agreement which they alleged was entered into between them and the city council for the purchase of the above described property.

The principal defence set up is, that the defendant could contract for the purchase of the said land only when authorized by by-law and no by-law therefor was passed by the defendant.

The principal authorities upon which they base this proposition are the cases of *Waterous Engine Works Co.* v. *Town of Palmerston*, 21 Can. S.C.R. 556, and *Ponton* v. *City of Winnipeg*, 41 Can. S.C.R. 18.

These cases are decided upon the principle "that contracts of a municipal corporation are absolutely void, whether executed or executory, unless they comply with all statutory requirements as regards formality of execution," and are decisions; the first, upon the Ontario Municipal Act, and the second upon the Manitoba Municipal Act. Both of these Acts contain a provision that:—"All the powers of the council shall be exercised by by-law unless otherwise expressly authorized or provided for."

The City Act in this province is different, and is in the following words:—

> 12. The powers of the said corporation shall be exercised by the council of the city, subject to the provisions herein contained as to commissioners (1915, ch. 16.)

The Municipal Act in Manitoba, under which *Bernardin* v. *Mun. of North Dufferin*, 19 Can. S.C.R. 581, was decided, is the same as our statute, and in his opinion in that case Patterson, J., at p. 631, referred to the difference between that Act and the Ontario Act. He said:—

> It should be noticed, in connection with the topic of the power of the council to act for the corporation, that the Manitoba statute does not prescribe the method by which the council is to act. While it is enacted that every by-law is to be sealed with the corporate seal, there is no general provision, such as is contained in the Ontario Municipal Acts, that the powers of the council shall be exercised by by-law. The omission is, I think, significant and it strikes me as being well advised."

I have looked all through the City Act, and I find nothing in it which requires the Council to act in a matter of this kind by by-law.

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Section 203 specifies the powers of the city council. It says that they may pass by-laws and make such regulations as are deemed expedient and are not contrary to law. Section 214 provides that the council may acquire for any public civic purpose whatever such land within or without the city as it shall deem expedient to acquire, and section 232 provides that, where land is acquired for certain purposes, the by-law shall receive the assent of the majority of the burgesses.

The acquiring of land for an incinerator is not one of the purposes specified in sec. 232. There are, therefore, no statutory provisions as to how the council shall make a contract, such as the present one. They would, therefore, have to follow the common law method of making their contract under seal, unless this should be one of these contracts which, under the decisions, can be made by a corporation without their seal; however, we need not consider that branch of the question, because the contract in question is under seal.

In referring to the manner in which such contracts should be executed, Patterson, J., in *Bernardin* v. *Mun. of North Dufferin*, *supra*, at p. 633, said as follows:—

> Now let us see how the doctrines thus formulated apply to the case before us. The corporation under the statute of Manitoba, 7 Vict. ch. 11, sec. 43, consists of the municipality and the inhabitants thereof, a comprehensive definition even if savouring of tautology. The seal would not express the sense of every member of the corporation. It would, if so understood, be a delusion. The statute which creates the corporation invests certain members of it, viz., the reeve and six councillors, with authority to bind the whole body: "The powers of the municipality shall be exercised by the council thereof." There is no such thing as a general meeting or any other method of managing the affairs of the corporation or ascertaining the corporate will. The seal is therefore a matter of form and not of substance. It may bind the corporation as being affixed by persons authorised to act for the corporation, but is only a formal act.

And Gwynne, J., in the same case, at p. 590, said:—

> In *The Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815, to an action for rent payable under a demise by deed, executed under the corporate seal of the plaintiffs, the defendant pleaded a set-off, whereby he claimed to be allowed a sum of money alleged and proved to have been expended by him under a parol contract contained in a resolution passed at a corporate meeting, and entered in the books of the corporation. The Court of Exchequer in that case held that, notwithstanding the defendant had executed the work, he could not set-off the amount so expended, the contract not having been under the corporate seal. It cannot be denied that the Court of Exchequer in that case, which was decided in 1840, were of opinion that the exceptions of the general common law rule that corporations can contract only under their common seal,

are to be limited to cases of urgent necessity, where, in fact, to hold the common law rule applicable would occasion very great inconvenience or tend to defeat the object for which the corporation was created. The Court, however, in delivering judgment, say:—"The seal is required as authenticating the concurrence of the whole body corporate."

That is the principle upon which the common law rule is founded. They go on, however, to say, and to lay down principles which might reasonably be construed as affording good foundation for future exceptions, as follows:—"If the legislature in erecting a body corporate invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly the adding of a seal would be matter purely of form and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else."

In referring to the Manitoba Act, under which that case was decided, and as to the necessity of a by-law where the Act does not specifically require one, Gwynne, J., at p. 617, said:—

By the 111th section of 47 Vict., ch. 11, entitled "an Act to revise and amend the Acts relating to Municipalities," passed on the 29th April, 1884, the same provision is made in the following language:—"In every city, town or local municipality, the council may pass by-laws for such municipalities in relation to (among other things enumerated) roads and bridges, and the construction and maintenance of roads and bridges, wholly within the municipality, provided that, etc.," as in the identical language of the 20th section of the Act of 1881, above quoted.

Now, it has been argued that as these sections authorised the municipal councils to exercise their jurisdiction over roads and bridges by by-laws, they are precluded from exercising their jurisdiction otherwise than by a by-law, and so that no road or bridge could be repaired or made fit to be travelled on unless a by-law should be first passed for the purpose. The answer to this contention is to be found in the language of Turner, L.J., in *Wilson* v. *West Hartlepool*, 11 Jur. N.S. 126, quoted above. Affirmative words in a statute saying that a thing may be done in one way do not constitute a prohibition to its being done in any other way. The word "may" in the section of the Manitoba Act enacting that the councils may pass by-laws, etc., in relation to the several purposes mentioned in the Act is by the Manitoba Interpretation Act, to be construed as permissive only, not as imperative. Although, therefore, a by-law is a mode by which councils may exercise their jurisdiction over bridges and roads within the municipality, still there is nothing in the above acts affecting municipalities in Manitoba which prohibits the councils from exercising their jurisdiction in any other way.

If a by-law is not necessary, and if, when the legislature has invested the council with the power of making contracts, and they have done so by resolution which is entered in the minutes of the

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council and sealed with the seal of the corporation, then, in the words of Rolph, B., in *The Mayor of Ludlow* v. *Charlton*, 2 M. & W. 815, "the adding a seal would be a matter purely of form and not of substance."

Although the letter in this case, agreeing to the offer of the plaintiffs, was under seal, it was contended by counsel for the defendant that the city clerk had no power to add the seal, and they referred to the procedure by law of the council, giving the duties of the various officials, which provided (amongst other things) that the city clerk should have charge of the seal of the corporation and only attach the same to any document on the order of the council, or as required by law.

I am of the opinion that, when the council passed the resolution they did, they thereby impliedly gave the clerk the authority to fix the seal on a contract in the words of that resolution; or if not and if such a contract by law required the seal, that the words of the by-law would give him authority to place it upon this letter.

The conditions stated in the letter have been fulfilled, as I have already stated, the Local Government Board gave their consent and the burgesses of the city by a majority voted for the by-law.

The fact that the by-law was not passed at its third reading, in my opinion, has no effect upon this transaction. The only object in passing the by-law, apart from the provision in the resolution of the council, was for the purpose of paying for this land.

In the *Waterous Engine Works Co.* v. *Town of Palmerston*, 21 Can. S.C.R. 556, at p. 575, Gwynne, J., in referring to the question of payment, said:—

> Of course, if it be necessary for the corporation to raise money by a rate to pay for the thing contracted for by a municipal corporation, that must be done by the exercise by the council of their legislative power, that is to say, by a by-law, but such a by-law might be passed as well after as before the execution of the contract, and if the corporation had funds to pay for the thing contracted for, without imposing a rate to pay for it, such a by-law would be unnecessary. Now, it sufficiently appears in evidence, I think, that the defendants at one time had control of funds sufficient to have enabled them to pay for the engine built for them by the plaintiffs, which funds, however, they seem to have misapplied to other purposes under circumstances, however, which make them responsible to replace the funds so misapplied; but whether the corporation had funds or not when the contract was signed, or would be in funds to pay for the thing contracted for in the terms of the contract when it

should be fulfilled by the plaintiffs, does not raise a point affecting the validity of a contract entered into under the corporate seal in respect of a matter for which they had power to contract.

In this case the council had already provided for funds for the purchase of an incinerator. In a report to the city, before the by-law in this case was introduced, the city commissioner stated as follows:—

With further reference to the resolution passed by the council at their meeting held on April 10, accepting the offer made by Bence, Stevenson & McLorg to sell to the city the property known as lots 17 to 27, both inclusive, block 6, plan 10, as a site for an incinerator, it will now be necessary that application be made to the Local Government Board for permission to borrow an additional sum of $90,000 made up as set out below, and it will also be necessary to submit a by-law or by-laws to the burgesses covering this expenditure.

Amount of amended tender of Messrs. Heenan & Froude to erect an incinerator (original tender $58,100) $69,400; add for estimated increase in price of material, etc., $6,720; flotation expenses, $13,880; total cost of building incinerator plant, etc., $90,000; cost of site for incinerator, stores, stables, and material yard, $60,000; contingencies, $10,000; total, $160,000; less amount already authorized by by-law No. 623, $70,000; total extra expenditure required to be passed by Local Government Board and burgesses, $90,000.

Attached hereto is the solicitor's opinion as to the advisibility of submitting to the burgesses one or more by-laws.

It is recommended that the city soliciter be instructed to forward the necessary application to the Local Government Board for permission to borrow the above amount and that the solicitor and city clerk be instructed to take the necessary steps provided for in the City Act to obtain the approval or disapproval of the burgesses to the proposed expenditure.

So that the council had the means of paying for the land if they wished to use the authority granted them by by-law 623.

The only other questions raised at the trial were that Bence, Stevenson & McLorg did not have authority to act for Mrs. Butler.

I think that the evidence shews that they did have such authority, and she has certainly approved of what they did by signing a transfer to the city for her interest in this property.

Some question was also raised as to the title to Judge McLorg's portion of the property. This was all straightened out before the trial and title which the plaintiffs offer the defendants is a perfectly good title.

Under all circumstances of the case, I think the defendants are bound by the agreement which they entered into, and that the plaintiffs are entitled to specific performance of that agreement.

Judgment for plaintiffs.

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REX v. MOORE.

Nova Scotia Supreme Court, Longley and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. March 10, 1917.

INTOXICATING LIQUORS (§ III K—94)—SECOND AND SUBSEQUENT OFFENCES—ADDITIONAL PENALTIES.

The additional punishment provided by sec. 24 of the Nova Scotia Temperance Act, 1910, as amended by N.S. Laws, 1911, ch. 33, for "each subsequent conviction" after conviction for the first offence, applies only to an offence of the same kind; selling liquor in contravention of the Act is a distinct offence from that of keeping for sale, and a prior conviction for selling will not support a conviction with a penalty as for a second or subsequent offence of keeping for sale.

[*R.* v. *Lyons*, 10 Can. Cr. Cas. 133, *Ex parte Doherty*, 1 Can. Cr. Cas. 84, 33 N.B.R. 15, referred to.]

Statement. APPEAL from the judgment of Sir Wallace Graham, C.J., allowing a writ of *certiorari* for the purpose of quashing a summary conviction for keeping intoxicating liquor for sale, made as for a second offence. There was a previous conviction for having sold and the ground upon which the writ was allowed was that the offence of keeping liquor for sale was one of a different description from that of selling and that the Act required a strict construction, and that in the section of the Act each subsequent conviction must be read, "conviction of an offence of the same description as the previous conviction."

W. E. Roscoe, K.C., for appellant; *H. W. Sangster*, K.C., for respondent.

The judgment of the Court was delivered by

Harris, J. HARRIS, J.:—The learned Chief Justice allowed an application for a writ of *certiorari* to remove into this Court a conviction under the Nova Scotia Temperance Act. The conviction was for unlawfully keeping for sale intoxicating liquor and was for a second offence against Part I. of the Act, the conviction alleging that the previous conviction was for having unlawfully sold intoxicating liquor.

The question is whether, under sec. 24 of the Act, a person is punishable as for a second or subsequent offence when the offences are not the same. Under sec. 24 of the Act, as amended by ch. 33 of the Acts of 1911, it is provided as follows:—

> "24. Everyone who, by himself, his clerk, servant or agent, directly or indirectly, or on any pretence or on any device, in violation of Part I. of this Act, keeps for sale, sells or barters, or in consideration of the purchase of any other property, or for any other consideration, gives to any other person any intoxicating liquor, shall on summary conviction be liable to a pen-

alty for the first offence of not less than fifty dollars, or imprisonment for a term not exceeding one month, with or without hard labour; and on each subsequent conviction he shall be liable to imprisonment for three months with or without hard labour."

The Act is to be strictly construed, and I have no doubt whatever that this section is to be read as referring to a subsequent conviction for the same offence. There are separate and distinct offences.

It is quite possible for a man to be guilty of selling liquor who never kept it for sale. If a man kept liquor for his own use and was induced by a friend to sell him a bottle to be used medicinally he would be guilty of selling, but he could not be said to have kept liquor for sale. So also a man who had imported and kept liquor on his premises for the purpose of selling might be convicted although he had not yet sold any of the liquor. That selling and keeping for sale are separate and distinct offences is, I think, perfectly obvious and it had been so decided in more than one case under similar statutes: *R.* v. *Lyons*, 10 Can. Cr. Cas. 133; *Ex parte Doherty*, 1 Can. Cr. Cas. 84, 33 N.B.R. 15.

The contention of counsel for the appellant is that sec. 24 is to be read as authorizing a conviction as for a second or subsequent offence where the accused has been previously convicted of any of the three or four offences dealt with in this section. If the legislature intended this it could easily have used language which would have been capable of that construction. The language of the section cannot, in my opinion, be so construed.

It is significant that in framing the Nova Scotia Temperance Act, sec. 127 of the Canada Temperance Act was copied almost *verbatim*, but sec. 128 of the latter Act, which would have obviated the difficulty which arises here, was omitted.

We were asked by Mr. Roscoe, K.C., on behalf of the informant, to deal finally with the matter, and to do so will save the expense of a separate motion to quash the conviction.

The appeal will be dismissed and the conviction quashed with costs of the appeal and of the motion before the Chief Justice.

Conviction quashed.

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STRONG & DOWLER v. HEUER.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck, and Simmons, JJ. April 20, 1917.

SALE (§ I B—5)—GRAIN—DELIVERY—"BUYER'S OPTION."

In a sale of grain deliverable at the "buyer's option," the seller is under no duty to procure cars for loading the grain before the option had been exercised.

[The Canada Grain Act (1912, ch. 27, sec. 196); The Sales of Goods Act (Alta.), sec. 20, considered.]

Statement. APPEAL by plaintiffs from the judgment of Ives, J., dismissing their action for breach of contract. Affirmed.

C. F. Adams, for appellant; *A. M. Sinclair*, for respondent.

The judgment of the Court was delivered by

Harvey, C.J. HARVEY, C. J.:—The plaintiffs, who are grain merchants, entered into an agreement with the defendant to purchase a quantity of wheat. The agreement was in writing, and is in the following terms:—

I, H. Heuer, do hereby sell and agree to deliver to Strong & Dowler, of Calgary, or their agent, at Dutchess Station, in the Province of Alta., between November 16, 1915, and December 30, 1915, buyer's option, 3,000 bushels of good, sound, dry, and merchantable wheat, for which I am to receive 99c. (less 1c. per bu. comm.) per bushel, basis No. 1, basis in store Ft. William or Port Arthur, Ont., said wheat being now in my possession and free from incumbrance and located So. W. 26-23-14, No. W. 22-23-14, No. E. 22-23-14.

Should the wheat I deliver be of any other grade than No. 1, I agree to accept the spread between grades existing on day of inspection.

And I furthermore agree that, in case of default in the delivery of the grain as stipulated above, or by such dates as buyer may extend the time of expiration of this contract, to pay as liquidated damages the difference between the price as above stipulated and the market value of same grain and grade on date this contract is closed by the buyer, together with all moneys paid on account hereof.

And I do furthermore acknowledge the receipt of $5 as part payment on account of this sale, and confirm this contract as above named, and to secure the due performance hereof do hereby grant to Strong & Dowler a lien upon the said grain and the right to possession thereof upon my default in the delivery of the same or any part thereof as hereby agreed. Provided that such taking possession shall not be a release of any liability on my part for payment of such liquidated damages.

Witness my hand, this 16th day of Nov., 1915.

Witness, (Sgd.) F. G. DAVIS. (Sgd.) H. HEUER.

On the same day the parties entered into an agreement for the purchase and sale of 1,000 bushels of oats at 37½ cents per bushel on the same general terms.

On December 3, defendant notified plaintiffs' agent at Bassano that he was unable to secure cars for that month's delivery, and

asking what was best to be done. As far as the evidence goes no reply was made to this letter. Defendant applied for a car on December 6, but there being a shortage, no car was allotted to him during that month, and on January 3, he again wrote to the agent stating that he had been unable to fulfil the contract on account of the car shortage, though he had had teams engaged to haul the grain, and returned the $6 advanced on the contracts. On January 8, the agent replied that the car shortage was now over, and requesting him to ship the grain immediately to Calgary. The defendant did not subsequently ship the grain, and the plaintiffs sued for damages. The case came on for trial before Ives, J., without a jury. The plaintiffs proved the facts above set out and the defendant moved for a dismissal of the action which was granted. The plaintiffs now appeal.

The main contention of the appellants is that it was the duty of the defendant to procure cars and load the grain in such cars for them since they could not do it themselves.

The Canada Grain Act provides that an applicant may order a car (sec. 196) and an applicant is defined as "any person who owns grain for shipment in car lots, or who is an operator of any elevator" (sec. 2). It also provides that the application may be made by the applicant, or his agent duly authorized, and imposes a penalty on anyone not an agent duly authorized in writing who obtains the placing of the applicant's name on the order book for cars.

It is arguable, therefore, that, if the plaintiffs were not the owners of this grain, they could not take advantage of the provisions of the Act, and in case of a car shortage, such as existed in this case, it would have been impossible for them to secure cars.

On the other hand, if they had become the owners of the grain in question, they, and not the defendant, would have the right to obtain the cars. The agreement purports to sell the grain which is to be delivered at a future time. It refers to certain specific grain which, at the time of the agreement, was located on the land described.

It is provided by sec. 20 of the Sales of Goods Act, that, *primâ facie*, when there is an unconditional contract for the sale of specific goods in a deliverable state, the property passes when the contract is made, though the time of delivery is postponed, but if

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something has to be done, such as measuring, etc., to ascertain the specific goods, the property does not pass until that is done and notice given to the buyer.

It is evident, therefore, that whether the buyer or the seller has the right to obtain a car depends on circumstances which may vary from case to case, and in the present case the evidence is not sufficient to show whether the grain sold was all the grain the defendant had of the kinds specified, or whether it had to be taken out of a larger amount and consequently whether the property passed at the time of the sale or not.

There is no doubt, however, that the plaintiffs could have ordered the car as the agent of the defendant if they had taken his written authority to do so, so that it was quite within their power to protect themselves in this respect.

By reason of the new law created by the Canada Grain Act, and the special conditions existing, I am of opinion that the decision in *Marshall* v. *Jamieson* (1877), 42 U.C. Q.B. 115, cannot be considered of much value as an authority.

In that case grain was sold under a contract, the terms of which were f.o.b., without more, and it was held, that while that imposed the duty of putting the grain on board the cars free of expense to the buyer, it was yet the duty of the buyer to provide the cars to receive it.

It may well be that under some contracts the obligation would be on the seller to procure the cars, especially having regard to the provisions of the Canada Grain Act, but the question is whether that was his duty under the present contracts, and whether even if it were he was required to do so until directed by the plaintiffs.

The plaintiffs had no representative at the place of delivery, and there were no facilities there for receiving or storing grain. It would therefore be reasonable to suppose that, although the contract does not call for delivery in cars, yet it was within the contemplation of the parties that this grain would be delivered upon cars, and if it were shewn that the seller was the only person who had the right to obtain the cars and there were nothing more it might be reasonable to think that it was intended that the seller should obtain the cars.

But there is much more. The trial Judge, quite properly, I think, attached much importance to the words "buyer's option" used in the contract. He states that counsel agreed that that

term gave the buyer the right to call for delivery on any date between November 16 and December 30.

In "Words and Phrases," vol. 1, p. 929, it is stated that "'Buyer's option', as used in an order to buy stock on a 60-days' buyer's option, means with a right on the part of the purchaser to take and pay for it at any time within 60 days if he chooses," and a Massachusetts case is given as authority.

In *Gath* v. *Lees* (1864), 3 H. & C. 558, there was a contract for purchase of cotton "to be delivered at seller's option in August or September." The invoice was to be dated from date of notice of the cotton being ready for delivery, and payment to be made within 10 days from date of invoice. The seller gave notice in August that the cotton was ready for delivery, but did not deliver it.

It was held that that was a good ground for refusing to accept afterwards. Appellant's counsel contends that, under the contract, if the defendant had shipped at any time between November 17 and December 30, plaintiffs would have been bound to accept. It is well enough to take this position upon this case, but it is clear that such a contention gives no effect whatever to the buyer's option, but in fact gives the option to the seller. Whether the buyer's option goes further or not it is unnecessary to consider, but it quite clearly is an option to say at what time within the period specified he will have the grain delivered.

If the defendant attempted to deliver without the buyer having exercised the option he might well be met by a refusal to accept.

It is perfectly reasonable for the buyers to protect themselves in this way, for it might be most inconvenient for them to have the grain delivered at certain times, but it also makes it quite impossible to expect the seller to obtain the cars, for he can only obtain them in accordance with the regulations of the Act, and must load them within 24 hours after they are ready for him, which might be at a time when the buyer would be unwilling to accept. The plaintiffs never did extend the time for delivery of the grain and did not, until January 8, after notification that the grain could not be delivered, indicate any time for delivery.

Even if it is not a matter of common knowledge it is apparent from the provisions of the Grain Act, and the terms used in these

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contracts, that Fort William or Port Arthur are the common points for shipment of grain from this province, but it is plain, of course, that all grain would not be sent to these points. The putting of grain in the cars is only one step towards getting it to the place desired. The grain must be consigned to some place. The seller has no interest whatever in that, and until the buyer indicates, either by the terms of the contract or otherwise, how he wishes it consigned, in cases such as the present when he has no representative to take delivery and direct the consignment, it would not be reasonable to suppose it was intended that the grain should be put on the cars by the seller.

But it is said that the defendant, as his acts and letters shew, considered that it was his duty to put the grain on the cars and acted on that view.

If the conduct of the defendant in this respect had been relied on by the plaintiffs to their prejudice, it appears to me that some importance might be attached to that fact, but otherwise I fail to see why any effect should be given to it, and there is no suggestion of any prejudice. I am of opinion, therefore, that the plaintiffs cannot succeed, both because they never exercised their option by requesting delivery as the contract gave them the right to do, and because they were never ready to receive delivery, not having the facilities to accept delivery.

I would accordingly dismiss the appeal with costs.

Appeal dismissed.

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STRONG & DOWLER v. LAHD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 20, 1917.

SALE (§ I B—5)—*Grain—Delivery — Time and place—Duty as to cars—Tender—Repudiation for non-acceptance—New trial—Newly discovered evidence.*]—Appeal by plaintiff, and application for new trial, in an action for breach of contract. Dismissed.

C. F. Adams, for appellant; *G. L. Fraser*, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—The contracts in this case are in the same general terms as in the case of the same plaintiffs against Heuer, 35 D.L.R. 396, but the facts are quite different.

They were dated September 27, 1915, and the time for delivery in one was between October 1, and December 1, and in the other the days of October and December were left blank.

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The place of delivery was Suffield Station, at which point the representative of the plaintiffs, through whom the contract was made, had his place of business and where there were elevators and other facilities for receiving and storing grain.

The only conflict in testimony is between this representative and the defendant, and the trial Judge, basing his reasons partly on the demeanour of the witnesses, accepts the evidence of the defendant.

The defendant was asked regarding the making of the contract. "What was said about the cars?" and his answer is, "Mr. Miller told me that he would be in Suffield and have a loader there and look after it there."

On November 22, 1915, the plaintiffs wrote defendant in the following terms:—

Mr. John Lahd, Nov. 22, 1915.
Tripola, Alta.

We hold contracts dated September 27, 1915, for 1,000 bushels wheat at 84¼c. basis in store Fort William and 2,000 bushels oats at 33½c. basis in store Fort William for shipments on or before December 1. As the time is close at hand for these shipments to be made, we are writing asking you to advise us just when you expect the cars to be loaded. Parties to whom we have sold this grain are asking us for the same information and we must look to our customers to get this advice. Let us hear from you by return mail.

STRONG & DOWLER.

About the beginning of December, according to defendant's evidence, having part of the grain stored at Suffield Station be brought in, in wagons, approximately, enough to make up the remainder and went to Mr. Miller, plaintiff's agent, and told him he had the grain there for delivery, but that Mr. Miller refused to have anything to do with it until it was on a car. Mr. Miller distinctly denies that any such interview ever took place, but in view of the trial Judge's finding and his reasons therefor, I think we must accept the defendant's statement as the true one.

Defendant said all he had to do with the grain was to bring it in to Suffield and reminded Mr. Miller of the arrangement that he was to load it in the cars. Defendant made no further effort to deliver and sold the grain elsewhere.

I am of opinion that Miller's refusal to accept delivery on the ground upon which it was based justified the defendant in treating it as a repudiation of the contract as he did. Miller's intention at the time of the making of the contract had been to have

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a portable elevator. By reason of expense or otherwise his plan had failed, but he had made arrangements at an elevator for receiving and storing grain delivered under contract until it could be loaded.

He, however, made no suggestion to defendant to put his grain in the elevator nor did he offer any objection that he had not sufficient notice of the delivery. The objection he made was one which cast on the defendant the obligation of obtaining and loading the cars. For the reasons given in the *Heuer* case, 35 D.L.R. 396, I am of opinion that the first obligation was not on the defendant, and the second clearly was not by reason of the arrangement made when the contract was entered into.

The objection was, therefore, one which plaintiffs were not entitled to make and the defendant had a right to consider that it discharged him from his obligation.

The plaintiffs also apply for a new trial on the ground of the discovery of new evidence. The defendant at the trial fixed the time at which he told Miller he had the grain ready for delivery by memory as about the first of December, but before that date, but declined to be positive, stating that he had weighed the loads he had that day and the tickets would shew the exact day.

The trial Judge, Greene, J., accepts the evidence as being the last week in November and finds that the defendant made a good and sufficient tender within the time stipulated by the contract. The evidence which it is proposed to give on a new trial is that furnished by the weigh tickets which it is stated are dated from 11th to 17th December.

Now, whether the tender was in fact before or after December 1, is, in my opinion, of no consequence whatever. If after, it may be that the plaintiffs would have rejected the grain as too late, but far from wanting to do that they wrote several letters after that date demanding the fulfilment of the contract.

It is urged, however, that this would shew that the evidence of the defendant should not be accepted in preference to that of Miller because in this respect he had stated what was not true.

The fact is, however, that in giving his testimony the defendant distinctly declined to be positive about the date, so that it is hard to see how the fact of his memory not enabling him to state,

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a year after the event, the exact time within 2 weeks, when he did refer to the facts which would settle the point with certainty, could have any effect on the trial Judge in estimating the honesty of his evidence generally.

In my opinion, therefore, both the appeal and the application for a new trial should be dismissed with costs.

Appeal dismissed.

REX v. REGINA TRADING Co.

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Saskatchewan Supreme Court, Newlands, Lamont and Brown, JJ. March 10, 1917.

LIMITATION (§ II F—60)—PROSECUTIONS UNDER ADULTERATION ACT (CAN.).

The time for laying an information for an offence punishable on summary conviction under the Adulteration Act, R.S.C. 1906, ch. 133, is two years under sec. 50 of that Act and sec. 135 of the Inland Revenue Act, which it makes applicable; sec. 1142 of the Cr. Code does not apply.

Statement.

CASE stated for the opinion of the Supreme Court by the Police Magistrate of the city of Regina on the question whether the time within which an information can be laid under the Adulteration Act, ch. 133, R.S.C. 1906, is six months, as provided by sec. 1142 of the Criminal Code for cases as to which "no time is specially limited," or whether sec. 135 of the Inland Revenue Act, applies.

H. V. Bigelow, K.C., for the Crown.

J. F. Frame, K.C., for defendant company.

Newlands, J.

NEWLANDS, J.:—Section 50 of the Adulteration Act provides:—

"Every penalty imposed under this Act may be enforced and dealt with as if imposed under the Inland Revenue Act."

If the penalty in question had been imposed under the Inland Revenue Act, then, by sec. 135 (R.S.C. 1906, ch. 51), any information or complaint with respect thereto, whenever the prosecution, suit or proceeding was instituted under part XV. of the Criminal Code, as it was in this case, could be laid or made withing two years of the time when the matter of the information or complaint arose.

The information is laid to enforce the penalty; the time within which it can be laid must, therefore, be taken into consideration, because, if the information is laid too late, the penalty imposed could not be enforced. I am, therefore, of the opinion that the words "may be enforced and dealt with as if imposed under the Inland Revenue Act" means, amongst other things, that the penalty may be enforced within the time penalties imposed by the Inland Revenue Act can be enforced, and that, therefore,

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the information in this case was not barred by sec. 1142 Criminal Code, but that it was laid in time.

The question asked should be answered in the negative and the matter referred back to the magistrate to decide the case on the merits.

BROWN, J., concurred with NEWLANDS, J.

LAMONT, J.:—The question to be decided in this case is: Can an action for an offence under the Adulteration Act, ch. 133, R.S.C. 1906, be laid within two years of the commission of the offence, as provided by sec. 135 of the Inland Revenue Act, or must it be laid within six months after being committed?

Sections 49 and 50 of the Adulteration Act are as follows:—

"49. The provisions of the Inland Revenue Act, whether enacted with special reference to any particular business or trade, or with general reference to the collection of the revenue, or the prevention, detection or punishment of fraud or neglect in relation thereto, shall extend, apply and be construed and shall have effect with reference to this Act, as if they had been enacted with special reference to the matters and things herein provided for.

"50. Every penalty imposed under this Act may be enforced and dealt with as if imposed under the Inland Revenue Act."

Section 135 of the Inland Revenue Act, which enacted that a prosecution may be entered within two years of the time when the matter of the complaint arose, is, in my opinion, a provision which has reference to the "punishment" of fraud. In order to punish a person for an offence, an information must be laid; whether or not it is laid in time will determine the question whether or not the accused can be punished. It seems to me, therefore, to follow that a provision fixing the time within which an information can be laid is a provision which has reference to punishment.

I am, therefore, of opinion that the information in this case was laid in time. *Judgment for the Crown.*

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J. C. GROENDYKE Co. v. THE KING.

Exchequer Court of Canada, Sir Walter Cassels, J. June 14, 1917.

CUSTOMS (§ I—5)—PRISON-MADE GOODS.

Item 1206, Schedule C, of the Customs tariff (Can. Stat. 1907, ch. 11), prohibiting the importation of "Goods manufactured in whole or in part by prison labour," applies to goods similar in character to the prison-made goods, if sought to be imported by one having at any time a contract to purchase prison-made goods.

PETITION OF RIGHT filed on behalf of the J. C. Groendyke Company, having its head office at No. 8 South Dearborn St., Chicago.

R. R. Hall, for suppliants; *W. D. Hogg*, for the Crown.

CASSELS, J.:—The allegations in the Petition of Right are, that in or about the month of June, 1914, the said Groendyke company, for its sole use and benefit, entered into negotiations with Mr. Green, who represented the Saskatchewan Grain Growers Association, for the sale of 300 tons of binder twine, with an option to increase the said sale by 450 tons more—all of which twine was to be manufactured and produced by the said Groendyke company at Miamsbury.

The allegation is that in pursuance of the said contract, the said Groendyke company caused to be shipped to the order of the Saskatchewan Grain Growers Assoc. 15 cars of the said binder twine so manufactured by them at Miamsbury as aforesaid containing 527,750 lbs., which in or about the month of July, 1914, entered the Province of Saskatchewan.

Par. 9 of the petition of right reads as follows:—

That on or about the 19th day of August, 1914, the Commissioner of Customs notified the said Groendyke company that the inspector of customs, Port of Preventive Service, having reported on the 3rd day of August, 1914, that the following facts have been ascertained upon inspection, namely, that since the first of June, 1914, the said Groendyke company exported to Canada 15 cars of binder twine, containing about 527,750 pounds, valued at $48,289, more or less, and the following charges for infraction of the customs laws having been made against said Groendyke company, namely, that the said goods were imported into Canada contrary to law, the same being prohibited importation (item 1206, schedule "C," Customs Tariff), wherefore the said Groendyke company was given notice that if such seizure or charges be maintained the said goods or moneys, if accepted on deposit in respect thereof, become liable to forfeiture and each party concerned in such infraction of the law subject to penalties under the provisions thereof.

The petition further alleges that in or about the month of August, 1914, the Commissioner of Customs released the said 15 cars of twine, and received a deposit from the said Groendyke company of $2,500 which was accepted by the said Commissioner of Customs in lieu of the said 15 cars of twine.

The 17th, 18th and 19th paragraphs of the said petition, read as follows:—

17. That under and by virtue of a certain notice bearing date on or about December, 1915, the Commissioner of Customs, pursuant to sec. 177 of the Customs Act, notified the said Groendyke company that said deposit of $2,500 made in this matter remained forfeited to the Crown.

18. That pursuant to sec. 178 of the Customs Act the said Groendyke

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company duly gave notice in writing that such decision to forfeit the said sum of $2,500 would not be accepted and respectfully requested the Honourable the Minister of Customs, pursuant to sec. 179 of the Customs Act, to refer the matter to the Court.

19. That under and by virtue of a certain notice bearing date January 13, 1915 (1916 intended), the Commissioner of Customs notified the Groendyke company that the Honourable the Minister of Customs declined to refer the matter in question in this petition to the Exchequer Court.

Item 1206 of schedule "C" of the Customs Tariff, as contained in ch. 11 of the Statutes of Canada of 1907, is as follows:—

Goods manufactured or produced wholly or in part by prison labour, or which have been made within or in connection with any prison, jail or penitentiary; also goods similar in character to those produced in such institutions when sold or offered for sale by any person, firm or corporation, having a contract for the manufacture of such articles in such institutions or by any agent of such person, firm or corporation, or when such goods were originally purchased from or transferred by any such contractor.

By sec. 11 of the said Customs Tariff Act of 1907 it is provided as follows:—

The importation into Canada of any goods enumerated, described or referred to in schedule "C" to this Act is prohibited; and any such goods imported shall thereby become forfeited to the Crown and shall be destroyed or otherwise dealt with as the Minister of Customs directs; and any person importing any such prohibited goods or causing or permitting them to be imported, shall for each offence incur a penalty not exceeding $200.

It is contended by the petitioner that it has not been proved that the goods which were seized had been manufactured by prison labour.

The contention, however, on the part of the Crown is that under this provision, item 1206 of schedule "C" of the Customs Tariff, that if "goods similar in character to those produced in such institutions when sold or offered for sale by any person, firm or corporation, having a contract for the manufacture of such articles in such institutions or by any agent of such person, firm or corporation" whether the goods were imported into Canada or not, would bring the importing company within the provisions of the statute.

Mr. Hall, acting for the petitioner, in his elaborate and able argument conceded that if the Groendyke company, through their agent, had contracted for binder twine similar in character, although such binder twine so manufactured was not the binder twine shipped to Canada, nevertheless the petitioner would come within the meaning of this particular provision.

I apprehend that the provision is intended to prohibit any

person, firm or corporation, who had at any time a contract by themselves or by their agent for prison-made twine, whether such twine were sold in the United States or shipped to Canada, sending any such goods similar to those produced in such institutions into Canada.

It would be extremely difficult if not impossible to prove that the particular twine brought into Canada had been manufactured by prison labour; and, therefore, to guard against any such importation no doubt the provisions of this section were enacted.

I have not the slightest doubt that the Groendyke company, acting through their agent, Mr. Groendyke, had a contract for the manufacture of binder twine with the prison authorities. It would appear from the contract filed that Groendyke was an agent for the prison authorities. It would also appear that he had contracts with companies other than the Groendyke company for the manufacture of twine in the prison. According to his own evidence these contracts were procured by him, and the labels of the various purchasers were placed upon the twine in the prison warehouse, and were sent out with the representation that they had been manufactured by the various companies by whom they were ordered.

It is proved beyond question that binder twine was manufactured for and on behalf of the Groendyke company in the prison. They were labelled with the trade label of the Groendyke company. This is conceded by Mr. Groendyke in his evidence. They were beyond question manufactured for the Groendyke company in the prison, and at the direction of Groendyke were labelled with the trade label of the Groendyke company, and no doubt were paid for by the Groendyke company.

Moreover, Mr. Kirk gives evidence of his visit to the Michigan State Prison at Jackson, Michigan. He gives detailed evidence of what was taking place—shews that the balls of twine were being put into bags, and these bags had stencilled on the outside of the bag the same mark as that placed upon the balls of twine similar in character "a circle 'G'" and "Manufactured by J. C. Groendyke Company, Chicago." With the morality of this method of dealing I am not at present concerned.

It is admitted by Groendyke that the twine manufactured by

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the company at their own factory at Miamsbury was of a superior quality to prison-made twine, although similar in character to prison-made twine.

They deliberately placed upon the prison-made twine their own trademark which would enable them to represent to their customers that the twine had been made by themselves at their own works.

The Groendyke Company is apparently composed of three members. Groendyke the witness was the owner of 85% of the shares, and his wife and son owned the remaining 15%. Groendyke was the president and manager of the company, and as such manager was in receipt of a salary, and in addition his share of whatever dividend may have been paid by the company. He admits he had no factory of his own. In his evidence he states, as follows:—

Q. Is your time entirely given up to the management of the Company? A. No. Q. Have you any other private business of your own? A. No, I have nothing private. Q. Any dealings you have, in binder twine, is for and on behalf of the company? A. Yes. Q. There is no question about that? A. Yes.

It is asking too much of the Court under the facts as proved in this case to conclude that this prison-made twine labelled was not manufactured by the prison authorities under a contract made by the agent of the Groendyke Company.

I think there is no question whatever that the Groendyke company had obtained twine manufactured at the prison, and such twine was manufactured for the Groendyke company, and that such contract was entered into by the agent of the Groendyke company.

I think the judgment of the Minister is correct.

Were it not for the case of *Julien* v. *The Queen*, 5 Can. Ex. 238, decided by Burbidge, J., I would have thought that after the Minister had heard the parties, as provided by sec. 174 *et seq.*, and had given his decision, it would be too late for the petitioner to assert his rights by petition of right. Burbidge, J., apparently, came to a different conclusion, and I think it only right to leave it to an appellate Court to say whether such decision is correct

Sec. 178 of the Customs Act (R.S.C. 1906, ch. 48) provides:—

If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, does not, within thirty days after being

notified of the Minister's decision, give him notice in writing that such decision will not be accepted, the decision shall be final.

Supposing no notice had been given, could a petition of right lie after a decision which is final?

Sec. 179 provides:—

If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, within thirty days after being notified of the Minister's decision, gives him notice in writing that such decision will not be accepted, the Minister may refer the matter to the Court.

In this particular case the Minister declined to refer the matter to the Court. I would have thought that his decision remained final. The Court could not review the decision of the Minister, and there is no attempt in the present case to appeal from him, and I would not have jurisdiction to entertain such an appeal.

In the *Julien* case the facts were not the same as in the present case, as I understand the property in question in that case was held until the final litigation. It was not the case where the goods were released and money deposited in lieu thereof under the special provisions of sec. 171 of the Customs Act. I see no reason why a person whose goods have been seized should not present a petition of right the day after such seizure, if a fiat therefor is granted. Moreover, the Crown might file an information to have the provisions of the Customs Act enforced, and also for any penalties that were sought. It would not be necessary to await the final decision of the Minister..

The earlier clauses of the statute, namely, sec. 164, seems to me to apply to actions of a different character, namely, an action brought for illegal acts on the part of the officials of the Crown. The money was deposited in the case before me in August of 1914. No petition was presented for a fiat until the year 1916.

Section 172 of the Customs Act applies to the case of the money being so deposited. Sub-sec. 2 provides that no proceeding against the Crown for the recovery of any such money shall be instituted unless brought within 6 months from the date of the deposit thereof. It seems to me that this forms a complete defence to the petition. The Crown has set it up as a defence, and I think I am bound by the terms of the statute, and if otherwise the petitioner were entitled to relief his petition is too late.

The petition is dismissed with costs.

Petition dismissed.

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DOMINION RADIATOR Co. v. PAYNE.

Alberta Supreme Court, Stuart, Beck, Walsh and Ives, JJ. May 14, 1917.

MECHANICS' LIENS (§ VIII—66)—TIME OF FILING—COMPLETE DELIVERY—CONTINUOUS ACCOUNT—NOTICE.

Materials furnished or machinery installed at different times may be treated as items in a continuous account for the purpose of filing a lien for them under the Mechanics' Lien Act within the time of the last delivery or complete installation; a failure by a sub-contractor to give the owner written notice of his lien, who has, in fact, had notice of the filing thereof, will not affect the owner's liability under sec. 32 of the Mechanics' Lien Act, Alta., for the amount owing by the owner to the contractor.

Statement. APPEAL from a judgment in an action under the Mechanics' Lien Act. Reversed.

H. P. O. Savary, for appellant; *C. F. Adams*, for respondent.

Beck, J. BECK, J.:—The City of Calgary had commenced the building of a Children's Shelter. After the work had progressed to some extent, the city, no doubt, after some preliminary inquiries, gave an order to Grant Bros., Ltd., a Calgary business firm, for the radiators and boiler required for the building. This order was given on July 23, 1914. The plaintiff company had a local representative resident in Calgary, one Clarke, and Grant Bros. placed the order with him for transmission to the company's head office in Winnipeg.

Early in July, if not in June, the question of a water supply for the shelter was considered; the city waterworks system did not extend to the building, and Nichol, Grant Bros.' foreman, who conducted the negotiations between his company and the city, says that a well was put down at the building, having, of course, a pumping system in contemplation, and that this was done on his own suggestion.

It is obvious, as was stated by one of the witnesses, that you cannot use a system of heat radiation without a supply of water. It is also obvious then that at the time the city gave Grant Bros. the order for the radiators and boiler, it had been settled that the city would, within a short time, give an order for a pumping system; whether it had then been settled that the order should go to Grant Bros. does not appear.

In due course then, and before the order for the radiators and boiler was filled, the city made inquiries of Grant Bros. as to the price of a suitable pumping system for the same building, with the result that Grant Bros. discussed t e matter with Clarke, the plaintiff's Calgary representative, and that Clarke, on Sep-

tember 28, 1914, still before the filling of the former order, wrote to the plaintiff's head office at Winnipeg, giving the specifications of the pumping apparatus and asking for a price "F.O.B. Children's Shelter job (Calgary)."

Both Clarke and the head office, from the beginning, knew that the heating apparatus was for the Children's Shelter, and consequently knew that the pumping apparatus was for the same building. The plaintiff company shipped the heating apparatus from Winnipeg under invoice dated October 16, 1914, and it seems to have arrived in Calgary somewhere about November 1, 1914. The invoice price was: boiler, $482.71; radiators, $536.56. The pumping apparatus was shipped from Winnipeg under invoice dated December 19, 1914. The invoice price was $440.50.

Grant Bros. had by letter dated July 24, 1914, offered to furnish all labour and material and complete the plumbing and heating for the shelter for some $3,000 odd, and this had been accepted by a letter from the city engineer, subject to Grant Bros. agreeing to some slight change.

Grant Bros.' offer as to the pumping system was similarly made by a letter dated November 12, 1914.

It appears that, as between the city and Grant Bros., the terms of payment were stated to be: "Terms of payment to be semi-monthly estimates for 85% of work completed as per vouchers and pay sheets." These terms, as I understand, were applicable to all work done or materials supplied by Grant Bros. to the city.

It seems to be a fact that, so far as the radiators and boiler were concerned, these had been accepted by the city and installed complete by the early part of January, 1915, and, that forming an item in an account of Grant Bros. against the city, payments on account of them had been made on the basis of semi-monthly estimates.

After a good deal of consideration, I have come to the conclusion that the plaintiff company has a right, for the purposes of the Mechanics' Lien Act and under the circumstances which I have detailed, to have the two items, radiators and boiler and the pumping apparatus, treated as items in a continuous account.

No one now doubts that a retail merchant, with whom an owner or a contractor runs an account for various articles in which he deals for the purpose of the articles being used in the course of the construction of a building then under construction by the

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owner or contractor, has a right to file a lien for the whole account within the time limited by the Act, calculating that time from the date of the last item *bonâ fide* ordered and supplied for the same purpose as the other items of the account, although it be admittedly the fact that there was no contract either that the articles would be supplied or ordered.

In interpreting Mechanics' Lien Acts, all the Canadian Courts recognize the value of American decisions, inasmuch as it is upon American statutes that our Acts are founded.

What I have just said is quite recognized not only by American, but by Canadian authorities, in which it is laid down that whether or not items are to be considered as items in a continuous account for the purpose of the Act is a question of fact and a question of *bona fides*.

Morris v. *Tharle*, 24 O.R. 159; *Sayward* v. *Dunsmuir*, 11 B.C.R. 375; *Steinman* v. *Koscuk*, 4 W.L.R. 514; *Clarke* v. *Moore*, 1 A.L.R. 49; *Turner* v. *Wentworth*, 119 Mass. 459. In *Carroll* v. *McVicar*, 15 Man. L.R. 379, the headnote is:—

> Plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and, as to the first job, if considered separately, his lien was not filed within the time required by the statute. Held, that, under the circumstances, a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that his filing his lien after he has completed all of his work is sufficient.

In *Miller* v. *Balchelder*, 117 Mass. 179, the headnote is, in effect:—

> Where labour is performed and materials furnished in the construction of a building, under different contracts, all of which are made before the work under any one is completed, the service is continuous, and a statement filed within the time required calculating from the time when the entire work is done is in time, although filed after the lien-claimant has ceased to labour or furnish materials under some of the contracts.

The evidence fully satisfies me that the pumping apparatus was not put in an absolutely complete and perfect condition, quite independently of the warranty for a year, until a date which makes the date of the filing of the claim of lien within the time required by the statute. I therefore hold that the claim of lien was registered in sufficient time to secure both items—the boiler and radiators and the pumping apparatus. The question, however, remains: What is the effect of the plaintiff company failing to give the city notice in writing of such lien and of the amount thereof? (Sec. 32).

As sec. 32 stood in the Act of 1906, *i.e.*, before the amendment of 1908, it read as follows:—

> No lien, except for not more than six weeks' wages in favour of labourers, shall attach so as to make the owner liable for a greater sum than the sum owing and payable by the owner to the contractor.

—all the rest of the section as it now stands was added in 1908.

The section as it originally stood was considered by this Court in *Ross* v. *Gorman*, 1 A.L.R. 109, 516; *Breckenridge & Lund* v. *Short*, 2 A.L.R. 71, reversed on appeal *sub nom; Travis* v. *Breckenridge-Lund Lumber Co.*, 43 Can. S.C.R. 59. In the former case I dissented from the rest of the Court, and that case must be taken to be overruled, on the precise point in question, by the latter case, which affirmed my own decision at the trial of the latter case, but the effect of the decision of the Supreme Court of Canada, as I understand it—the reasons are not reported—was that the owner was protected against liability beyond the total amount of the contract price (except under some circumstances for labourers' wages and costs), and that, subject to these exceptions, the lien holders could look only to the balance of the contract price left after deducting all payments made by the owner to the contractor. I said (in *Ross* v. *Gorman*) if such payments were made in good faith and without notice of the existence of the liens (whether registered or not); the rest of the Court held the owner liable beyond the contract price whether the owner had notice of liens or not; but we all agreed a lien arises in favour of a materialman or labourer from the moment that he begins to supply materials or do work. I quote my own words (p. 522):—

> But, as I have intimated above, the rights of the owner may be affected and a greater liability may be imposed upon him, not merely by express statutory enactment, but by the application of any well-established principle of law, in which expression I include equity.
>
> A mechanic's lien is a lien which arises partly by virtue of the statute and partly by virtue of the acts of the parties, and operates as an assignment, in whole or in part, of the fund represented by the contract price, but, like every other assignment, whether legal or equitable, is ineffective, as against the holder of the fund, until he has had distinct notice of the assignment. In the case of a mechanic's lien, I think that to constitute effective notice, it is necessary for the lien claimant to bring home to the owner notice, not merely that he is supplying materials or doing work upon his property (because that does not necessarily constitute a lien, inasmuch as he may have waived his lien or been paid for his materials or labour, or the amount of his claim may be under $20), but also that he looks to the fund constituted by the contract price for payment These principles will

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be found set forth and exemplified in any work on equity jurisprudence. This is why, in expressing my opinion as to the extent of the liability of an owner, I have declared him liable under circumstances in which the Act does not expressly do so.

As I have already said, the point upon which all the Judges of this Court who dealt with the question agreed has been left undisturbed, namely, that there is created under the Act an interest on behalf of the materialmen and labourers in the fund constituted by the contract price in the hands of the owner—an interest, however, which requires for its *preservation*—not its creation—the registration of a claim of lien within a limited time.

Does the amendment to the words of the Act place the owner in such a position that, notwithstanding the fact of the lien, of its preservation by registration, and of his having actual notice that the lien holder is looking directly to the fund for payment of his claim, he may disregard the lien absolutely and pay over the money to the contractor, the lien holders' primary debtor.

It seems to me that this is not so, that the same principle of equitable interpretation is to be applied to this statute as has been applied to the Wills Act, the Statute of Frauds, and various Registration Acts as explained in Pomeroy's Equity Jurisprudence, 2nd ed., secs. 430-1—that the intention of these Acts, and the Mechanics' Lien Act, too, was, to use the words of Bramwell, L.J., in *Greaves* v. *Tofield* (1880), 14 Ch.D. 563, at p. 577, "to afford a protection to persons *whose consciences were not affected*," and (to adapt his words to the present case) not to give the owner whose conscience was affected an opportunity of joining with the contractor in the commission of an act which would frustrate the obvious purpose of the Act and inflict a wrong upon the lien holder. This Court has adopted and applied the same principle in construing the Land Titles Act, where, even in face of the enactment that mere notice shall not be deemed to be fraud, it has held that notice coupled with knowledge that acting in disregard of the notice will injure or destroy the right of which notice is had is fraud (*Sydie* v. *Saskatchewan & B.R. Land Co.*, 14 D.L.R. 51, 6 A.L.R. 388, and subsequent cases). In the present case the city had the distinctest notice—given to Sylvester, who had the superintendence of the building—of the claim of lien, its registration, its amount, and the fact that the plaintiff company was looking directly to the fund for payment, and,

further, it is a fair inference from the evidence that it was made known to Sylvester that, unless the plaintiff company was paid by the city, it would have to look to a company in liquidation—as Grant Bros., Ltd., then actually was or soon became. Yet, in spite of all this, the city paid over the whole balance of the contract price to the Bank of British North America as assignees under a much earlier assignment of all future debts of Grant Bros., taking, however, from the bank a receipt which, on its face, refers to the claim of the plaintiff company, for its claim of lien was, as the evidence shews, the only one known to exist, and which obliged the bank to refund the amount and pay any costs incurred by the city. This receipt is as follows:—

> The Bank of British North America hereby acknowledges to have received from the City of Calgary $1,457.98, the balance due as certified by the city engineer on the contract between Grant Bros., Ltd., and the city for plumbing, heating and water supply in connection with the Children's Shelter; and the bank hereby undertakes and agrees with the City of Calgary that, if any claim shall be made and established against the city under the Mechanics' Lien Act under said contract not exceeding the sum of $1,457.98, the same shall be paid by the said bank, and if any action is brought against the city to establish under such lien the bank will either pay the amount claimed, or, at its own costs and charges, contest said claim and indemnify the city against the same and any costs occasioned thereby not exceeding the amount hereinbefore mentioned—the city on receipt of said claim, or on being served with any proceedings in Court, to notify the bank thereof.
>
> Dated the 5th day of May, A.D. 1915.

I hold, therefore, that the city does not escape liability by reason of the absence of a *written notice* of the plaintiff company's lien.

In the result, I would allow the appeal with costs, and direct judgment to be entered declaring a lien in favour of the plaintiff company for $1,457.98, with interest at 5 per cent. per annum from the commencement of the action and the costs of the action, the judgment to follow the usual form.

Walsh, J.

WALSH, J.:—I am of the opinion that what took place between the defendant city and the Bank of British North America did not amount to a payment by the former to the latter of the balance owing by it to the contractor, and, therefore, that the plaintiff's right to a lien was not lost by its failure to give the city notice of it in writing under sec. 32 of the Mechanics' Lien Act before this money was handed over to the bank, even if such failure could in the circumstances avail the city as a defence to this action, as to which I express no opinion. The plaintiff filed

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its claim of lien on April 1, 1915, and its representative in Calgary, on the 16th of the same month, notified the city's building inspector who was in charge of the construction of the building in question that it had been filed. The amount then in the city's hands applicable to the payment of the plaintiff's lien, if it was entitled to enforce the same, was $1,457.98, not enough by $1.79 to satisfy the plaintiff's claim, which amounted to $1,459.77. This money remained in the city's hands until May 18, 1915, when it was paid over to the bank on the terms of the receipt or agreement signed by the bank, which is set out in full in the judgment of my brother Beck.

There is nothing in the oral evidence to shew why the city did this, but the wording of the bank's receipt and agreement, coupled with some of the other written evidence, makes it sufficiently clear. The contractor, Grant Bros., Ltd., on October 29, 1913, assigned to the bank all book debts and accounts then owing or that might thereafter become owing to it, and the bank, on February 25, 1915, gave the city written notice that the money owing by the city to the contractor was assigned to it and that payment of the same must be made to it. The position on May 18, therefore, was this. The city owed the contractor $1,457.98; the plaintiff, to the knowledge of the city, had filed a lien for $1,459.77, which was, so far as the evidence discloses, the only claim of lien outstanding in respect of this contract; the bank said that the contractor owed it $1,526.98, and claimed from the city, under the above assignment, payment of the amount so owing by the city. If the plaintiff's claim was good, it was entitled to a lien to the full extent of the money still owing by the city to the contractor, which would completely displace the bank's right under its assignment. And so the city practically said to the bank:—

> We owe Grant Bros. this money. The Dominion Radiator Co.'s claim of lien will exhaust it if that claim is good. We will let you have this money until it is decided whether or not it is good. If it does not prevail, you may keep the money; if it does prevail, you must return it.

And the bank accepted the money on these terms and bound itself by writing to observe them. The effect of all this was, I think, nothing more than to transfer to the bank the temporary control and use of this money, which would develop into an absolute right to it only if and when the plaintiff's claim of lien failed.

I do not think that this was a payment made by the city which entitles it to say that, when served with the statement of claim in this action, which was the first written notice given to it of the plaintiff's claim, it owed nothing to the contractor, and, therefore, under sec. 32, there was then nothing to which the plaintiff's lien could attach. It had let the money out of its hand, it is true, but with a string tied to it, which enables it to pull it back into its possession, if necessary. Mr. Adams quite candidly admitted that the city is but a nominal defendant, and that the real defendant, so far as the claim of lien is concerned, is the bank, whose solicitor he is, and for whom he hopes for a judgment which will entitle it to retain this money. Under these circumstances, I think sec. 32 cannot avail the defendant to defeat the plaintiff's lien.

I agree with the view of my brother Beck that the two items constituting the plaintiff's claim should be treated as items in a continuous account. There is, however, another objection to the plaintiff's right to recover which Mr. Adams spoke of as his principal ground and which deserves more than passing notice, namely, that, even upon this view of it, the lien was not filed within the time required by the statute. The articles constituting the pumping system as originally supplied were delivered to the contractor on December 14, 1914, they being the last goods to be delivered of all that make up the plaintiff's claim. If that is to be taken as the date from which the 35 days limited by the statute for the filing of the claim of lien are to run, the lien, of course, lapsed, for the affidavit was not filed until April 1, 1915. The plaintiff, however, relies upon the facts that certain parts of the pumping system, as thus supplied, were defective and that the contractor refused to accept or pay for the same until these defective parts were replaced, and that these parts were finally delivered on March 6, 1915, as fixing that as the date from which the time for filing the lien began to run, and, if that is so, of course it was filed in time.

I take the facts, in this connection, from the evidence of the defendant's witness Nichol, who was foreman of the work for the contractor, for he knows more about them than any of the other witnesses, as he was on the job all the time. The plaintiff merely supplied this plant. It had nothing to do with its installation. That was done by the contractor. It was installed in the

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last week of December, 1914, and the first week of January, 1915. There was trouble with it practically from the time that the contractor began to operate it, which was at once taken up with the plaintiff. The first trouble was over a broken pinion. From a letter which is in evidence and to the statements of which Nichol lends his approval, it would appear that the plant had just been started when the pinion broke, but later he says it had been in operation fully 10 days before the trouble with the pinion was discovered. This broken part was returned to the plaintiff by its Calgary representative on January 25, and a new one was sent to replace it. When it came, there was no key with it to hold it in place on the shaft, and that was sent for. Then, when it arrived, it appears from one of the letters in evidence, dated February 22, that Nichol and the plaintiff's representative went out "to get this outfit started," and they found the wheel was not straight. They took out the shaft and tried to take the wheel off, but the key was so twisted that it was impossible to remove it. It was found necessary to send for a new shaft and wheel, which arrived on March 6, and were placed in position by the contractor on March 13. These proved to be all right, and then this pumping system was quite complete, and there was no further trouble over it, though there does appear to have been some subsequent difficulty between the contractor and the city over its installation, but with that, of course, the plaintiff had no concern. The plant must, of course, have been idle between January 25 and March 6. It was sold by the plaintiff under the manufacturer's guarantee that

> our method of manufacture and inspection makes defects in workmanship and material almost impossible. If such defects exist, a year of operation will show them, and we will replace any such parts free of charge if claim is made within that time.

The argument for the defendant is that this plant was furnished on the date of its delivery to the contractor, namely, December 14, and that the subsequent delivery of new parts to replace the defective parts which its operation revealed was not by way of a completion of the plaintiff's contract, but was under the guarantee above mentioned. There was no agreement in writing between the plaintiff and the contractor for this plant other than the above guarantee. It was known that it was to be set up and used in the building which the city was then con-

structing and in which it was afterwards installed. There was, I think, an implied condition that it was reasonably fit for that purpose, and under sec. 33 of the Sale of Goods Ordinance the contractor was not deemed to have accepted them unless and until he had had a reasonable opportunity of examining them for the purpose of ascertaining whether they were in conformity with the contract. That reasonable opportunity could, I think, in this case, only be afforded by the installation of the plant and a testing of it in actual operation. It was for that purpose, according to the evidence of the defendant's witness Nichol, that it was operated for the first period of 10 days, at the end of which the trouble with the pinion developed. He says this was done "to satisfy the engineer" (meaning, no doubt, the city engineer) "that it was doing the work we claimed it would do." According to his evidence, the city had not then accepted the plant from the contractor and the contractor had not accepted it from the plaintiff. I think it a reasonable assumption from the evidence that all parties understood that it was to be put to this test, and that only when it stood up under it was the plaintiff to be deemed to have performed its contract and the contractor to have accepted the goods. There was nothing in the circumstances, therefore, to constitute an acceptance of them within sec. 34 of the Sale of Goods Ordinance until by the delivery of the shaft and wheel on March 6 and the subsequent testing of them the plant was made to measure up to the proper standard of efficiency. The facts of this case distinguish it, in my opinion, from the authorities relied upon by Mr. Adams, namely, *Neill* v. *Carroll*, 28 Gr. 339, as corrected in the footnote to *Summers* v. *Beard*, 24 O.R. 641; *Kelly* v. *McKenzie*, 1 Man. L.R. 169; *Kilbourne* v. *McEwan*, 6 W.L.R. 562, and numerous American cases. It is not contended that what the plaintiff supplied in this case to make this plant what the contractor and the city were entitled to have it, was supplied colourably for the purpose of extending the time for filing the lien. On the contrary, it is practically admitted that it was furnished in perfect honesty and necessarily for the proper operation of the plant. In the judgments of the Manitoba Court of Appeal in *Brynjolfson* v. *Oddson*, 32 D.L.R. 270, are collected many authorities, and, amongst them, a judgment of the Supreme Court of Canada, *Day* v. *Crown Grain Co.*, 39 Can. S.C.R. 258, which hold that if the work upon which the

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lien claimant relies as giving a new day from which the statute begins to run against his lien is something which the owner could have insisted upon before accepting it as complete, it will be sufficient for that purpose. To quote from the judgment of Idington, J., in delivering the judgment of the Court in *Day* v. *Crown Grain Co.*, *supra*, at p. 263:—

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> The test question here is whether or not the appellant could in law have sued on April 20 (the date here would be December 14) and recovered from Cleveland (the contractor) as for a completed contract. I am of opinion he could not. Trifling as the parts unfinished were, the party paying, in such a case, was entitled to insist on the utmost fulfilment of the contract and to have these parts so supplied that the machine would do its work.

Applying that test, I think the plaintiff must, on the facts of this case, have failed in such an action if he had brought it against the contractor immediately after December 14.

I concur in the disposition of the appeal by Beck, J.

Stuart, J. Ives, J.

STUART and IVES, JJ., concurred with WALSH, J.

Appeal allowed.

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PARTRIDGE v. WINNIPEG INVESTMENT Co.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. May 2, 1917.

ASSIGNMENT (§ II—21)—EQUITABLE—ORDERS.

An order directing the payment of a sum from the proceeds of a loan does not create an equitable assignment of the particular amount from a fund other than the one specially designated.

Statement.

APPEAL by plaintiffs from a verdict for defendants in an action to enforce an equitable assignment. Affirmed.

W. H. Trueman, K.C., and *A. B. McAllister*, for appellant.

A. E. Hoskin, K.C., and *E. G. Siddall*, for respondent.

Perdue, J.A.

PERDUE, J.A.:—This action is brought to enforce an equitable assignment. Gow, the owner of certain lands, entered into an agreement of sale of the land to Shaw. A considerable portion of the purchase price was payable by deferred instalments bearing interest. Gow applied to the defendants, the Winnipeg Investment Co. for a loan of $4,250 on the security of the agreement, and the company agreed to make the loan. There was $6,500 owing and unpaid on the agreement and Gow gave an assignment of it to the company, dated April 1, 1913, to secure the loan. On August 17, 1913, Gow, who was indebted to the plaintiffs, gave them the following order:—

To Winnipeg Investment Co.:

Please pay to the order of Messrs. Partridge & Halliday the sum of $1,260 from the proceeds of the loan coming to me on No. 1015 McMillan Ave. (Signed) A. M. Gow.

This order was enclosed with a letter from the plaintiffs to the company bearing date October 2, 1913. At the time it was received all moneys due under the loan to Gow had been paid out. In November following, Gow desired a further loan on the balance owing on the agreement. One Bettes was the managing director for both defendants, the Winnipeg Investment Co. and the Investors Limited. Gow applied to Bettes for the loan and the latter placed it with the Investors Limited. The last named company made the loan and by the direction of Gow paid the proceeds to the Northern Crown Bank.

The order on which the plaintiffs rely as creating an equitable assignment specially designated the loan made by the Winnipeg Investment Co. to Gow as the fund out of which the amount of the order was to be paid. There was no order given by Gow to Shaw to pay the plaintiffs any part of the money due by the latter on the agreement to purchase the land. There was therefore no equitable assignment to them of any part of the purchase money of the land. The plaintiffs never had an order on the Investors Limited. The order on the Winnipeg Investment Co. was of no avail because the proceeds of the loan they made had been paid out before the order was presented to them. The plaintiffs rely upon the written order signed by Gow. No case is made of a verbal assignment to the plaintiffs by Gow of money due to him from Shaw so as to bring it within *Riccard* v. *Prichard* (1855), 1 K. & J. 277 (69 E.R. 462); *Brown, Shipley & Co.* v. *Kough* (1884), 29 Ch.D. 848, 854; *Lee* v. *Magrath* (1882), 10 L.R. Ir. 45, 49; *Gurnell* v. *Gardner* (1863), 4 Giff. 626 (66 E.R. 857), and other cases relating to equitable assignments by parol. See 4 Hals. 375.

There is no legal or equitable liability to the plaintiffs from the defendants or either of them.

HOWELL, C.J.M. and CAMERON, J.A., concurred with PERDUE, J.A. Howell, C.J.M. Cameron, J.A.

HAGGART, J.A. (dissenting):—The question here is whether $1,260 was assigned by Gow to the plaintiffs, being a portion of the moneys coming to Gow under the sale or discount of an agreement to purchase a house and lot. The trial Judge gave a verdict for the defendants. Against that verdict the plaintiffs appeal. [Reference to 4 Hals. 375, White and Tudor, 8th ed., 111.] Haggart, J.A.

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In the case of *Fraser* v. *Imperial Bank*, 10 D.L.R. 232, 47 Can. S.C.R. 313, which was an appeal from our own Court, Davies, J., when discussing this same subject, says, p. 242:—

> Now, was there an equitable assignment to Fraser of Garson's Outlook contract? I agree with the trial Judge that there was. No form of words is necessary to create such an assignment. It is always a question of fact and of the intention of the parties to be gathered from what they said and did and from all the surrounding circumstances. Garson died before the suit began, and the only direct evidence of what took place between Garson and Fraser is that of the latter. Reading it, as I have done, several times over and applying it to the admitted facts of this case, I cannot doubt that, if believed, and the trial Judge who saw Fraser and heard his evidence believed it, the intention of both parties was that the entire contract and Garson's rights under it should, as expressed, be "taken over" by Fraser at the price Garson had for the stations to be built, and that Fraser should supply all the materials, do all the work and become entitled as between him and Garson to the contract price.

It is true, as claimed by the defendants, that the order is in terms directed to the Winnipeg Investment Co., Ltd.; but the specific amount of the fund is mentioned and the property which created that fund is named, and it was plainly evident to all parties concerned that whenever that fund should come into existence it was to go to the plaintiffs. If the foregoing authorities govern, then I think there was an equitable assignment of the same, and there was a charge created to that extent on these moneys.

Molsons Bank v. *Carscaden*, 8 Man. L.R. 451, was a case in which a firm of contractors agreed with one S. that if he would endorse their notes to the Molsons Bank to the amount of $10,000, they would give an assignment to the bank of all moneys to be payable to them from a railway company on contracts made and to be made by them with the railway company to secure the notes. They also agreed with the bank that in consideration of an advance to them of the money upon their notes endorsed by S., they would assign to the bank the said moneys, and gave to N., the bank manager, a power of attorney authorizing him to collect from the railway company the said moneys. S. endorsed the notes and the moneys were advanced. It was held there that this transaction amounted to an equitable assignment to the bank of the moneys in question, and that the moneys arising out of future contracts could be assigned. Killam, J., in delivering his judgment in this case observed, in relation to the case of *Brown* v. *Johnston*, 12 A.R. (Ont.), 190, that,—

In that case a debtor who had been in treaty with the defendants for the sale to them of his stock-in-trade gave to the plaintiffs an order directing the defendants to pay to the plaintiffs a certain sum out of the moneys payable to him on the purchase-money of the stock by them. No definite agreement had been made for the sale of the stock, but the debtor afterwards made one stipulating that it was to be for cash to be paid over to him at once, and the moneys were so paid. The decision was that under these circumstances there was no assignment of the moneys, as the stock was not assigned to the plaintiffs and the owner could agree for its sale upon such terms as he should see fit.

There are many authorities as to the assignment of future debts.

Re Clarke (1887), 35 Ch.D. 109; 36 Ch.D. 348, was a case where a mortgagor by deed assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person;" and also all real and personal property "of, in, or to which he was or during that security should become beneficially seized, possessed, entitled, or interested, for any vested, contingent, or possible estate or interest." The mortgagor afterwards became entitled under a will to a share of the personal estate of the testator. It was held there that the assignment of after-acquired property was divisible; and that although the general assignment of all property to which the mortgagor might become entitled might be too wide, as to which the Court gave no decision, the assignment for valuable consideration of all moneys to which he should become entitled under a will operated as a contract which the Court would enforce, and that the share of the personal estate of the testator was accordingly included in the mortgagor's security.

Another case along the same lines is that of *Heyd* v. *Millar*, 29 O.R. 735. A present appropriation by order of a particular fund not yet realized operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity. A married woman, as agent of her husband who was indebted for costs to a firm of solicitors, instructed one of the firm, after its dissolution, to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold, and it was held that the wife's instructions amounted to an equitable assignment, and that the solicitors were entitled to the proceeds of the sale as against an

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assignee under a written assignment of the same, subsequently made. And it was also held that the transaction there was not a contract concerning land, but simply an agreement to apply the proceeds of land when sold, and this verbal equitable assignment was held good as against a subsequent written assignment.

Another case is *Tailby* v. *Official Receiver*, 13 App. Cas. 523. There a bill of sale assigned all the book debts due and owing or which might during the continuance of the security become due and owing. It was held there that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on at the time of the assignment or in any other business. Lord Watson, at p. 533, in discussing the assignment of future choses in action, says:—

> The rule of equity which applies to the assignment of future choses in action is, as I understand it, a very simple one. Choses in action do not come within the scope of the Bills of Sale Acts, and, though not yet existing, may, nevertheless, be the subject of present assignment. As soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things, assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee. Mere difficulty in ascertaining all the things which are included in a general assignment, whether *in esse* or *in posse*, will not affect the assignee's right to those things which are capable of ascertainment or are identified.

And Lord Macnaghten, at p. 547, says:—

> The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained, you have only to apply the principle that equity considers that done which ought to be done.

In the case at bar the land was sold by Gow to Shaw under an agreement of sale between the parties bearing date April 1, 1913. On May 23, following, when there was still owing on the agreement $6,500 or thereabouts, Gow desired to raise money or to discount the unpaid instalments for the purpose of paying some of his creditors. Bettes, the managing director, did not advance

the whole, but decided to retain over $2,000 until Shaw had made some further payments. The assignment bears date May 23, and is given to the Winnipeg Investment Co., and is for the whole of the unpaid purchase money, and for the whole of Gow's interest.

On May 31, 1913, Gow gave an order on the Winnipeg Investment Co. in favour of the Northern Crown Bank for $3,005. This absorbed most of the money on hand. The plaintiffs were pressing Gow for moneys owing to them when, on August 17, 1913, he gave to the plaintiffs ex. 2, which is in these words:—

To Winnipeg Investment Co.,

Dear Sirs: Please pay to the order of Messrs. Partridge & Halliday the sum of $1,260 from the proceeds coming to me on No. 1015 McMillan Ave. [Sgd.] A. M. Gow.

"Cancelled as this amount has been settled previous to this date. Nov. 26th, '13. [Sgd.] A. M. Gow."

And by a letter dated October 2, the above, without the last clause written on it, was forwarded to the Winnipeg Investment Co., which directed the attention of it to Mr. Bettes.

The plaintiff Partridge attended Mr. Bettes' office for the purpose of getting payment, but to no purpose until about November 27, when liability was repudiated.

On or about the latter date, Bettes discounted the balance of the unpaid instalments, but he says that this further advance was made by the other company, "The Investors Ltd." and now claims that he did not have on hand for the Winnipeg Investment Co., Ltd., to whom the order is directed, any money,

Since the assignment of the Gow agreement to the Winnipeg Investment Co., Ltd., is absolute in form, I think it is a reasonable inference to draw that the moneys to be subsequently advanced would be paid over by that company. It does not appear that Gow or the plaintiffs knew of the existence of this other company, and in any event it is plain that the intention was that this sum of $1,260 should be paid to these plaintiffs, and the Investors Ltd. did not come into the transaction until November 26 or 27, when the matter was closed by paying over some $1,700 odd to the Northern Crown Bank, upon which date an order was signed by Gow directed to the Investors Ltd. to pay the bank.

The memorandum purporting to cancel the plaintiff's order was written by Gow in Bettes' office without any authority or

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even notice to the plaintiffs and must have been prompted by Bettes or the manager of the Northern Crown Bank, and this is what Gow has to say about the matter when examined as a witness:—

Q. I notice that at the bottom of ex. 2, Mr. Gow, these words, "Cancelled as this amount has been settled previous to this date. November 26, 1913, A. M. Gow." Would that be in your writing? A. Yes, it is. Q. How did you come to put those words there? A. It is a rather nasty one, you know. Q. Did anybody ask you to do that? A. No. Wait, I had better recollect this. Q. When was it done? A. I don't recollect it, but this was not in my possession and naturally someone must have handed it to me to do something, for that is in my writing, and the only excuse I can offer for having done it is that between the devil and the deep sea, and by handing this money to the Bank I would get money to pay Partridge. Q. Was there any discussion, Mr. Gow, between you and Mr. Bettes as to the order in favour of Partridge at the time you signed that? A. No; no discussion at all. If I was told to sign it, I suppose I did. Q. Was that signed by you at the time Mr. Bettes agreed to discount the balance of the agreement? A. It must have been, yes.

There is no question that Gow could not cancel that order. So far as Gow was concerned it took effect at once and he assumes to cancel it without notice to or the authority of the plaintiffs. The similarity of the two names, the Winnipeg Investment Co., Ltd., and the Investors Ltd., is a factor, and the fact that they both had their offices in the same room, that Bettes was the manager and executive officer of both companies. I do not think there is any question as to the intention of the parties, and if we give effect to that intention, then the money should go to the plaintiffs. I would look upon this transaction as a device to direct the money into the coffers of the bank, and the cancellation of this order above referred to shows, to my mind, that Bettes thought that the order sued upon, ex. 2, stood in the way.

Without any writing at all, following the above case of *Heyd* v. *Millar*, 29 O.R. 735, and the other authorities cited, in my opinion what was said and what was done under the circumstances forms a valid transfer of the money. The consideration was the doing of the work and forbearance after August 17. There is no question as to the intention of the plaintiffs and Gow.

It would be a mental and physical impossibility for Mr. Bettes to efface the managing director of the Investors Ltd. when he was acting or assuming to act for the Winnipeg Investment Co., Ltd., or to efface the manager of the Winnipeg Investment Co., Ltd., when acting for the Investors Ltd. When the fund came

into existence it would be subject to the equities and to the charge originally contemplated by the parties.

With all due respect, I differ from the trial Judge, and I would set aside his judgment and enter a judgment against the Investors Ltd., who, through their executive officer, had full knowledge of all these transactions, and I would allow the plaintiffs to amend their pleadings claiming the relief I would give them.

Appeal dismissed.

MUSGRAVE & Co. v. PARKER.

Nova Scotia Supreme Court, Graham, C.J., and Longley, Harris and Chisholm, JJ. April 21, 1917.

EXECUTORS AND ADMINISTRATORS (§ II A—30)—POWER TO GIVE OPTION—EXECUTED CONTRACT.

Money paid on an option given by an executor, which has expired through no fault of the person who gave it, will be treated as an executed contract, and cannot be recovered back.

Statement.

APPEAL from the judgment of Russell, J., in favour of defendants, in an action to recover back a sum of money paid for an option given by defendants as executors and trustees, for the purchase of the homestead property of the deceased, to be exercised within the period of 3 months, with a view of reselling the property and having failed to do so. Affirmed.

C. J. Burchell, K.C., and *F. D. Smith*, for appellants.

T. S. Rogers, K.C., and *J. McG. Stewart*, for respondents.

The judgment of the Court was delivered by

Harris, J.

HARRIS, J.:—The defendants, who are the surviving executors and trustees under the last will and testament of the late Dr. Daniel McNeil Parker, on September 3, 1915, in consideration of the sum of $1,500 paid in cash by the plaintiff, gave to plaintiff an option for the period of 60 days to purchase the homestead formerly owned by the deceased, known as "Beechwood," for the sum of $30,000. The option contained a provision, that if the proposed purchase was not completed on or before November 15, 1915, the $1,500 should be forfeited to the defendants as stipulated and liquidated damages.

Under the will of the late Dr. Parker, the executors were authorized to sell real estate and execute deeds, and the residue of the estate, after certain bequests were paid, was devised and bequeathed to the executors in trust for the sole use and benefit of the wife of the deceased for her life, and then for the use and benefit of all the children of the deceased, their heirs, executors,

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administrators and assigns forever share and share alike. As to the share of each of the daughters, the will provided that the executors were to hold it in trust to and for her sole and separate use and benefit free from the control of any husband for such period as the executors in their discretion should deem best in the interests of the daughter. The executors were further authorized and empowered to pay over and convey to any daughter at any time they saw fit any part or the whole of the principal or capital of such daughter's share. The will further provided that if the executors did not pay over to any daughter her share, they were to hold such share on the death of such daughter for the child or children of such daughter attaining twenty-one years, and if such daughter should die without leaving lawful issue her surviving, then as she should by her last will and testament direct and appoint.

The late Dr. Parker left a widow and 4 children, all of whom still survive except the widow. He had 1 son and 3 daughters. One daughter is unmarried and the other daughters and the son have children. The son, William F. Parker, is a defendant, and one the executors of the estate, and he and the daughters of the deceased authorized the defendants to give the option in question to the plaintiff. After getting the option, the plaintiff for the whole 60 days endeavoured to resell the property, and just before its expiry, endeavoured to get the option renewed for a further period. During the period of the option the defendants did not deal with the property in any way. The plaintiff being unable to effect a sale during the 60 days, and failing to get an extension or renewal of the option for a further period, brings the present action to recover the amount of the consideration paid for the option, $1,500.

The contention of the plaintiff is that executors and trustees having a power of sale cannot give an option and that there was no consideration for the payment of the $1,500 and that the defendants can be compelled to refund the amount.

Counsel for the defendants did not dispute the contention made on behalf of the plaintiff that executors and trustees cannot give a future option to purchase, but I have some considerable doubt whether the reason of the old decisions on this question apply to this case. The two English cases relied upon in support of the proposition were both cases in which the facts were very different from those involved in the present case. In *Clay* v. *Rufford*, 5

DeG. & S. 768, 64 E.R. 1337, the option was for twenty-one years, and in *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch.D. 236, an administrator had made an underlease and gave the tenant an option of purchase for a period of 7 years. These options were held invalid because it was said that if the estate should increase in value, they will have given the increase away, whereas, if it should decrease, the person to whom the option is given would not exercise it. In these days when the giving of an option for a short period in consideration of a substantial cash payment is recognized as (in some cases at least) the best means of effecting the sale of property it may well be doubted whether the rule should be applied. On principle, I do not see why an option for a short period in consideration of a substantial cash payment, if for the benefit of the *cestuis que trustent*, should not be held good, and if it were necessary to decide the point, speaking for myself, I would require to hear counsel further before deciding that this option was beyond the power of the executors. It is, however, not necessary to decide the question in view of the conclusion which I have reached with regard to another point more fully discussed at the argument.

The ground upon which, I think, this case must turn is this: assuming the law to be that executors and trustees cannot give a future option to purchase, the contract has been fully executed before action, and the plaintiff cannot in such case recover back the money paid. The plaintiffs got what they paid their money for. The defendants held the property for them and the plaintiffs had sixty days within which to endeavour to sell, and they tried to sell during the whole of that time. The option expired not because the defendants refused to convey the property, but because the plaintiffs did not pay the balance of the purchase money, and as I understand the authorities, it is immaterial whether defendants were bound to hold the property or not. They did hold it, and the plaintiffs got all they bargained for, all they paid the $1,500 for.

In *Fishmongers Co.* v. *Robertson*, 5 M. & G. 131, 134 E.R. 510, Tindal, C.J., had to deal with a case very similar to this. A company had made a contract but not under seal, and in those days a company could not contract except by deed, and Tindal, C.J., at p. 193, said:—

> The question therefore becomes this, whether in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained,

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it is an answer to an action of assumpsit by the corporation that the corporation itself was not originally bound by such contract the same not having been made under their common seal.

Upon the general ground of reason and justice no such answer can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered have received the consideration for their own promise; such promise by them is therefore *nudum pactum*; they never can want to sue the corporation upon the contract in order to enforce the performance of those stipulations which have already been voluntarily performed and, therefore, no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability to sue the corporation which suit they can never want to sustain. It may possibly be the case that up to the time of the corporation adopting the contract by performing the stipulations on their part there was a want of mutuality from the corporation not being compellable to perform their contract, and that the defendants might during that interval have the power to retract and insist that their undertaking amounted to a *nudum pactum* only. But after the adoption of the contract by the corporation by performance on their part, upon general principles of reason, the right to set up this defence appears altogether to fail.

In *Thomas* v. *Railroad Co.*, 101 U.S. at p. 85, Miller, J., said:—

There can be no question that in many instances where an invalid contract which the party to it might have avoided or refused to perform, has been fully performed on both sides whereby money has been paid or property changed hands, the Courts have refused to sustain an action for the recovery of the property or the money so transferred.

In *Parish* v. *Wheeler*, 22 N.Y., at p. 509, Comstock, C.J., in speaking of *ultra vires* acts of corporations, said:—

"But the executed dealings of corporations must be allowed to stand for and against both the parties when the plainest rules of good faith so require."

In *Whitney Arms Co.* v. *Barlow*, 63 N.Y., at p. 70, Allen, J., said:—

It is now very well settled that a corporation cannot avail itself of the defence of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement either equity will grant relief or an action in some other form will prevail. The same rule holds *e converso*. If the other party has had the benefit of a contract fully performed by the corporation he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

See also *Central Transportation Co.* v. *Pullman*, 139 U.S., pp. 35, 36; Brice on Ultra Vires, 701.

On this ground I think the appeal fails.

There were other grounds urged, but it is unnecessary, in my opinion, to consider them.

The appeal will be dismissed with costs. *Appeal dismissed.*

Re WINDING UP ORDINANCE AND TIMBERS Ltd.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 3, 1917.

COMPANIES (§ VI A — 305) — RIGHT TO APPLY FOR WINDING-UP — SHAREHOLDER—PARTNERSHIP.

A fully paid-up shareholder is entitled to apply for a winding-up order as a contributory; and where it appears just and equitable, a corporation formed out of a partnership may be dissolved as if it were in substance a partnership. A share held by the solicitor of a partner in trust for his client cannot be used to deprive the partner of his equal voice in the corporation.

Statement.

APPEAL from the refusal of Hyndman, J., to make a winding-up order. Reversed.

S. W. Field, for appellant; *C. C. McCaul*, K.C., for respondents.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The company has only three members, one Bell, the holder of 50 shares, one McPhee, the holder of 49 shares, and one Robertson, the holder of 1 share.

Bell and McPhee were formerly partners and in December, 1914, they formed the company for the purpose of carrying on the business theretofore carried on in partnership. As under our law there must be three shareholders, Mr. Robertson, who had acted as solicitor for the partners, was given one of McPhee's shares for the purpose of qualifying to permit of a valid incorporation. The partnership assets in which the partners had equal shares were turned over to the company. It is contended by McPhee that in respect of the 1 share held by Robertson he is a trustee and representative for McPhee. Bell and Robertson, however, while admitting that Robertson was to have no beneficial interest in the share and that all dividends in respect of it were to go to McPhee, contend that Robertson was intended to be an arbitrator or referee in case of any disputes between the original partners.

In June, 1916, differences having arisen in respect to the conduct of the business McPhee made an application to wind-up the company. This application which was opposed by Bell was allowed to stand and in the meantime an audit of the company's affairs was directed as well as a reference to the Master to ascertain the amount of the assets and liabilities. After this had been done an attempt was made to settle matters amicably by one of the old partners buying out the interests of the other in the business. Tenders were made by each and the one made by McPhee was

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accepted and an agreement attempted to be settled. It was thought by McPhee that this had been accomplished but Bell repudiated and upon an action being brought by McPhee against Bell and Robertson for specific performance and on appeal it was decided that no binding and enforceable agreement existed.

McPhee then attempted again to wind-up the company and also brought an action against the company and Bell and Robertson for an injunction to restrain them from holding meetings of the company and paying out moneys of the company. Injunctions were obtained and in part dissolved and the application for a winding-up order came on to be heard and was refused at the same time that the injunction restraining Bell and Robertson from holding a meeting of the directors was dissolved.

The first objection that is made to the application for a winding-up order is that McPhee is a fully paid-up shareholder and has no right to make the application. That his shares are in fact paid for in full under the ordinance is denied, but I do not consider it necessary to consider this for I am of opinion that even if they are paid up in full he is still entitled to apply.

Sec. 5 of the Winding-Up Ordinance (ch. 13 of 1903, 1st. sess.), provides that an application may be made by a contributory and it has been held under the similar provision of the English Act on the same definition of "contributory" as is given in our ordinance, that a fully paid-up shareholder is a contributory within the meaning of this provision (see *Re National Savings Bank Assocn.* (1866), L.R. 1 Ch. 547 and *Re Anglesea Colliery Co., ibid.* 555.) Those decisions were followed as recently as *Re Osmondthorpe Hall &c. Society* (1913), 58 Sol. J. 13, and *Re Colonial Assurance Co.*, 29 D.L.R. 488, 26 Man. L.R. 324.

Mr. McCaul in opposing the appeal urges that we should not adopt the construction given by the English Courts because it was based in part on the provisions of sec. 38 of the English Companies Act, 1862, to which we have no corresponding section.

Even if Our Companies Ordinance had no similar provision to that of sec. 38 yet having adopted the exact definition of "contributory" of the English Act for our Winding-Up Ordinance which is distinct from our Companies Ordinance after it had for years had a definite judicial interpretation we would I think not be justified in holding that it should not receive the same interpretation.

However, though we have no section corresponding in terms with sec. 38, we have sections of the Companies and Companies Winding-Up Ordinance containing provisions similar to those of sec. 38, which were considered important in interpreting the word "contributory" (see secs. 43 and 44 and 110 now substituted for 43 of the former ordinance and sec. 17 of the latter). I am of opinion, therefore, that even if McPhee is a fully paid-up shareholder he is entitled to apply for a winding-up order as a contributory.

The grounds on which the order may be made are declared by secs. 5 to be, "that in the opinion of the Court it is just and equitable that the company should be wound up." In addition to the proceedings to which I have made reference negotiations have taken place between the solicitors for a settlement by arbitration or otherwise but all without avail. Bell and Robertson together carry on the business and McPhee in the face of their combination can do nothing.

If Robertson in reality owned in his own interest the share which stands in his name McPhee would perhaps have no redress being in the unfortunate position of a minority shareholder. The fact is, however, that he and Bell alone are beneficially interested and in equal shares and unless McPhee can have an equal voice with Bell in the conduct of the business he is not receiving justice. Even if Robertson's representation that he was to act as an umpire in case of differences between the other members is correct he appears to have entirely failed in his duty. He or his junior partners have acted as solicitor for Bell and himself and the company in all the proceedings between them and McPhee. How anyone can do or permit that course and consider himself neutral I am at a loss to understand. Even if he had taken no sides with Bell before McPhee began proceedings it was quite inconsistent with the duty he owed McPhee to act or permit his partners to act as solicitors for the other party to the dispute when he was there for the express purpose of being impartial between them and qualified for that purpose on a share which really belonged to McPhee. When proceedings were taken against him by McPhee I should have thought he would have at once divested himself of his responsibility by transferring his share to McPhee whose it really was and left the old partners to thresh out their disputes between

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themselves. If he had done that the case would then have presented almost the identical situation that existed in the case of *Re Yenidge Tobacco Co., Ltd.*, [1916] 2 Ch. 426, where the question of what is just and equitable was determined in favour of the dissolution of the company. In that case two individuals with different businesses formed the company without any other shareholders, as they had a right to do under the English Act, the regulations giving each an equal voice in the conduct of the company's affairs. The business was carried on for over a year quite satisfactorily as in the present case and then differences arose and proceedings were taken and thereafter the members could not work together, the result being a deadlock. Provision had been made for the settlement of differences by arbitration and one arbitration had been had at a great expense. One member then applied for a winding-up order under the provision of the English Act which is in the same terms as that of our ordinance. The application was opposed and it was shown that the company was prosperous and making large profits. The Court of Appeal held that if the members of the company had been in partnership it would have been proper to order the dissolution of the partnership and it was consequently just and equitable that the company should be dissolved as they were in substance though not in form in partnership.

It appears to me that the situation of the present case increases rather than lessens the justice and equity of the application. The reason there is no deadlock here is that Robertson is prepared to work with Bell with the result that the applicant though interested equally with his former partner is deprived of all voice in the management of the affairs and cannot even prevent action by his opposition, however prejudicial he may consider such action.

I would therefore allow the appeal and direct that the company be wound up. There will be the usual reference to the Master at Edmonton. The applicant should have his costs of both the appeal and the motion to the Judge and in the winding-up both these costs and the costs of the company in opposing the application should be borne by Bell.

Appeal allowed.

MacEWAN v. TORONTO GENERAL TRUSTS Co.

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S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Duff, Anglin and Brodeur, JJ. February 6, 1917.

1. CONTRACTS (§ III E—275)—RESTRAINT OF TRADE—CRIM. CODE.
A contract whereby the sale of about ninety per cent. of the salt output in Canada is controlled, but where the quantity imported and subject to competition exceeds the home manufactured article, and the prices not having been enhanced thereby, is not in undue restraint of trade in violation of sec. 498 of the Criminal Code.

2. CONTRACTS (§ I C—16)—CONSIDERATION—SETTLEMENT OF ACTION.
The settlement of an action is a sufficient consideration for a promise to pay a sum in addition to the amount agreed upon by the settlement.
[*MacEwan* v. *Toronto General Trusts Co.*, 29 D.L.R. 711, 36 O.L.R. 244, reversed.]

3. CONTRACTS (§ I E—70)—STATUTE OF FRAUDS—DEBT OF ANOTHER.
An agreement by the head of a syndicate to pay an amount in connection with the settlement of an action against the firm is not a promise to answer for the debt of another within the Statute of Frauds, and need not be in writing.

4. EVIDENCE (§ XII A—920)—DECEDENT'S ACT—CORROBORATION.
An agreement of a decedent in connection with the settlement of an action may be proved and corroborated, under the Evidence Act (R.S.O. 1914, ch. 76, sec. 12), by the evidence of the solicitors for the parties thereto.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 29 D.L.R. 711, 36 O.L.R. 244, reversing the judgment at the trial in favour of the plaintiffs. Reversed.

Garrow, for appellant; *Weir*, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—I have come to the conclusion that this appeal ought to be dismissed. I do not give much credit to what has been said concerning the late Mr. Carter being desirous as a man of honour and as a matter of business honesty to pay his share of the appellant's claim in the former action. I know nothing of Mr. Carter beyond what appears in the record, but I think it is clear that he was engaged in transactions of a dubious character and being a rich man was not only willing but anxious that they should not be brought into public prominence by being discussed in a Court of law. Carter was president and manager of the Empire Salt Co., Ltd., one of the companies banded together in the Dominion Salt Agency of which he was also president. Whether he had rendered himself liable under sec. 496 of the Criminal Code might depend upon whether the objects of this concern were *unduly* in restraint of trade, but that they were in restraint of trade there can be no doubt. *Herbert Morris* v. *Saxelby*, [1916] 1 A.C. 688, 32 Times L.R. 297; *Andrew Millar and Co.* v. *Taylor and Co.*, [1916] 1 K.B. 402, 32 Times L.R. 161.

But though I think Carter had the best of reasons for wishing

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to have the action settled as he succeeded in doing, there is no reason on the face of things to suppose that he did not get it settled for the amount agreed upon after much negotiation between the solicitors for the parties.

It is suggested that he was willing to pay personally a further sum which would represent his share of the balance of the claim beyond the amount for which it was settled and that he entered into a binding contract with the plaintiff's solicitor to do so. It would, I think, require clear evidence to establish this and it seems to me that not only have we no such evidence but there is a good deal of evidence which would prevent a finding to this effect. That Carter would have been willing to pay whatever was necessary is possible, but that he intended to pay more than he could help is, I think, improbable.

The evidence of any member of the bar is entitled to be received with respect in the Courts but it would be invidious to allow any personal considerations to enter into our estimate of such evidence. Whilst therefore accepting Mr. Proudfoot's account of what took place between himself and the late Mr. Carter as being in accordance with his belief, it is necessary to weigh the evidence and remember that he is speaking of what took place years ago and that his conclusion is far from being supported by the circumstances.

I agree with the reasons for the judgment of the Appellate Division in holding that the evidence is of too doubtful and uncertain a character to enable the Court to find upon it any proof that a binding promise was ever made or intended to be made.

It seems to me most remarkable that Mr. Proudfoot should have omitted to inform his clients of such a promise and the fact that he allowed payment to stand over for years until after the death of Mr. Carter, the only person who could possibly have given any other explanation of the matter, renders it impossible to accept his recollection and understanding of the matter unaided as it is by writing of any sort or description.

Davies, J.

DAVIES, J.—A great many questions were raised and debated at bar upon the hearing of this appeal. Some of them related to the binding effect of the promise or contract sued on and alleged to have been made by the deceased, Carter, in his lifetime with Mr. Proudfoot, K.C., the solicitor of the appellant MacEwan, in

order to effect a compromise of an action then pending in which Carter was interested, and as to the necessity of corroborative evidence of such promise, and whether if made it was a promise to answer for the debt of another within the Statute of Frauds, and lastly whether there was any consideration for the promise.

On all these questions I concur with the dissenting opinion of Riddell, J., of the Appellate Division, and with the opinion of my brother Anglin, J., in this Court.

The only question upon which I entertained any doubt was whether the original agreement made between the MacEwans and one Ransford with respect to the control of their Salt Works in Goderich and for moneys alleged to be due under which agreement the compromised action had been brought, was an agreement in restraint of trade and contrary to the policy of common law and of the Criminal Code, sec. 498, and so unenforceable at law. This question was not referred to by the Appellate Division in their judgment which was determined on the other questions raised. It was, however, pressed forcibly in this Court by Mr. Weir.

Mr. Garrow for the appellant contended that even if the original agreement was unenforceable as being in restraint of trade and contrary to public policy, the contract on which the present action was brought was not affected thereby, as the contract now in question was based upon an entirely distinct agreement or promise made by Carter.

But if I felt obliged to hold the original agreement unenforceable as being in restraint of trade, I would also feel myself compelled to refuse the aid of the Court in enforcing the present agreement which, in my opinion, is based upon and depends absolutely upon the existence and enforceability of the original agreement the action with respect to which was compromised.

The substantial ground relied upon by Mr. Garrow was that this original agreement was not void on grounds of public policy and as being contrary to sec. 498 of the Criminal Code.

The original agreement was made between the MacEwans, representing the estate, and one Ransford, and was put in evidence.

It was to last for a period of 5 years and in consideration of the annual payment of $2,000 for the said period, gave the sole and exclusive control of the Salt Works and Plant of the MacEwans at Goderich to Ransford, with a provision allowing the MacEwans to "manufacture salt and sell the same to supply what

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was known in business as the local retail trade of Goderich" but "at prices which they would be advised of from time to time by Ransford." A further provision was to the effect that the MacEwans agreed not "to be interested directly or indirectly in the manufacture or sale of salt in any other place or places in Canada" while the agreement lasted.

No evidence of any kind was given by the defendants (respondents) that competition had been unreasonably or unduly prevented or that trade had been unreasonably or unduly restrained in the article of salt in any way, or that the agreement was unreasonable in the interest either of the parties or of the public, or that MacEwan had any knowledge that Ransford was acting for a larger combination and not for himself alone, while the evidence of MacEwan and Ransford was in favour of the plaintiffs (appellants) upon these points.

The respondents relied upon the agreement as being sufficient in itself and as being *ex facie* one which the Courts would hold to be an undue or unreasonable restraint of trade.

I am not able to accept that argument. The mere fact standing alone and without other evidence that for a consideration which it is not contended was unreasonable the owner of a salt mine or works and plant should agree to give the sole and exclusive control for a limited period to another person of those works and plant retaining only a right to manufacture for the local trade and sell to that trade at prices to be fixed by the purchaser of the control of the salt works, would not in my judgment justify the Court in holding such an agreement illegal.

I think the question of illegality is one which as a general rule depends upon the surrounding circumstances and that in a case such as this at any rate where no evidence of these surrounding circumstances was given, this contract on the face of it cannot be held so unreasonable as between the parties, or so detrimental to the public, that the Court would refuse to enforce it.

The latest authorities on the question fully support this position. They are: *Att'y-Gen'l of the Commonwealth of Australia* v. *Adelaide Steamship Co.*, [1913] A.C. 781, which is a decision of the Judicial Committee of the Privy Council, and *North Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461, a decision of the House of Lords. The headnote to this last decision states the facts as follows:—

The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market. The members of the company were entitled to be appointed as its distributors, *i.e.*, agents to sell on behalf of the company the salt which it had purchased from them. The defendants, who had not joined the combination, agreed to sell to the company for 4 years 18,000 tons of salt per annum, of which a certain proportion was to be table salt, at a fixed uniform price per ton, and undertook not to make any other salt for sale. They were to have the option of buying back the whole or a part of their table salt in each year at the plaintiff company's current selling price and were to be appointed distributors on the same terms as the company's other distributors. The defendants having sold salt in violation of this agreement, the plaintiff company sued them for breach of contract. The defendants did not by their defence raise the issue of illegality, but they sought to rely on certain facts and documents admitted in evidence at the trial upon other issues as shewing that the agreement was illegal as against public policy.

The House of Lords, reversing a majority decision of the Court of Appeal, held that the agreement there in question and substantially stated in the headnote was not *ex facie* illegal.

Upon the authority of these two cases determined, one by the Judicial Committee and the other by the House of Lords, I have no hesitation in deciding that *ex facie* the original agreement in question here is not illegal. The speeches of the noble lord who determined the case of the *North Western Salt Co.*, [1914] A.C. 461, are most illuminating and instructive upon the question I am discussing. I will content myself with quoting a few extracts only, one from Haldane, L.C., at p. 472:—

> In an appeal which recently came before the Judicial Committee of the Privy Council (*Att'y-Gen'l of the Commonwealth of Australia* v. *Adelaide Steamship Co.*, [1913] A.C. 781), my noble and learned friend Lord Parker delivered on behalf of the committee a judgment in which the law on these subjects was fully reviewed. Among other statements in that judgment there is one which bears closely on the question before us. After explaining the difference between a monopoly in the strict sense of a restrictive right granted by the Crown, and a monopoly in the popular sense in which what is meant is that a particular business has been placed under the control of some individual or group, he says (p. 796) that it is "clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties the onus will be no light one."
>
> My Lords, I desire to adopt this proposition as applicable to the question before us.

Another from Lord Moulton, at p. 476:—

> It may be shortly put as follows: If the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it

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only a part of the setting which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

The other extract, which I think very applicable to the appeal now under consideration, is from Lord Sumner, at p. 481. He says:—

> Whatever else can be made of it, if anything, this is certain, that we do not know half of the facts material to the case. For myself I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of salt. In such a matter partial information is as bad as none.

For the above reasons and on the above authorities, I concur in allowing the appeal and restoring the judgment of the trial Judge, Sutherland, J.

Duff, J.

DUFF, J., dissented from the judgment allowing the appeal.

Anglin, J.

ANGLIN, J.—The facts of this case appear in the judgment in the Ontario Courts, 29 D.L.R. 711, 36 O.L.R. 244.

Mr. Proudfoot's evidence was accepted by the learned trial Judge. While there are, no doubt, circumstances dwelt on by the Chief Justice of the Common Pleas which, as Riddell, J., puts it, "would—or might be—suspicious in persons of less high standing than Mr. Proudfoot," I cannot agree with the Chief Justice that they warrant rejecting his testimony or treating the definite promise made by Carter, to which he deposes, as an indefinite expression of mere intention, or as meant to create not a legal contract, but only the moral obligation of "a gentleman's bargain" I concur in Riddell, J.'s interpretation of Mr. Proudfoot's testimony and, unless I should discredit him—which I am certainly not prepared to do—the conclusion seems to me inevitable that the late J. I. Carter meant to enter into a legal contract—collateral to the settlement of the then pending litigation, but for which that settlement and the fact that he would thereby be relieved from what he deemed a humiliating, if not a dishonest position formed the consideration—to pay to the estate of the late Peter MacEwan, represented by the three plaintiffs then before the Court, five-sixteenths of the sum of $3,200 or $1,000.

The evidence of Mr. Proudfoot was not that of an opposite or interested party within R.S.O. ch. 76, sec. 12. Yet if, for any other reason, corroboration of it should be necessary or desirable I agree with Riddell, J., that it is supplied by the evidence of Mr. Hanna.

For the reasons assigned by that Judge and by Suther-

land, J., I am also of the opinion that the defendants' objections based on the Statute of Frauds and on the fact that the present plaintiff sues alone as administrator of his father's estate are ill-founded. If thought desirable for their protection by the defendants, the plaintiff's two brothers, who were joint plaintiffs with him in the former action, may be added as parties, as Riddell, J., has suggested.

Another defence, chiefly relied upon by the respondent in this Court, which was pleaded and was noticed in the trial judgment, is that the contract on which the former action was brought was illegal and that its illegality so tainted the agreement now sued upon, made in consideration of the compromise and settlement of that action, that it cannot be enforced. The illegality of the original contract has never been determined. The question of its validity might have been settled in the former action, but not without considerable trouble. The rights of the parties could not be known without a judicial decision. For aught that appears the plaintiffs at that time *bonâ fide* forbore further litigating a doubtful question. The consideration moving from them was the abandonment not of a right, but of a claim. In relinquishing their right to litigate that claim they gave up something of value. *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch.D. 266. Carter on his part escaped from an unpleasant position. There was, therefore, consideration for his promise and that consideration possibly was not illegal. Moreover, as his claim was presented at the trial the plaintiff did not invoke the alleged illegal contract.

On the other hand, what the defendant's testator agreed to do was to make good to the MacEwan Estate a part of the moneys which it sought to recover under the very contract alleged to be illegal. Though in a sense collateral, was not Carter's agreement in fact tantamount to a security to the plaintiffs for a partial payment of the fruits of the impugned contract and therefore, if that contract was illegal, itself fatally tainted? *Everingham* v. *Meighan*, 55 Wis. 354, at p. 360 *et seq.* Did it not spring from, and was it not a creature of, the contract alleged to be illegal? *Fisher* v. *Bridges*, 3 E. & B. 642, at 649; *Clay* v. *Ray*, 17 C.B.N.S. 188. (But see 1 Smith's L.C. (1915), pp. 435-6; *Armstrong* v. *Toler*, 11 Wheaton, 258, at 271 *et seq.*).

In order that this defence should succeed, however, the illegality of the original contract must be established. It is attacked

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as a contravention of sec. 498 of the Criminal Code, the scope of which was somewhat considered in *Weidman* v. *Shragge*, 2 D.L.R. 734, 46 Can. S.C.R. 1. The trial Judge dealt with this branch of the present case in a single sentence. He said:—"I am unable to find upon the evidence that the defence of the contract being void as against public policy was made out." It is not adverted to at all in the opinions delivered in the Appellate Division.

The MacEwans by their contract with Ransford, in consideration of an annual payment of $2,000, gave him control of their salt works and plant at Goderich for 5 years and agreed not to be interested directly or indirectly in the manufacture or sale of salt elsewhere in Canada, to discourage the erection of other salt works at Goderich and to turn over to Ransford all orders or offers for the purchase of salt which they should receive, other than for retail sales, retaining, however, the right to supply "the local trade," but at prices of which Ransford should advise them. I am not prepared to pronounce this contract *ex facie* illegal. Although it was executed after the formation of the Dominion Salt Agency, the MacEwans were unaware that Ransford was making it in the interests of that company, to which he subsequently assigned it. If they knew at all of the existence of the Dominion Salt Agency, they did not know that "there was an attempt being made to round up the salt trade." This evidence given by Hugh J. A. MacEwan is uncontradicted. Moreover it has been shewn that during the period in question, while the Dominion Salt Agency may have controlled 90% of the output of salt by Canadian manufacturers, the importation of salt, duty free, exceeded that output, and for aught that appears to the contrary this imported salt competed with the domestic article. It is also proved that no enhancement in the price of salt resulted from the formation and activities of the Dominion Salt Agency. Under these circumstances I am not prepared to hold, reversing the trial Judge, that it has been established that in making the agreement with Ransford the MacEwans contravened sec. 498 of the Criminal Code. The purpose may have been to limit the facilities for producing, manufacturing, supplying and dealing in salt and to lessen competition therein, but that it was to do so "unduly" has not been shewn. *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*, [1914] A.C. 461, at 469, 471. Neither can I say without more evidence than the present record furnishes as to the circumstances under

which the agreement was made and the situation of the salt trade at the time that the restriction imposed upon the MacEwans' right to manufacture and deal in salt was greater than was reasonably necessary for the protection of Ransford in taking over the control of their Goderich works and agreeing to pay therefor the sum of $2,000 per annum, or that it was clearly injurious to the public interest. *Att'y-Gen'l of Australia* v. *Adelaide Steamship Co.*, [1913] A.C. 781, at 794-7; *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630; [1894] A.C. 535; *Collins* v. *Locke*, 4 App. Cas. 674; *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q.B. 478, at 484; *Underwood & Son* v. *Barker*, [1899] 1 Ch. 300, at 303, 305. Anglin, J.

On the whole case I am of the opinion that the appeal should be allowed with costs in this Court and in the Appellate Division and the judgment of the trial Judge restored.

BRODEUR, J.:—I am of opinion that this appeal should be allowed for the reasons given by my brother Anglin. Brodeur, J.

Appeal allowed.

MACDONALD v. CASEIN.

B. C.
C.A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. June 5, 1917.

INJUNCTION (§ IB—22)—CONTRACT FOR PERSONAL SERVICE.

One who contracts to give an exclusive sale agency within a specified area and for a specified time will not, where there is no express negative stipulation, be enjoined from giving others the right to sell within that area before the expiration of the specified period.

APPEAL by the defendant from the order of Hunter, C.J.B.C. Reversed. Statement.

E. P. Davis, K.C., for appellant; *S. S. Taylor*, K.C., for respondent.

MACDONALD C.J.A.:—Whether this case be treated as one of personal service or one of sale of goods, the order appealed from cannot be sustained. Macdonald, C.J.A.

Regarded as a contract of personal service it is not distinguishable from that in question in *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416, in which the English Court of Appeal decided that a manager who had contracted to give "the whole of his time to the company's business" for a period therein specified could not be enjoined from giving within that period his services to another.

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In the case at bar the contract relied upon appoints the plaintiff "the sole agent for (the sale of) Sanagen" within a specified area for a specified time, but notwithstanding this, the defendant authorized others to sell within the area before the expiration of the specified period. In each case it was argued that the substance and not the form of agreement is to be considered; that if a man contracts to give his whole time or to give the sale agency, he in substance contracts not to work for another or not to give the agency to another. The Court of Appeal, however, in the case above referred to, declined to grant an injunction restraining the manager from giving his time to another.

Treated as a contract for the sale of goods as respondent's counsel argued it was, the plaintiff is met with the judgment of Jessel, M.R., in *Fothergill* v. *Rowland* (1873), L.R. 17 Eq. 132, where the contract was that the defendant should sell to the plaintiffs the whole of the coal got from No. 3 seam for a period of 5 years. An injunction to restrain defendants from disposing of the mine and thus disabling them from performance of their contract was refused. In *Donnell* v. *Bennett* (1883), 22 Ch.D. 835, the contract, apart from the express negative stipulation therein contained, was in terms from which a negative could be as clearly inferred as in the contract before us. Fry, J., granted the injunction because he felt bound to do so on account of the express negative agreement. At p. 840 he said:—

> I have come to the conclusion, therefore, upon the authorities which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty because I find it hard to draw any substantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation, which implies a negative. I find it exceedingly difficult to draw any rational distinction between the case of *Fothergill* v. *Rowland* (*supra*), and the case now before me, but at the same time the Courts have laid down that so far as the decisions have already gone in favour of granting injunctions, the injunction is to go.

In *Whitwood Chemical Co.* v. *Hardman*, *supra*, Lindley, L.J., said:—

> I agree with what the late Master of the Rolls, Sir G. Jessel, said about there being no very definite line. I agree in what Lord Justice Fry has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley* v. *Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend.

The tendency of the Courts now appears to be not to follow *Lumley* v. *Wagner*, 1 DeG. M. & G. 604 (42 E.R. 687), and the line of cases founded on that decision, unless there be in the par-

ticular case an express negative stipulation. Agreeing as I do with the observations above quoted, I would allow the appeal.

With respect to the costs, I would deprive appellants of them. The appellants' conduct as disclosed in their letters was most reprehensible. The odious doctrine of the "scrap of paper" is unblushingly adopted. In a letter of September 14, 1916, the appellant tells the plaintiff that it was farthest from appellants' thoughts to do him any harm or injustice, but that having arranged a big scheme for the whole of Canada *appellant did not feel that anything ought to stand in the way of carrying it out.*

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GALLIHER, J.A.:—I agree in the conclusions of the Chief Justice, and would allow the appeal.

Galliher, J.A.

MCPHILLIPS, J.A.:—I agree with the judgment of the Chief Justice. *Appeal allowed.*

McPhillips, J.A.

MONTREAL-CANADA FIRE INS. CO. v. NATIONAL TRUST CO. Ltd.

QUE.
S. C.

Quebec Superior Court, Allard, J. April 4, 1917.

COMPANIES (§ VII B—370)—EXTRATERRITORIAL POWERS AS TO DOING BUSINESS—INSURANCE.

An insurance company incorporated under a Dominion statute has the inherent power, unless forbidden by its charter, to carry on business and to issue policies to persons and on property outside of Canada.

ACTION to determine validity of insurance policies issued by a company incorporated under a Dominion statute insuring property situated outside of Canada. Validity sustained.

Statement.

A. Chase-Casgrain, K.C., and *A. C. Heighington*, for liquidator. *Eugene Lafleur*, K.C., and *G. M. Clark*, for claimants.

ALLARD J.:—The company in liquidation was incorporated by Act of the Parliament of Canada, 3 Edw. VII. ch. 158. Before the passing of this Act the said company bore the name of the Mutual Fire Insurance Company of the City & District of Montreal, and as such had been incorporated under Act of the Province of Canada of 1859. Since that date from 1859 to 1903 it has always existed with the powers which were first conferred upon it by its Act of Incorporation of 1859 and with the additional powers which were given it by various subsequent legislation.

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By the Statute of Canada, 22 Vict. ch. 59, statute of 1859, it was decreed that freeholders and other persons residing at Montreal might establish a mutual insurance company to insure properties situate within the limits of the said city only *and not*

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elsewhere under the name of the Mutual Fire Insurance Company of the City of Montreal. In 1903 this said company, the Mutual Fire Insurance Company of the City of Montreal, requested and solicited from the Parliament of Canada the Act of Incorporation which created it and gave it the powers which it possesses and which it has enjoyed up to the present date.

Sec. 2 provided that the name of the company be changed to that of the Montreal Canada Fire Insurance Company: Sec. 12, that as soon as the capital subscribed should reach $100,000 and 10% be paid, and as soon as the company should obtain its license, it might operate and insure according to the mutual and non-mutual systems *in the different provinces of Canada.*

After its incorporation the said company, in liquidation, fulfilled the requirements of the federal government, commenced immediately its operations and continued them up to the time when it was put into liquidation.

In the course of its operations, it made contracts of insurance and of re-insurance with persons and companies residing outside of the country, and for the purpose of insuring and re-insuring properties situated outside of Canadian territory. The policies for that purpose were issued in favour of the persons thus insured in the form of those which are annexed to the memorandum signed by the attorneys of the parties and marked A, B, C. These latter, after the said company had been put into liquidation, filed claims as creditors with the liquidator, claims based on the contracts of insurance and re-insurance mentioned above, made by the company defendant in favour of foreign persons and companies as above mentioned.

The liquidator contends that these claims are badly founded because these contracts of insurance and re-insurance were *ultra vires* of the powers of the company, in liquidation, and therefore null and of no effect.

On their part the claimants submit that these same contracts are *intra vires* and that the company had the right to enter into them.

For the purpose of obtaining a decision on the point raised, the said parties have submitted a joint memorandum containing an enumeration of the various Acts of Parliament and of the Legislature of Quebec relating to the incorporation of the said

company and the powers which have been granted to it, a classification of the different contracts of insurance and of re-insurance entered into by the said company in favour of the claimants and to which are annexed *fac-similes* of the policies issued by the said company, and, finally, the conclusions of each of the parties on the memorandum of fact and of law produced by mutual consent by the parties.

The contentions of the claimants are as follows: That the contracts of the kind marked A, B, and C are and were within the powers of the said company, and that these contracts are not null by reason of the fact: (1) That the parties insured resided outside of Canada; (2) that the properties insured were not situated within the limits of Canada; and (3) because the said contracts or some of them were completed outside of Canada; and the claimants ask, in conclusion, that the liquidator be ordered to pay their claims in as far as the monies of the said company are available.

On its part, the liquidator submits: (1) That the said contracts were *ultra vires* of the powers of the said company, because the said contracts of insurance or re-insurance were not made in the different provinces of Canada; (2) because the properties insured by the said contracts of insurance and of re-insurance are not situated within the limits of the different provinces of Canada, but in foreign territory.

And the liquidator asks, in conclusion, that the said claims be set aside, subject always to the rights of the said claimants to claim the whole or part of the premiums paid by them on the said contracts of insurance or of re-insurance.

Such are the questions submitted to the Court for adjudication in this case.

The first question which arises is that of ascertaining what are the powers and the rights which the company, in liquidation, received from the federal parliament by its Act of Incorporation.

Sec. 12 of the Act of Incorporation of the said company, 3 Edw. VII. ch. 158, says that the company will have the power to insure in the various provinces of Canada. Sec. 13 adds that it may cause itself to be insured against any risks it may have undertaken in the course of its business; and, finally, sec. 14 says that it may also accept from other companies insurances

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and re-insurances of their risks wherever the said risks may be situated.

Corporations have only the rights which are specially conferred on them by their Act or by the general laws applicable to their kind, and all those which are necessary to them in order to attain their purposes.

Corporations or companies may be incorporated either by charter or by an Act of legislature or of parliament. Those which are incorporated by charter without any restriction in their powers have the capacity of natural persons, and may do everything which a natural person may do, unless they are forbidden directly or indirectly by the Act creating them or by a general law capable of affecting them. Those which are created by statute can do all the acts which they are authorized directly or indirectly to do by the statute which created them.

Such is the doctrine which I find set forth in Hals.' Laws of England, vol. 8, p. 358.

According to this theory, the company, in liquidation, in this case could only do the acts which its Act of Incorporation authorized it to do—namely, make contracts of insurance and of re-insurance. It is evident that the company would not have had power to carry on another kind of business. And if it had done so, it would have acted without right, without power, and its acts would have been *ultra vires* of the powers conferred upon it. But if the company, in liquidation, had the right to make, in the Dominion of Canada, contracts of insurance and of re-insurance of the nature of those which are produced and attached to the said memorandum in the forms A, B, and C, could it carry on the same kind of business outside of Canada, and, if so, in virtue of what right and what power?

I believe that one must reply affirmatively to this question. The reasons which militate in favour of this solution are set forth at length in the different citations which follow and which I find in certain judgments of the Supreme Court of Canada and of the Ontario Court of Appeal. *Canadian Pacific R. Co.* v. *Ottawa Fire Insurance Co.*, 39 Can. S.C.R. 405, at 452, Idington, J.:—

> The sole questions are: Is it a corporation? Was it given power to carry on this kind of business; to form this kind of contract in question? If so, and given it at home, then it is always presumed to be implied as given elsewhere, wherever the comity of nations prevails.

Nor has the recognition abroad and force of that recognition depended on a provision, express or implied, in the charter or Act creating the corporation anticipating its going abroad to do business.

It simply depends on the kind of business it was incorporated to do. If that business can be done abroad, as well as at home, in addition to or as part of the home business, the right is inherent in the corporation to go there to do it unless recognition there is denied it. . . .

It is that any State creating a corporation without restricting its power is supposed to know as a matter of international law that the same kind of business it enables it to do can then legally be done abroad by this creation, in States that choose to accord it recognition.

When statesmen frame a law, its language must be read in light of that international law and unless clearly repugnant thereto or expressly excluding its operation both must be read together.

C.P.R. v. *Western Union Telegraph Co.*, 17 Can. S.C.R. 151, at 155, Ritchie, C.J., says:—

The comity of nations distinctly recognises the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein; for there can be no doubt that a State may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such proper terms and conditions as it may prescribe. With respect to foreign corporations generally, the statutes of New Brunswick provide for the service of process on foreign corporations carrying on business by agents in the province "whose chief place of business is without the limits of the province, and if established by the law of any other place," and provision is made for the proof of contracts by foreign corporation.

Howe Machine Co. v. *Walker*, 35 U.C.Q.B. 37, at 53, Richards, C.J., says:—

In *Bard* v. *Poole*, 12 N.Y., Denio, J., thus sums up the law applicable to this subject, at p. 504: They (corporations) are beings existing only in contemplation of law, and have no other attributes than such as the law confers upon them; and as the laws of a country have in general no extraterritorial operation, a corporation cannot challenge, as a matter of right, the privilege of dealing in a country not under a jurisdiction of the sovereignty which created it. Any of the States of the Union may, as this and several other States have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business within its jurisdiction. But, in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law, and not inconsistent with the policy of the State as indicated by the general scope of the laws or institutions, corporations are permitted, by the comity of nations, to make contracts and transact business in other States than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the Courts of such other States. It is, of course, implied that the contract must be one which the foreign corporation is permitted, by its charter, to make; and it must be one which would be valid if made at the same place

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by a natural person, not a resident of that State: *Silver Lake Bank* v. *North*, 4 Johns. Ch. 370; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Mumford* v. *American Life Insurance and Trust Co.*, 4 Comst. 463.

I find also in the Encyclopedia of Law and Procedure, *verbo* "Corporation," vol. 10, p. 144, par. 18, sanction of the same principle.

From these different citations, it follows that international law allows corporations, incorporated companies, the right to make contracts and to carry on business outside the country in which they have been incorporated, if these contracts are of the kind which they have been authorized to make in the country in which they were incorporated, and if they are allowed by the law of the country in which they are made.

The Parliament of Canada which incorporates a company without restriction of its powers is presumed to know that the same kind of business may be likewise carried on outside of its territory and to have given authority to carry it on, and unless it is clearly expressed in the Act of Incorporation that the incorporated company cannot carry on business outside of the territory, or unless the law of the foreign country where it wishes to operate forbids it, such corporation can carry on its operations there.

The liquidator contends that the Act of Incorporation of the company in liquidation restricts and limits its powers to Canadian territory.

I do not think that the said Act of Incorporation ought to be interpreted as prohibitive as to the territory where the company could operate.

It is well to note that the said company, at the time when it bore the corporate name of the Mutual Fire Insurance Company of the City of Montreal, had received by the Act 22 Vict. ch. 59, the right and the power to insure in the City of Montreal only, and *not elsewhere*, which means that, when the company was originally constituted as a corporation, it received restricted rights and powers, and there is no doubt that at that time it could not operate outside the limits of the City of Montreal. But the terms of sec. 12 of the Act of 1903, 3 Edw. VII. ch. 158, incorporating the present company, are not the same and are not restrictive like the first were. It is quite true that, by sec. 12, the Act of Incorporation gives it the right to do business in the

various provinces of Canada, but there is not found in this sec. 12 the same restriction or prohibition which is seen in the Act of 1859, 22 Vict.

It is evident that sec. 12 would have given the company as great powers as it actually has if the words "In the various provinces of Canada" had not been inserted. The Parliament of Canada cannot give to a company power to do business outside its own territory.

In my opinion, in order to decide that the company had not the right of making contracts of insurance outside the country, it would have been necessary that it should have been forbidden to do this in a formal and absolute manner by its Act of Incorporation.

The provisions of the statute which prescribe the place where the company will carry on business are not drafted in the negative form—that is to say, that it is not stated that the company may carry on business in the various provinces of Canada *and not elsewhere*. If they were drafted in this form, I am of the opinion that they would constitute a prohibition against carrying on business elsewhere, and that the violation of this prohibition would entail the nullity of contracts made in foreign countries, but the provisions of the Act of Incorporation of the said company are in affirmative terms only, and, in my opinion, do not constitute a prohibition against carrying on, in foreign countries, business of the same kind as it was authorized to transact in this country.

If we take a glance at the Insurance Act of 1910, we see that our legislators evidently had in view, in adopting that legislation, the law called international law, in virtue of which Canadian companies are authorized to do business outside of Canadian territory, and foreign companies to do business within the limits of Canadian territory. Thus, secs. 59, 60 and 63 of the said Insurance Act formally contemplate the case where Canadian companies operate outside Canadian territory, and in several other sections, notably 15, 32 and 58, these same insurance laws foresee the case where foreign companies, on authorization of the Minister of Finance of Canada, will carry on business on Canadian territory. Art. 79 of our Code of Procedure gives to foreign persons or corporations the right of suing in our province, always apparently in virtue of this same international law, and if these

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foreign companies have the right of action, they must also necessarily have that of contract, since the right of action is given only to enforce the execution of a contract. And, if we give to foreign persons the right to do business here in our province, why cannot a Canadian corporation do business in a foreign country? It can only be prevented by its Act of Incorporation or by the laws of the country where it does business. However, as I have said above, I do not see anything in the Act which restricts the powers of the company as to territory, and hinders it from going beyond the Canadian frontier to do that kind of business which it is authorized to do in this country. The company has not acted in contravention of its charter. The powers which the parliament gave it ceased, it is true, at the Canadian frontier, but, as a legal person having a legal existence, it had the power in virtue of international law to do in foreign lands the same kind of business as it was authorized to do in this country in virtue of its Act of Incorporation, provided that it was authorized to do so by the laws of the foreign country.

For these various reasons, I consider the various contracts of insurance and of re-insurance made and entered into by the said company in favour of persons residing outside of Canada and on properties situated outside the limits of this country *intra vires* of the powers of the said company, and that the claims of the various creditor claimants ought to be admitted by the liquidator.

I order the said liquidator to receive the said claims and to pay them out of the monies of the said company, according to their sufficiency and conformably to the law in such cases.

Judgment accordingly.

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CRISTALL v. McKERNAN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 17, 1917.

LANDLORD AND TENANT (§ III D—95)—COVENANT AS TO RENT—INSOLVENCY —FORFEITURE.

A provision in a lease that six months' rent shall become payable in advance in the event of the lessee's insolvency or his assignment for creditors is enforceable against the lessee if the tenancy had that period to run; it cannot be relieved against, as a penalty or forfeiture, where the lessor was compelled to lease the premises for the unexpired term at a reduced rent.

Statement.

APPEAL from a judgment dismissing an action for rent. Reversed.

Frank Ford, K.C., for appellant.

The judgment of the Court was delivered by

HARVEY, C.J.:—The plaintiff, the owner of certain hotel premises in the City of Edmonton, leased them to the defendant for the term of 2 years and 9 months, commencing on October 1, 1913, at a monthly rental of $2,000 payable in advance. The lease contained the following clause:—

And it is further agreed by and between the parties hereto that if the term hereby created shall at any time be seized or taken in execution or in attachment by any creditor of the lessee or if the lessee shall make an assignment for the benefit of creditors or become bankrupt or insolvent or take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or in case he shall do or suffer to be done any act whereby the license to sell intoxicating liquors in the said hotel shall become forfeited, refused, or suspended or whereby he, the lessee, shall become disqualified from holding such license, then and in such case, in addition to the then current month's rent, the next ensuing 6 months' rent shall immediately become due and payable and the said term shall immediately become forfeited and void.

On March 16, 1915, the defendant made an assignment for the benefit of his creditors to the official assignee. In a prior case of assignment to the assignee in which there had been a lease, the assignee took possession of the leased premises until he could wind up the estate, and an attempt had been made to hold him liable to the landlord for the remainder of the term. The case was then before the Courts, but it was ultimately held that he was so liable. In view of that experience he was unwilling to take possession in this case without a special arrangement with the landlord. This arrangement was found by the trial Judge to have been an agreement between him and the landlord that he should go into possession only for such period as he desired to wind up the estate and should pay the landlord at the rate provided for in the lease if the profits of the business justified it; otherwise, whatever the business or any surplus on the winding-up of the estate would pay.

He then went into possession and remained there until April 23, 1915, when he withdrew, having sold the chattels in the hotel to a purchaser who obtained a lease from the plaintiff until June 30, 1916, the date of expiration of the former lease, at a monthly rental of $1,000. Under each lease, the lessee was to pay the taxes also. At the time of making this second lease, plaintiff notified defendant and the assignee that he was making it, and that it was the best he could do, and that he would hold the defendant or his estate liable for the difference between the two rentals.

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He subsequently brought an action for this, and at the trial asked leave to amend by claiming in the alternative the value of 6 months' rent under the terms of the clause above set out. The action as framed was dismissed, but leave was given to amend, and by agreement between the parties, instead of filing a new amended claim in the same action, a new action was begun for this alternative claim and pending the determination of that action notice of appeal was given against the judgment in the former one. The second action also was dismissed, notice of appeal being given. This is, therefore, in form two appeals, though in substance it is one since the plaintiff only makes alternative claims. The clause in question is not a novel one and there are numerous cases in which the same terms have been under consideration, but in most of the cases the question under consideration was between the landlord and the assignee, the landlord claiming a preference over other creditors.

In *McKinnon* v. *Cohen*, 16 D.L.R. 72, 7 A.L.R. 317, my brother Beck held that a somewhat similar provision for the falling due and payment of 3 months' rent upon assignment was ineffective as against the assignee to give the lessor the full amount which he claimed, but intimated that it might be valid as between the parties subject to the jurisdiction of the Court to relieve against it as being a penalty.

In a later case in Saskatchewan, *Harwood* v. *Assiniboia Trust Co.*, 25 D.L.R. 830, 8 S.L.R. 162, Brown, J., held that a similar provision was valid even as against the assignee in view of the provisions of their Assignments Act, which authorized a preferential lien in favour of a landlord for rent for 3 months, following the execution of an assignment.

It is to be noted that in the present case no claim whatever is being made to a preference, the question being one simply between the parties.

In *Re Hoskins*, 1 A.R. (Ont.) 379, the provision was that in the event of insolvency "the term shall immediately become forfeited and void, but the next succeeding current year's rent shall nevertheless be at once due and payable." It was held that as to the subsequent year's rent, the landlord was not entitled to a preference which was the question for consideration. The only reasons for judgment are gven by Patterson, J.A., who says, at p 383:

Then as to the subsequent year's rent, I see no reason for refusing to hold that, as between the lessor and lessee, the amount became due and payable when the event happened which the lease declares shall produce that result, viz., the institution of the proceedings in insolvency.

And again on p. 384:—

It is argued by Mr. Roaf that this was a provision for the payment of a sum of money in the nature of liquidated damages, for the loss involved in the landlord's having to resume possession of the premises. It may be conceded that as between the parties to the lease it is an agreement of that character, and that, as I have already said, it creates a legal debt.

In *Baker* v. *Atkinson*, 14 A.R. (Ont.) 409, the provision, as appears from the report in 11 O.R. 735, was that upon the event happening "the said term shall immediately become forfeited and void, and the full amount of the next ensuing one year's rent shall be at once due and payable." The question was a complicated one between the landlord, who had distrained for the year's rent, and execution creditors. It was contended that the lease was forfeited by the action of the landlord in distraining, and that in consequence the term being ended, there was no right of distress. Hagarty, C.J.O., was the only Judge who dealt with this contention in the appeal and at p. 416 he says:—

I do not see why, notwithstanding the distress, the landlord might not still elect to continue the relation. Must we hold that his seizing for the amount, which would only be coming to him by reason of the assignment, is an absolute irrevocable election on his part to avoid the lease? . . . I do not see any inconsistency in holding that the lessor might still be held not to have elected to avoid. (And points out that) In *Jones* v. *Carter*, 15 M. & W. 718, . . . Parke, B., says: "The lease would be rendered invalid by some unequivocal act indicating the intention of the landlord to avail himself of the option given him and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease."

In a later case, *Linton* v. *Imperial Hotel Co.* (1889), 16 A.R. (Ont.) 337, this point was considered by all the members of the same Court, and it was then distinctly held that the provision for forfeiture of the lease was quite independent of that for the added payment, and that the distraining for the added rent was not by itself to be deemed as indicating an intention to forfeit. Hagarty, C.J.O., adhered to the view above quoted, and Osler, J.A., at p. 345 said:—

I think the clause is divisible, and the lessor may distrain for the rent so long as he has not elected to forfeit the term. If he elects to do that, he loses his remedy by distress, and is perforce driven to recover the rent in some other manner.

Burton and Maclennan, JJ.A., concurred. The provision of

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the lease in that case was, so far as material, similar to the one in the present case.

Now the conclusion from all these cases would appear to be that the provision that the ensuing six months' rent should become due is binding between the parties, and that it became due forthwith upon the making of the assignment to the official assignee. The liability then existed, and unless that liability was discharged in some way it would still continue. The trial Judge who dealt with this branch of the case was of opinion that there was a surrender of the lease by operation of law by reason of what took place subsequently, but I am unable to see that any surrender could discharge this liability unless it were one by agreement between the parties, of which some express or implied term would have that effect. The act of the plaintiff in making a new agreement with the official assignee different from the original lease was, it appears to me, an act so inconsistent with the continued existence of the term that it must be deemed to have put an end to it, but whether it should be treated as a surrender or a forfeiture, when the landlord had the right to effect either, may require consideration. If it is equally consistent with either view it may be that the one more favourable to the landlord is the one which should be accepted.

In *North West Theatre Co.* v. *MacKinnon*, 28 D.L.R. 63, 52 Can. S.C.R. 588, the case to which I have already referred in which the assignee was held liable under the lease by taking possession without making a new arrangement, Duff, J., in giving his reasons in the Supreme Court of Canada for reversing this Court said:—

> The Appellate Division seems to have proceeded upon the ground that occupation is to be attributed not to the exercise by the assignee of his rights under an assignment of the lease, but to a special arrangement with the landlord. Here the fallacy, with great respect, appears to be this: The landlord could only deal with the right of occupation of the property after cancelling or after a surrender of the lease. There is not a suggestion that there was any cancellation or surrender. The assignee's possession or occupation was, therefore, either wrongful or was an occupation under rights derived from McLachlan (the assignor). Being capable of an explanation which makes it a rightful possession, the assignee could not be heard to say that the possession was intentionally wrongful or in fact wrongful (p. 69).

It was because of the trouble in that case that there was an arrangement in this case with the landlord, which was not in accordance with the terms of the lease, under which the assignee went into possession. I am of opinion, however, that it is unnecessary to determine whether what took place constituted a

surrender or a forfeiture, and that being so the notices that were subsequently given need not be considered. If the plaintiff had elected to allow the lease to continue, the 6 months' rent, which he was entitled to receive at once in advance, would, if received, be in payment for the following 6 months' tenancy, but if the lease were determined there would be no further tenancy under the lease, and the money would require to be considered as liquidated damages, as suggested in *Re Hoskins, supra*, or a penalty as suggested in *McKinnon* v. *Cohen, supra*. In neither of these cases was it necessary to consider which it was, nor do I think it necessary to determine that point here. In this case, as in all the other cases, the lease, upon the event happening, had longer to run than the period for which the rent was made forthwith payable. The possibility that it might not be so under some circumstances ought perhaps to be taken into consideration if it were necessary to determine the question of penalty, but even if it is a penalty, the Court will relieve against it only on equitable grounds. The consequences of the defendant's act by reason of which he becomes liable to this penalty, if it be such, is that the plaintiff has lost the benefit of a good lease that had still more than a year to run. By terminating the lease and making new arrangements he has reduced that loss, but it is still a loss of $1,000 a month for 14 months, and it seems clear on the evidence that the new lease was as good a one as could be obtained. This loss is more than the $12,000 which would be payable, and there seems therefore no just and equitable ground on which there should be relief even in part. There is, of course, no ground for deducting any of the rent subsequently obtained, for it was not rent under the original lease, but under other arrangements.

For the reasons I have stated, I think the plaintiff is entitled to judgment for $12,000, the amount of 6 months' rent, and it naturally follows that that is the only claim in which he can succeed.

I would therefore allow the appeal with costs, and direct that judgment should be entered for the plaintiff for $12,000 with costs.

The respondent should have the right to set off his costs of the appeal so far as they apply to the other branch of the case, and also of the action in that respect in so far as not covered by the agreement between the parties. *Appeal allowed.*

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PROVINCIAL TREASURER v. SMITH.

Nova Scotia Supreme Court, Russell, Longley, Drysdale and Chisholm, JJ. June 2, 1917.

1. TAXES (§ V C—190)—SUCCESSION DUTIES—SITUS OF SHARES.
Shares of stock of a bank have their *situs*, for the purpose of succession duties, in the place of their registry office, and not where the bank has the head office; the share register is the document which determines the locality of the shares.

2. CONSTITUTIONAL LAW (§ II A—195)—DOMINION POWERS AS TO BANKS—SHARE REGISTRY OFFICES.
The Dominion Parliament, for the purpose of carrying into effect its powers as to banks and banking under sec. 91 (15) of the British North America Act, has the power to require banks, in the interest of shareholders, to maintain share registry offices where their shares may be conveniently transferred, though it in effect operates as a change of the *situs* of the shares from one province to another; it is no encroachment upon the constitutional powers of the provinces as to "property and civil rights in the province." The Dominion Bank Act, sec. 43, as amended in 1913, held *intra vires*.

Statement.

SPECIAL case agreed upon to determine whether bank shares owned by the late Wiley Smith, who died intestate, were liable to payment of succession duty to the province.

S. Jenks, K.C., Dep't Att'y-Gen'l, for the Provincial Treasurer.

W. A. Henry, K.C., for administrators.

The judgment of the Court was delivered by

Chisholm, J.

CHISHOLM, J.:—This is a special case stated under the provisions of the N.S. Judicature Act, Order XXXIII. The facts agreed upon are stated as follows:—

The administratrix and administrators of Wiley Smith, late of the city and county of Halifax, deceased, and the provincial treasurer for the province of Nova Scotia, the parties to the matter herein stated, concur in stating the question of law arising herein in the following case for the opinion of the Court without any previous proceedings having been instituted in respect thereto:—

1. Wiley Smith departed this life intestate at Halifax, in the county of Halifax, province of Nova Scotia, on February 28, 1916, and at the time of his death had his permanent domicile and residence within the said province of Nova Scotia.

2. Letters of administration were, on March 6, 1916, duly granted to Harriet W. Smith, L. Mortimer Smith, and the the Montreal Trust Co. by the Probate Court for the Probate District of the County of Halifax.

3. The next of kin of the said Wiley Smith, and their relationship to the intestate, are as follows:—Mrs. Harriet W. Smith, widow, Halifax, one-half interest; L. M. Smith, nephew, Halifax, one-eighth interest; J. E. Young, nephew, Shelburne, one-sixteenth interest; Mrs. J. B. Johnson, niece, Winthrop, U.S., one-sixteenth interest; Mrs. Emma Lighte, niece, New York, one-sixteenth interest; Johnson Smith, nephew, Cambridge, U.S., one-six-

teenth interest; Mrs. A. L. Ames, niece, Topenish, U.S., one-twenty-fourth interest; Mrs. Elizabeth Merrill, niece, Quincy, U.S., one-twenty-fourth interest; Mrs. Rachel Guilbert, niece, San Francisco, one-twenty-fourth interest.

4. The aggregate value of the property passing on the death of the said intestate exceeds (within the meaning of the Succession Duty Act, 1912) $100,000.

5. The property passing on the death of the said deceased consists, *inter alia*, of 2,076 shares of the capital stock of the Royal Bank of Canada, of the value of $442,168 or thereabouts.

6. The said Royal Bank of Canada, on and previous to the said February 28, 1916, as well as after the said date, had its head office in Montreal, in the province of Quebec.

7. The said Royal Bank of Canada, at the time of the passing of said property, and previously thereto, maintained within the province of Nova Scotia a share registry office under the provisions of sec. 43 of the Bank Act (Can.), at which the shares of shareholders resident within the province of Nova Scotia were required to be registered.

8. The said 2,076 shares held by the deceased and passing on his death, as aforesaid, were on and before February 28, 1916, duly registered at the said share registry office.

9. The provincial treasurer of the province of Nova Scotia, under the provisions of the Succession Duty Act, 1912, claims to be entitled to the payment of succession duty upon the said shares.

10. The question for the opinion of the Court is whether, in the circumstances stated, the said shares are subject to the payment of succession duty for the use of the said province.

The statutory enactment of the Parliament of Canada dealing with the opening and maintenance of share registry offices outside the province in which the head office is situate is the Bank Act, Canada, 3-4 Geo. V. ch. 9, sec. 43 (4):—

The bank may open and maintain in any province in Canada in which it has resident shareholders, and in which it has one or more branches or agencies, a share registry office, to be designated by the directors, at which the shares of the shareholders, resident within the province, shall be registered, and at which, and not elsewhere, except as hereinafter provided, such shares may be validly transferred.

The provincial enactment under which the plaintiff claims is the Succession Duty Act, 1912, ch. 13, sec. 6 (1), which is as fol ows:—

6. The following property, as well as all other property subject to succession duty, shall be subject to duty at the rates hereinafter imposed:

(1) All property situate in Nova Scotia, and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

The question which the Court is required to determine is, in brief, whether the shares of the capital stock of the Royal Bank of Canada, standing at the time of his death in the name of the

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late Wiley Smith on the Nova Scotia share register, constitute "property situate in Nova Scotia" within the meaning of sec. 6 (1) of the Act. It is to be noted that it is the shares only that are in question. The case is not complicated by any contest as to any part of the dividends accruing due on said shares at the time of the intestate's death.

The first point to be disposed of is that raised by Mr. Henry, K.C., who argued that sec. 43 of the Bank Act, if it is intended, and so far as its terms import an intention, to change the situs of such shares from one province to another, is *ultra vires* as infringing upon the rights exclusively granted to the provinces to legislate with respect to "property and civil right in the provinces."

By sec. 91 (15) of the B.N.A. Act the subject of "banking, incorporation of banks, and the issue of paper money" is assigned to the Parliament of Canada; and it has been decided in several cases that in assigning to the Dominion Parliament legislative authority in relation to the subjects enumerated in sec. 91, the Imperial statute, by necessary implication, intended to confer on parliament legislative power to interfere with and encroach upon matters otherwise assigned to the provincial legislatures under sec. 92, so far as may be necessary to give effect to legislation on the subjects enumerated in sec. 91. *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409; *Russell* v. *The Queen* (1882), 7 App. Cas. 829; *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31.

In *Cushing* v. *Dupuy*, Sir Montague Smith observed, pp. 415-16:

It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, so far as a general law relating to those subjects might affect them.

And in *Russell* v. *The Queen*, Sir Montague Smith, dealing with legislation by parliament relating to public order and safety, said, p. 839:—

That is the primary matter dealt with, and, though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. . . . They are of a nature which fall within the general authority of parliament to make laws . . . (in relation to) one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

In *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31, it was held that legislation by the Parliament of Canada on the subject matter of banking under sec. 91 (15) of the B.N.A. Act was valid

although it interfered with property and civil rights within the province.

The first general Act passed by the Parliament of Canada dealing with Banks and Banking is 34 Vict., ch. 5 (1871). Sec. 17 of that Act is as follows:—

> Books of subscription may be opened and shares of the capital stock of the bank may be made transferable and the dividends accruing thereon may be made payable in the United Kingdom of Great Britain and Ireland, in like manner as such shares and dividends are respectively made transferable and payable at the head office of the bank; and to that end the directors may from time to time determine the proportion of the shares which shall be so transferable in the United Kingdom, and make such rules and regulations, and prescribe such forms and appoint such agent or agents as they deem necessary.

And sec. 19 of the same statute enacts that:—

> The shares of the capital stock of the bank . . . shall be assignable and transferable at the chief place of business of the bank or at any of its branches which the directors shall appoint for that purpose and according to such form as the directors shall prescribe.

Thus it will appear that, as early as 1871, parliament gave authority to banks to make the shares transferable in the United Kingdom, or at any of its branches throughout Canada; and there has not been any substantial change in the statute in that respect until 1913, when what was before then simply an enabling provision was made compulsory in that the transfer of the shares of shareholders, resident within a province in which there is a share registry, must be transferred in such share registry, and not elsewhere: 3 & 4 Geo. V. ch. 9, sec. 43 (4). All the power directors have in regard to the transfer of shares they derive from the Dominion statute; and what was formerly optional, and was no doubt largely the custom, has been made compulsory. If parliament can validly prescribe several ways of transferring shares, why cannot parliament validly prescribe one way and one alone?

It seems to me that the statute of the Dominion Parliament, passed in 1913, was passed for the convenience and in the interests of the shareholders in the particular provinces where there were share registry offices; and that it is legislation reasonably necessary to the carrying out of the general purposes of the Act. If that view is correct, the amendment of 1913 cannot be held to be invalid as trenching upon the subject-matter of "property and civil rights in the province."

The question still remains as to the effect of the statute as regards the situs of the shares.

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Some cases were cited to show that an incorporated company, for the purpose of service upon it of process, etc., "dwells or carries on business" where its principal office is. For example, a railway company must be served where its principal office is, and not at any station along its line. These cases do not appear to me to be decisive of the question. The business of a company, that is, its business with third parties, or with the public, is quite a different thing from the locality of shares in a company.

Cases were also cited as to the locality of the business of a partnership, and these again deal with a subject of a different nature. The case most directly in point, if not on all fours with the present case, was that cited by Mr. Jenks, K.C., *Att'y-Gen'l* v. *Higgins* (1857), 2 H. & N. 339, where a testator domiciled in England owned shares in railway companies in Scotland, and the question arose where the stamp duty in respect to the shares was payable. *In arguendo*, the Attorney-General (Sir Richard Bethell) contended as follows, p. 344:—

> For general purposes personal property has no locality, but it has a locality for the purposes of probate. If there is a provincial probate, that operates only on property within the jurisdiction of the Court which granted it. These railway shares were personal property in Scotland. They were not within the jurisdiction of the Court which granted probate in England . . . The chief offices of these railways are in Scotland, and therefore the shares in question are personal property in Scotland.

Martin, B., in the course of his opinion, said:—

> At first I had considerable doubt about this case, but the argument of the Attorney-General has perfectly satisfied me. Two points were made by Mr. Manisty; the first was that the shares were *bona notabilia* here. I apprehend that he has entirely failed in that, and that they are not. It is clear that by the 19th section of the 8 & 9 Vict., ch. 17, the evidence of title to these shares is the register of shareholders, and that being in Scotland, this property is located in Scotland.

Watson, B., said:—

> If the testator had no property in England, and these shares in Scotland were all the property he possessed in the world, the Ordinary would have had no jurisdiction.

The authority of the case of *Att'y-Gen'l* v. *Higgins*, is conceded in later cases.

In *Att'y-Gen'l* v. *Sudeley*, [1896] 1 Q.B. 354, at 361, Esher, M.R., said:—

> The case of *Att'y-Gen'l* v. *Higgins* is really to the same effect. The head office of the railway company was in Scotland. The shares were, therefore, payable in Scotland.

And in 13 Hals'. Laws of England, p. 310, it is said:—"Where

by statute the evidence of title to shares is in the register of shareholders, the property is located where the register is." Citing *Att'y-Gen'l* v. *Higgins*.

The headnote of the case *Re Clark*, [1904] 1 Ch. 294, gives the facts briefly and is as follows:—

A testator domiciled in England by his will bequeathed all his personal estate in the United Kingdom to certain persons, whom he called his "home trustees" upon certain trusts; and he bequeathed all his personal estate in South Africa to certain other persons whom he called his "foreign trustees," upon other trusts. At the time of his decease the testator was possessed of the bonds payable to bearer of a waterworks company in South Africa, and of the shares in mining companies in South Africa. The bonds were only payable in South Africa. The mining companies were constituted according to the laws of the Transvaal and Orange Free State, and had their head offices in South Africa where the register of shareholders was kept and the directors met; but they also had an office in London where a duplicate register was kept and shares could be transferred. The testator's name was on the London register of the companies, and all his bonds and share certificates were at his bankers in London.

Held that the bonds passed under the bequest to the "foreign trustees," but that the shares passed under the bequest to the "home trustees."

Farwell, J., was the Judge, and he dealt with the matter in these terms:—

The testator was possessed of shares in a number of South African companies, *i.e.*, companies constituted according to the law of the Transvaal and Orange Free State. Those companies all have offices in London, as well as in South Africa, with boards of directors or officers, for the purpose of conducting the business of the company, of transferring shares and issuing share certificates here as well as in South Africa. So far, therefore, as regards any locality or situation of the share register or the means of transferring shares, it is impossible to say whether South Africa or England has the greater claim to be regarded as a guide to the Court as to what the testator meant by the words he used. . . . I have got to find out the locality of the personal estate, whether English or South African. The property I have to deal with is a share, and that is represented by a certificate without which no transfer can take place. The actual effective transfer can be done equally effectually in South Africa or in England, and the only conceivable distinction that I can discover in point of locality is the possession of the certificate which, for this purpose, is essential to complete the title to the shares. Therefore I hold that where the certificates of the shares in these companies were in England, they pass under the gift of property situated in England, and not under the gift of property in South Africa (pp. 298-9).

In two respects the facts in *Re Clark*, *supra*, and in the case at bar differ; transfers of bank shares can be made without the production of the certificate; and in the *Clark* case there were directors both in England and in South Africa. Although the certificate was regarded as important by Farwell, J., the essential

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and determining factor seemed to be the place where an effective transfer of the shares could be made; and the document to determine that is, in a case like ours, where the share-register is.

An exception to the general rule is made where the certificates are marketable, and pass by delivery, such as the certificate considered in *Stern* v. *The Queen*, [1896] 1 Q.B. 211, as to which Wright, J., said, p. 218:—

> It is found by the case that the certificates are currently marketable here as securities for that share, and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country, *ipso facto*, affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary.

See also *Winans* v. *Att'y-Gen'l*, [1910] A.C. 27.

Shares in a bank while marketable do not pass by delivery as in the above cases.

Another case which was referred to was *Att'y-Gen'l* v. *New York Breweries Co.*, [1898] 1 Q.B. 205 (affirmed later in [1899] A.C. 62).

There the testator was resident and domiciled in America, and had shares in a company in London. The company, at the request of the executors, registered the executors as the holders of the shares, and paid them the dividends and interest on the shares and debentures, without any probate of the will having been taken in England. The company were held to be executors *de son tort*.

The Solicitor-General (Sir Robert Finlay) *in arguendo*, contended:—"The defendants are an English company having their head office and register of shares and debenture-holders in England, and the shares and debentures are locally situate in this country: *Att'y-Gen'l* v. *Higgins*."

Rigby, L.J., said:—

> By English law, with which alone we are concerned in this case, probate duty is payable in respect of all assets of a deceased person, whether domiciled or resident within this country or not, which are within the meaning of the numerous decisions on this point locally situated in England. The authorities shew that for this purpose the following are treated as local assets subject to probate duty; (*a*) Any choses in action which are incapable of being effectually transferred without some act being done in this country. This would include

shares and debentures of a limited company incorporated in England, transfers or transmissions of which must, as in the present case, be completed by entries made in this country in a register of members or a register of debenture-holders. (*b*) Any debts payable by debtors in this country, including incorporated companies which, as in the present case, are registered, managed and controlled here.

In that case Collins, L.J., said:—

I think it cannot be doubted on the facts admitted that the defendant company have taken upon themselves to deal with the English assets of a deceased person. . . . The interest and dividends as well as the shares and debentures formed part of the estate of the deceased in England, being debts due from an English company and payable in England: *Att'y-Gen'l* v. *Higgins*, 2 H. & N. 339.

I am of opinion that the share-register is the document, and the only document which determines the locality of the shares. In the share-registry office in Nova Scotia, and nowhere else, could the intestate have made a valid transfer of his shares; and on the authority of *Att'y-Gen'l* v. *Higgins*, and the later cases following it, I am of opinion that the bank shares of the intestate were situated within the Province of Nova Scotia at the time of his death. *Judgment accordingly.*

BOURNER v. PAULING.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. June 5, 1917.

PARTIES (§ I B—55)—JOINDER OF PLAINTIFFS—SAME TRANSACTION—SAME QUESTIONS.

Moneys due to several persons in their respective capacities, under a contract for work and labour done, upon the same construction, there being no common question of law or fact, are not "causes of action arising out of the same transaction or series of transactions," to enable the several plaintiffs to join into one action, nor within the rule "where if such persons brought separate actions any common question of law or fact would arise," within the rules of the Supreme Court of B.C.

APPEAL by defendant from an order of Macdonald, J. Reversed.

E. P. Davis, K.C., for appellant; *E. A. Lucas*, for respondent.

MACDONALD, C.J.A.:—I agree in the reasons for judgment of Galliher, J.

GALLIHER, J.A.:—I have come to the conclusion that this appeal must be allowed.

I cannot agree, as contended, that these causes of action arose out of the same transaction or series of transactions: see the House of Lords decision in *Smurthwaite* v. *Hannay*, [1894] A.C. 494.

But if I am in error as to that, there is a further requisite under O. XVI., r. 1, namely, that "where if such persons brought

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separate actions any common question of law or fact would arise," both conditions must be fulfilled to bring a case within the rule: see Chitty, L.J., in *Stroud* v. *Lawson*, [1898] 2 Q.B. 44.

It was urged that the bonus agreed to be paid under the contract was a common question of fact, but that cannot be so as the payment of bonus was dependent upon the satisfactory work of each individual, and the evidence that A's work was satisfactory could not be used by B. or enure to his benefit.

The plaintiffs will be entitled to elect as among themselves who shall continue the action.

McPhillips, J.A.

McPHILLIPS, J.A.:—This appeal involves the consideration of the following Rules of the Supreme Court: 64, 123, 133 and 134. In my opinion the action is one within r. 64, *i.e.*, that the order for service out of the jurisdiction was proper; therefore the writ and service thereof in my opinion was rightly upheld by the Judge in the Court below. The remaining question is whether the three plaintiffs are entitled to join in the action. The contracts sued upon are identical in form, but no question of fraud or misrepresentation is alleged, nothing which can be said to enclose the causes of action into the ambit of one enquiry, either in whole or in part. The causes of action are simply for moneys due and owing in respect of contracts for work and labour performed in pursuance of the terms of separate and distinct contracts. Although it is true the contracts are alike in terms, yet the breaches of contract may differ and no common question is to be determined relevant to all the contracts; nor can it be at all successfully contended, as in *Drincqbier* v. *Wood*, [1899] 1 Ch. 393, that the several causes of action are the same and arise out of the same transaction. Nor can it be said to be a series of transactions. This will appear more clearly by examining and considering what Byrne, J., said in the above case, at p. 397:—

> I have, therefore, to consider whether the plaintiffs in the present case allege causes of action arising out of the same transaction. If in the present case, separate actions had been brought, there would be common questions of law and fact. It is perfectly true that if these plaintiffs had not entered into contracts they could not have a title to relief. The entering into the contract was a separate transaction. All the plaintiffs allege the right to relief to arise out of the issue of the prospectus containing false statements, and therefore out of the same transaction. I do not consider that the word "transaction" in the rule necessarily implies something taking place between two parties, as, *e.g.*, where a collision between two ships causes damage, or houses are shaken down by a traction-engine passing along a highway; it is perfectly true that to establish their respective rights to relief the plaintiffs

must prove their title on distinct evidence. But when each plaintiff has proved his title there is a common ground of action, namely, the loss to the plaintiffs caused by the defendants issuing the prospectus. I think, therefore, that the present case does come within the meaning of the rule, and that the defendants are not entitled to say that the plaintiffs must proceed in separate actions. The latter part of the rule provides for the prevention of injustice being done if the defendants are embarrassed by joinder of plaintiffs. In the illustration suggested of injury done to a terrace of ten houses by the illegal use of a traction-engine passing in front of them each owner would have to prove the title to his house, but the other questions of fact and law would be common to all the owners, and I have no doubt that they could all sue in one action.

It will be seen that the main matter of enquiry would be the prospectus and all contracted upon the faith of the truth of the prospectus. Here there is no question of representations made. The amount to be found due to each of the plaintiffs must be referable to the contract in each case; and there is no suggestion even of any common question of law or fact that will arise in respect of the several contracts. The contracts would appear to have been duly executed, and the sole question is, what sums of money are due and payable to each of the plaintiffs in respect to work and labour performed referable only to each of the contracts, and damages for alleged breaches of the contracts? and the amounts claimed all differ in amount.

In *Allen* v. *McLennan*, 31 D.L.R. 617, this Court held that there was no misjoinder of plaintiffs. There, as in *Drincqbier* v. *Wood*, *supra*, are to be found facts by way of false statements that influenced the parties to the contracts, statements of common import and interest, common inducing causes, "arising out of the same transaction or series of transactions" (r. 123).

Smith, L.J., in *Stroud* v. *Lawson*, [1898] 2 Q.B. 44, 67 L.J.Q.B. 718 (C.A.), at 720, said:—

> In my opinion several plaintiffs cannot bring themselves within the new rule unless it can be shewn that the right to relief claimed by them arises in each of their cases out of the same transaction.

I do not think it necessary to review the authorities at any greater length especially in view of the fact that this Court so recently dealt, somewhat exhaustively, with the question under consideration upon this appeal in *Allen* v. *McLennan*, *supra*. For the reasons stated I think the present case does not fall within the rule (r. 123) and that two of the plaintiffs and the claims made by them must be struck out—the plaintiffs amongst themselves to be put to their election as to which one will remain and proceed with the action. *Appeal allowed.*

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TOWNSHIP OF CORNWALL v. OTTAWA AND N.Y.R. Co.

Judicial Committee of the Privy Council, Lord Buckmaster, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Walter Phillimore, Bart. May 1, 1917.

TAXES (§ III B—132)—ASSESSMENT—STRUCTURES AND OTHER PROPERTY "ON RAILWAY LANDS"—EXEMPTION—R.S.O. 1914, CH. 195, SEC. 47 (3).

The words, "on railway lands," in R.S.O. 1914, ch. 195, sec. 47 (3) (the Assessment Act), exempting certain structures and other property "on railway lands" from municipal assessment, include all lands in the lawful use and occupation of a railway company, exclusively for railway purposes, or incidental thereto, without reference to the title under which they may be held.

[*Township of Cornwall* v. *Ottawa and New York R.Co.*, 30 D.L.R. 664, 52 Can. S.C.R. 466, affirmed.]

Statement.

APPEAL by special leave from a judgment of the Supreme Court of Canada, 30 D.L.R. 664, 52 Can. S.C.R. 466, affirming the judgment of the Appellate Division of the Supreme Court of Ontario, 23 D.L.R. 610, 34 O.L.R. 55.

The respondents were three railway companies which were the owners and lessees of an international railway bridge across the river St. Lawrence; they used the bridge exclusively for the purpose of railway traffic. The Canadian portion of the bridge was situated in the township of Cornwall. The bridge is described in the judgment of their Lordships. The soil of the bed of the river and of Cornwall Island, upon which the piers and abutments rested, were vested in the Crown in the right of the province.

The appellants in the year 1914 assessed the Canadian portion of the bridge for municipal taxation under the Assessment Act (R.S.O., 1914, ch. 195) at $300,000, and that assessment was confirmed by an order made by the Ontario Railway and Municipal Board. The order confirming the assessment was set aside by the Appellate Division, which declared that the bridge was not liable to assessment.

The Supreme Court of Canada, by a majority, affirmed the decision of the Appellate Division. Fitzpatrick, C.J., and Idington, J., dissented upon a question of procedure not raised upon the present appeal.

Clauson, K.C., *Barrington-Ward*, and *Gogo*, for appellants.

P. O. Lawrence, K.C., *W. L. Scott*, and *Hon. M. Macnaghten*, for respondents.

E. N. Armour, for the Attorney-General of Ontario, intervener.

The judgment of their Lordships was delivered by

Lord Parmoor.

LORD PARMOOR:—This is an appeal from a judgment of the

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Supreme Court of Canada confirming a judgment of the Supreme Court of Ontario. Special leave to appeal was granted by His Majesty in Council on August 18, 1916, the appellants undertaking not to raise on appeal the question that the Railway and Municipal Board of Ontario had no jurisdiction to hear the appeal direct from the Court of Revision, or that the Appellate Division of the Supreme Court of Ontario or the Supreme Court of Canada had no jurisdiction to entertain the appeals to those Courts. The question which was left open for the appellants to raise is whether a railway bridge, which is described in the assessment as an international bridge between Canada and the United States of America, is assessable to municipal taxation so far as it is situated within the Canadian boundary. The respondents raised in their case the further question whether the appeal is competent, having regard to a prohibition contained in a Provincial statute, R.S.O., (1914) ch. 186, sec. 48 (6), as amended by 6 Geo. V. (Ont.), ch. 24, sec. 26. The provisions in terms refer to an appeal from the Appellate Division, and not to one from the Supreme Court. The respondents in argument raised but abandoned the contention that the appeal was not competent. But their Lordships are of opinion that the Provincial statute does not affect the jurisdiction of the Privy Council to entertain an appeal from the Supreme Court of Canada.

The northern portion of the bridge crosses the north channel of the St. Lawrence by a cantilever span, and is supported on two abutments and six piers. The abutments are on the land to the north of the Cornwall Canal and on Cornwall Island; two of the piers are erected in the canal, one on the strip of land between the canal and the north channel of the St. Lawrence, two in the north channel, and one on Cornwall Island. The southern portion of the bridge crosses the south channel of the St. Lawrence. It rests upon two abutments, one on Cornwall Island and one on land within the territory of the United States, and upon four piers, one erected on the island and the other three south of the international boundary. No question arises on details or on cost of construction, and the position of the bridge is sufficiently shown on a map attached to the case of the appellants.

The Assessment Act (R.S.O., 1914, ch. 195) contains the provisions on which the appellants and respondents respectively rely in support of their contentions. Sec. 2 of the Act defines "land,"

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"real property," and "real estate" as including, *inter alia*, all structures erected or placed upon, in, over, under, or affixed to land and all structures erected or placed upon, in, over, under, or affixed to any highway or other public communication or water, but not the rolling stock of any railway, electric railway, tramway, or street railway. The distinction between structures placed over or affixed to land and structures placed over or affixed to any highway, canal, or other public communication or water becomes important in considering the assessment of railways under sec. 47 of the Act. Subject to certain exemptions, which are not material to the present case, sec. 5 of the Act renders all real property in Ontario liable to taxation. The structure of the bridge would therefore, apart from the special provisions as to railways contained in the Act, appear to be liable to assessment. Where an international bridge is liable to assessment the method of valuation is specified in sec. 46.

Sec. 47 is the section under which steam railways are assessed to municipal taxation, and the present appeal depends on the construction of this section. It enacts that every steam railway company shall annually transmit to the clerk of every municipality in which any part of the roadway or other real property of the company is situate a statement under four heads. These four heads designate what property of a steam railway is liable to assessment. This statement is communicated to the assessor, who is directed to make the assessment on the prescribed basis. There is a third sub-section which exempts from assessment certain structures and other property on railway lands, and used exclusively for railway purposes or incidental thereto, notwithstanding anything contained in the Act. It will be convenient to postpone the consideration of this sub-section to a later stage.

Under clause (*a*) of sub-sec. 1 the railway company is required to state the quantity of land occupied by the roadway, and the actual value thereof (according to the average value of land in the locality), as rated in the assessment roll of the previous year. There is no difficulty in determining the nature of this statement. It would comprise the superficial area occupied by the roadway between the relevant termini within the particular municipality and a valuation based on the assessment roll of the previous year. The corresponding direction to the assessor is quite explicit. He is to assess the quantity of roadway or right of way returned

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in the statement at the actual value thereof according to the average value of land in the locality; but not including structures, sub-structures, and super-structures, rails, ties, poles, and other property thereon. Land in the locality may be agricultural land or land of special value for building or commercial purposes. The effect is that the quantity of land occupied by the roadway is assessed at the same average land value as if such land had not been taken for the purpose of railway construction, and that a structure such as the bridge in question would not be included in the valuation.

Under clause (*b*) of sub-sec. 1 the statement is required to show the vacant land not in actual use by the company and the value thereof. This return and the method of assessment which the assessor is directed to follow cannot directly affect the present appeal, but the effect is that vacant land, not in actual use by a railway company, contributes to municipal taxation on the same basis as other vacant lands within the municipality.

Under clause (*c*) of sub-sec. 1 the statement is required to show the quantity of land occupied by the railway and being part of the highway, street, road, or other public land (but not being a highway, street, or road merely crossed by the line of railway) and the assessable value as thereinafter mentioned of all the property belonging to or used by the company upon, in, over, under, or affixed to the same. The quantity of land to be included in the return of the railway company would not comprise the land under the bridge crossing the two channels of the St. Lawrence. These channels are merely crossed by the line of railway. If, therefore, the channels are to be regarded as a highway, street, road, or other public land, they are excluded under the terms of the exception from the quantity of land which the company are required to return. There is no return of the assessable value of a structure not over or affixed to the land comprised within the statement. It may be noticed that under clause (*a*) the roadway occupied by the company has been returned and assessed. The statement of the quantity of land under clause (*c*) is not for the purpose of an overlapping assessment, and the assessable value to which this statement refers is not the assessable value of land as such, but of property belonging to or used by the company upon, in, over, under or affixed to any highway, street, road, or other public land.

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The direction to the assessor under clause (*c*) of sub-sec. 2 is clearly not applicable to the assessment of the bridge in question. The words, "not being a highway, street, or road merely crossed by the line of railway" are repeated, and there is a direction that the structures to be assessed shall not include any bridges in, over, under, or forming part of any highway.

Under clause (*d*) of sub-sec. 1 the railway company are required to make a return of real property, other than aforesaid, in actual use and occupation by the company and its assessable value as thereinafter mentioned. The assessor, under clause (*d*) of sub-sec. 2, is directed to assess the real property not designated in clauses (*a*), (*b*), and (*c*) of this sub-section in actual use and occupation by the company at its actual cash value, as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises. There is no doubt that the bridge is in actual use and occupation by the company. Its structure is clearly not designated in clauses (*a*) or (*b*). The only structures designated in clause (*c*) are structures over or affixed to any highway, road, or street.

In the opinion of their Lordships it is doubtful whether the word "highway," in association with the words "road or street," would include the two channels of the St. Lawrence crossed by the bridge, but it is not necessary to decide this question, since, in their opinion, the structure of the bridge is excluded from assessability under the terms of sub-sec. 3.

Sub-sec. 3 enacts that, notwithstanding anything in the Act contained, the structures, sub-structures, super-structures, rails, ties, poles, and pins or other property on railway lands, and used exclusively for railway purposes or incidental thereto (except stations, freight-sheds, offices, power-houses, elevators, hotels, round-houses, and machines, repair and other shops), shall not be assessed. This differentiation between railway structures and buildings used in connection with railway business is familiar in English law. The bridge does not come within the category of any of the exempted properties, and it is used exclusively for railway purposes or incidental thereto. The only question which arises for decision is whether it is "on railway lands."

In the opinion of their Lordships the words "on railway lands" have no reference to the title by which lands are held. It does not

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make any difference for rating purposes by what title lands are held so long as they are in the lawful actual use and occupation of the person or company on whom a rate is sought to be levied.

The bridge is affixed to the land on which the abutments and piers rest. Both the abutments and five out of the seven piers within the Canadian frontier are erected on land outside the channels of the St. Lawrence and capable of being purchased and acquired by the railway company under ordinary statutory procedure. There is no reason to assume that they are not lands in the lawful use and occupation of the railway company, and therefore in the ordinary sense railway lands. It is not necessary to inquire whether any special permission was required in reference to the use and occupation of land in the south channel of the St. Lawrence, nor are any such questions raised, since the only effect of proving that such use and occupation are not lawful could not be in favour of establishing a liability to assessment. In the opinion of their Lordships the bridge is affixed to lands in the lawful use and occupation of the railway company and is a structure on railway lands within the meaning of sub-sec. 3. They agree in the view expressed by Meredith, C.J.O., which is followed by Anglin and Davies, JJ. (23 D.L.R. 610, at 614):—

> The erection of the bridge having been authorised by Parliament of Canada, it must be assumed for the purposes of the case that it is a lawful structure, that the railway company is entitled to maintain it as it has been constructed, and that its occupation of the soil by the piers and by the super-structure, in so far as the latter occupies the land of the Crown, is a lawful occupation; and, that assumption being made, the bridge is, in my opinion, a structure on railway lands within the meaning of sub-sec. 3.

In the opinion of their Lordships the appeal should be dismissed, with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

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ANDERSON v. CANADIAN NORTHERN R. CO.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Newlands, Lamont, Brown, and McKay, JJ. July 14, 1917.

RAILWAYS (§ II D—70)—INJURY TO ANIMALS AT LARGE—WILFUL ACT—NEGLIGENCE.

"Wilful" in sec. 294 (4) of the Railway Act, ch. 37 R.S.C. 1906, means "intentional," and an owner who intentionally turns his animals at large cannot recover damages if they stray to a railway right of way and are killed thereon by a train.

[See annotation following.]

Statement.

APPEAL by plaintiff from a judgment of Elwood, J., 33 D.L.R. 418, dismissing his action for damages for loss of certain ponies killed by the defendant's train. Affirmed.

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Newlands, J.

G. E. Taylor, K.C., for appellants; *J. N. Fish*, K.C., for respondents.

HAULTAIN, C.J., concurred with Newlands, J.

NEWLANDS, J.:—The trial Judge found the facts in this case as follows:—

In the month of January, 1916, certain Shetland ponies belonging to the plaintiffs were killed upon the right-of-way of the defendant company. This right-of-way was fenced on either side, but the cattle guards at the highway crossing, from which the ponies got upon the right-of-way, had been removed apparently by the defendant company.

The evidence shews that in the month of November, 1915, these ponies were turned out to let run with other stock; that for the most part they grazed upon a section of land about a mile from the land of the plaintiffs, and between 1 and 2 miles from the crossing where they got upon the railway; that they were in the habit of coming home for water, and were looked up by the plaintiffs every day or two; and that, so far as the plaintiffs know, they had never before the accident strayed from the section on which they were pasturing.

At the time of the accident, the municipality in which the accident occurred had not passed any by-law prohibiting the animals from running at large, pursuant to ch. 32 of the statutes of Saskatchewan of 1915.

And upon these findings gave judgment for defendants. Plaintiffs appeal on the ground that the trial Judge should have found that the animals were not at large through the negligence or wilful act or omission of the owners or their agents within the meaning of sec. 294 (4) of the Railway Act.

Ch. 32 of the Acts of 1915 provides that it shall be lawful to allow animals at large in Saskatchewan unless the municipality passes a by-law to prohibit them.

This Act was considered by me in *Early* v. *C.N. Ry. Co.*, 21 D.L.R. 413, 8 S.L.R. 27, and again by Lamont, J., in *Koch* v. *G.T.P. Ry.*, [1917] 1 W.W.R. 1120, 10 S.L.R. 35 (32 D.L.R. 393), and we came to the conclusion that it was not negligence to allow cattle to run at large where no by-law prohibited them. This latter case has been wrongly reported in that it states that McKay, J., agreed with the judgment of Lamont, J. I was the only Judge who agreed with him on this point. Brown, J., agreed that there was no negligence, but stated that he had not considered the effect of the want of a by-law, and McKay, J., concurred with him. There is, therefore, no binding decision of this Court that, where it is lawful for animals to run at large, it is not negligence to allow them to do so.

I am of the opinion, however, for the reasons stated by Lamont, J., in *Koch* v. *G.T.P.*, *supra*, that to allow them to run at large

in such a case is not negligence, but I am also of the opinion, which I expressed in *Early* v. *C.N.R.*, *supra*, that animals, when so allowed to run at large, are at large by the wilful act of the owner.

Where animals stray on to the property of another person, such animals are trespassers. It is not necessary to fence as against trespassers: *Luscombe* v. *Great Western R. Co.*, [1899] 2 Q.B. 313.

Upon the same principle, it is not necessary to erect cattle guards as against them: *Early* v. *C.N.R.*, *supra*. Therefore, if animals stray upon the property of another person and are accidentally killed, the owner upon whose property they are killed is not liable: *Tillett* v. *Ward*, 10 Q.B.D. 17.

It, therefore, follows that, if it were not for sub-sec. 4 of sec. 294 of the Railway Act, a railway company would not be liable in damages for cattle accidentally killed upon the right-of-way when such animals are trespassers.

That sub-section imposes a liability on a railway company which is not theirs by common law. It makes the company liable in damages to the owner of animals killed or injured by a train when such animals are at large upon the highway or otherwise and get upon the property of the company and are so killed or injured, unless the company, in the opinion of the Court or jury trying the case, establishes that such animals got at large through the negligence or wilful act or omission of the owner or of the custodian of such animals or his agent.

It having been shewn in this case that the animals were allowed at large by the owner, and were, therefore, at large by his wilful act, the company is not liable.

Mr. Taylor further appealed on the ground that sec. 294 (4) of the Railway Act was *ultra vires* of the Dominion Parliament.

As I have pointed out, it is only by virtue of this sub-section that the company would be liable, and it is, therefore, of no importance to this decision whether this sub-section is *ultra vires* or not. I would, however, express it as my opinion that, as this sub-section only imposes a liability on a Dominion Railway, a subject over which the Parliament of Canada has exclusive jurisdiction, the sub-section in question is *intra vires*.

The appeal should be dismissed with costs.

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The defendant company counterclaimed for damages caused to the company's engine by these animals, which was found against them by the learned trial Judge. From this decision the company also appealed. I am of the opinion that the trial Judge was right. In *Tillett* v. *Ward*, *supra*, Lord Coleridge, C.J., at p. 20, said:—

Newlands, J.

In the present case, the trespass, if there was any, was committed off the highway upon the plaintiff's close which immediately adjoined the highway, by an animal belonging to the defendant, which was being driven on the highway. No negligence is proved, and it would seem to follow from the law which I have previously stated that the defendant is not responsible. We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway the owner of the land must bear the loss.

The defendants' appeal should also be dismissed with costs.

Lamont, J.

LAMONT, J.:—Sec. 294 (1) of the Railway Act reads as follows:—

No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

Sub-sec. (2) provides that cattle at large contrary to the provisions of this section may be impounded. Sub-sec. (3) provides that if they are so at large and are killed or injured at the intersection the company shall not be liable. Sub-sec. (4) is as follows:—

When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; provided, however, that nothing herein shall be taken or construed as relieving any person from the penalties imposed by sec. 407 of this Act.

For the plaintiffs two arguments were advanced: (1) that the turning of their ponies out to grass was neither "negligence" nor "a wilful act or omission" within the meaning of sub-sec. 4 above quoted; (2) that, apart from sub-sec. 4, the plaintiffs were entitled to recover by reason of the failure of the company to maintain cattle guards at the crossing.

That the ponies were at large is beyond question. It is also beyond question that they were killed on the property of the

company by the defendants' train. Under these circumstances, the plaintiffs are entitled to recover unless it is established that they got at large through the plaintiffs' negligence or wilful act or omission.

It is contended that they were not at large through the plaintiffs' negligence, because they were under no obligation to keep them at home.

Sec. 4 of ch. 32 of the statutes of Saskatchewan (1915), reads:—

> 4. Subject to the provisions of this Act it shall be lawful to allow animals to run at large in Saskatchewan.

As against this, the defendants contend that permitting animals to run at large was prohibited by sec. 294 (1), and that the provincial legislation was ineffective as against the provisions of the Railway Act. To this it was replied that the prohibition in sec. 294 (1) was *ultra vires*.

If the Federal legislation was simply an enactment that cattle shall not be permitted to run at large upon the highway within half a mile of a railway crossing, I would be inclined to doubt the validity of such legislation, as the running at large of cattle is a matter of local concern within the jurisdiction of the provincial legislature. But it is surely within the jurisdiction of the Parliament of Canada to fix the liability to be imposed upon a Dominion railway in case cattle are killed by the railway while at large.

It was argued that, where animals are at large contrary to the provisions of sec. 294 (1), it was a conclusive answer to the plaintiffs' contention that they were not guilty of negligence in allowing them to be at large. In my opinion this argument cannot be supported, because, under sub-sec. 4, even when cattle are at large contrary to the provisions of sub-sec. (1), the owner may still recover unless the company proves that they got at large through the negligence or wilful act or omission of the owner or one for whom he was responsible. Proof that the animals were at large contrary to sub-sec. (1), is not evidence of that negligence on part of the owner which frees the company from liability. To escape liability, the company must show that the ponies—before they came within the prohibition of sub-sec. (1) at all—had got at large through the negligence or wilful act or omission of the owner.

In my opinion, the prohibition of sub-sec. (1) has no applica-

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tion, nor does it render inoperative, as against the railway, the provincial legislation.

We have, then, to determine whether or not the turning out of the plaintiffs' ponies to graze constituted "negligence or wilful act or omission" on their part through which they got at large.

Dealing first with negligence:

In *Koch* v. *G.T.P. Branch Line Co.*, 32 D.L.R. 393, 10 S.L.R. 35, I held that an owner was not guilty of negligence in allowing his animals to run at large where there existed a valid municipal by-law permitting them to do so. I adhere to the view I there expressed. Negligence is a breach of the duty to take care which, under the circumstances, the plaintiffs owed to the defendants. As applied to this case, it could only be a breach of the duty to keep their animals from being at large. At common law that duty rested on the plaintiffs. The legislature, however, declared that no longer should the plaintiffs be under that obligation. As there was no duty resting on the plaintiffs to keep their animals from being at large, there could be no breach of that duty, and, consequently, no negligence.

Then, was it a "wilful act or omission"?

In *Early* v. *C.N.R.*, 21 D.L.R. 413, 8 S.L.R. 27, this Court held that turning horses out and letting them run at large was a "wilful act" within the meaning of sub-sec. 4.

In *Greenlaw* v. *C.N.R.*, 12 D.L.R. 402, 23 Man. L.R. 410, the Manitoba Court of Appeal held that an owner was not guilty of negligence or wilful act or omission in turning cattle out to graze on the highway when there was in operation a municipal by-law permitting him to do so.

If the decision in *Early* v. *C.N.R.* is correct, and I am bound by it, I am unable to see how a statutory provision permitting animals to run at large can deprive the act of turning them out of its "wilful" character. No definition of either "wilful act" or "omission" or "negligence" is given by the Railway Act, but, as both are used, I take it that a "wilful act" means something different from "negligence."

In *Lewis* v. *Great Western Ry. Co.* (1877), 3 Q.B.D. 195, Bramwell, L.J., in discussing "wilful misconduct," at p. 206, says:—

"Wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct

must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of "wilful misconduct" must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other "wilful misconduct." I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, "Now this may or may not be a right thing to do." He might say, "Well, I do not know which is right, and I do not care; I will do this." I am much inclined to think that that would be "wilful misconduct," because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not,

and in *Stevens* v. *G.W. Ry. Co.*, 52 L.T. 324, Smith, J., distinguishes "wilful misconduct" from an act of "pure inadvertence or negligence." The term "wilful act" in sub-sec. (4) seems to me to embody the idea of intentionally doing an act which leads to the damage, whether the owner has a legal right to do the act or not.

The Railway Act is not, in my opinion, to be construed as denying the owner's legal right to have his animals at large where such is permitted by provincial legislation, but it is to be construed as saying that if an owner deliberately exercises that right, and his animals by reason thereof are killed, he must bear the loss himself.

So far as the facts of this case are concerned, it makes no difference, in my opinion, whether we adopt the definition of "wilful" given by Bowen, L.J., In *Re Young and Harston's Contract*, 31 Ch.D. 168, at 175, accepted by my brother Newlands in *Early* v. *C.N.R.*, *supra*, namely: "That he knows what he is doing and intends to do what he is doing and is a free agent." Or define it as: "Intentionally doing an act which the owner knows or must be deemed to have known would probably result in the animals being injured, and taking chances that no damage would accrue to them."

In either case, an owner who turns his animals out to graze on an unfenced section of land, adjoining that across which he knows a railway runs, could not help but know that there was not only a possibility but a probability that his animals would stray along the highway to the crossing. If, under such circumstances, he turns them out, he is, in my opinion, deliberately taking chances on their being injured, and the turning of them out is a "wilful act" within the meaning of sub-sec. (4).

The other point raised by the plaintiffs, that they were entitled to succeed by reason of the absence of cattle guards, was

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disposed of adversely to their contention by this Court in *Early* v. *C.N.R.*, *supra*. I would therefore dismiss the appeal with costs.

The defendants counterclaimed for damages caused to their engine by these animals. The trial Judge dismissed the counterclaim. I think in so doing he was right. The cattle were lawfully at large, and the defendants had removed their cattle guards, which is equivalent to leaving their land unfenced adjoining a highway, in which case they could not recover, without proof of negligence on part of the plaintiffs. *Tillett* v. *Ward*, 10 Q.B.D. 17.

McKay, J.

McKAY, J., concurred with Lamont, J.

Brown, J.

BROWN, J.:—There was no by-law in force in the municipality preventing the animals from running at large, and, under the provincial statute, being ch. 32 (1915), it was lawful for the plaintiffs to have the animals at large on the section where they were pasturing. In the circumstances, the defendants' liability must be determined under sec. 294 of the Railway Act of Canada, as amended by ch. 50 of 1910, and, under sub-sec. (4) of sec. 294, the defendants are liable unless they establish that the animals got at large through "negligence or wilful act or omission of the owner."

For the purposes of this case, it does not seem to me necessary to consider whether or not the animals got at large because of the negligence of the plaintiffs, or because of their omission to do something which they should have done. It is an ample defence if they were at large through the plaintiffs' "wilful act."

"Wilful," as defined in vol. 8 of the Century Dictionary and Cyclopedia, means: "Due to one's will; spontaneous, voluntary; deliberate; intentional."

As ordinarily used in Courts of law, the word "wilful" implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent. It does not imply that an act done in that spirit was necessarily a malicious act. But generally in penal statutes the word "wilful" or "wilfully" means something more than a voluntary or intentional act; it includes the idea of an act intentionally done with a bad motive or purpose, or, as it is otherwise expressed, with an evil intent.: 40 Cyc. 944.

This statement virtually adopts the definition given the word by Bowen, L.J., in *Re Young*, 31 Ch.D. 168. This definition was adopted and applied both by the trial Judge and on review in *Wilson* v. *Manes*, 28 O.R. 419, in considering the words "wilful

act" in the following provisions of the then Ontario Municipal Act:—

> Every officer and clerk who is guilty of any wilful misfeasance, or any wilful act of omission, . . . shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission, a penal sum of $400.

This definition has also been adopted and applied by many Judges in considering the provisions of the Railway Act in question. See Newlands, J., in *Early* v. *C.N.R. Co.*, 8 S.L.R. 27, 21 D.L.R. 413; Phippen, J.A., in *Clayton* v. *C.N.R.*, 17 Man. L.R., at p. 438; *Becker* v. *C.P. Ry. Co.*, 5 W.L.R. 569; *Murray* v. *C.P. Ry. Co.*, 7 W.L.R. 50; Lamont, J., in *Koch* v. *G.T.P. Ry.*, 32 D.L.R. 393, 10 S.L.R. 35.

I agree with this definition as applied to the Act in question, and I fail to see in what way the Provincial Act allowing animals to run at large bears on the case. The mere fact that the plaintiffs were legally permitted to allow the animals to be at large does not make their act any less voluntary.

The provisions of the Railway Act under consideration undoubtedly have in view the safety and protection of the travelling public, as well as the protection of private property, and it seems to be the clear intention that an owner of animals who allows them to run at large, even though legally entitled to do so, must assume the risk if they happen to get on a railway and are injured or killed in consequence.

The defendants in their cross-appeal contended that the plaintiffs are liable to them for damages suffered by virtue of the animals in question being on their railway. The trial Judge found on evidence justifying such finding, that the animals got on the right-of-way from the highway because of the cattle guards being out of place. That finding, in my opinion, is a complete answer to any claim on the defendants' part to damages.

I am, therefore, of opinion that the judgment of the trial Judge was right and that both the appeal and the cross-appeal should be dismissed with costs. *Appeal dismissed.*

"Negligence or wilful act or omission"—Sec. 294, Railway Act, Can. **Annotation.**

By ALFRED B. MORINE, K.C. (Consulting Editor, D.L.R.).

An annotation upon this subject appears in 32 D.L.R. 397, attached to the report of *Koch* v. *G.T.P. Branch Lines Co.* Another annotation appears in 33 D.L.R. 418, trial Judge in *Anderson* v. *C.N.R. Co.*

In *Greenlaw* v. *C.N.R. Co.* (Man.) 12 D.L.R. 402, the plaintiff had

Annotation. purposely turned cattle at large to graze, relying on a municipal by-law which permitted it, and the Court distinctly held his "intentional" act was neither "negligence" nor a "wilful" act within the meaning of sec. 294 (4) of the Railway Act. The latest decision of the Saskatchewan Court, *en banc*, adopts a diametrically opposite view, and, it is submitted, the correct one, upon the meaning of the word "wilful."

In *Early* v. *C.N.R. Co.* (Sask.) 21 D.L.R. 413, the plaintiff was held guilty of a "wilful" act in allowing his cattle to run at large, but Haultain, C.J., intimated plainly that if a by-law had been proven, permitting cattle to run at large, he would have adopted the decision in the *Greenlaw* case. It is worthy of note that he concurred in the judgment of Newlands, J., in *Anderson's* case (*supra*), and it would have been illuminating if he had given his reasons for his latest and soundest view on this point.

In *Koch* v. *G.T.P. Branch Lines Co.*, 32 D.L.R. 393, the plaintiff had done what a prudent man would to keep his cattle in an enclosure, and there was no intentional "turning at large," so that the meaning of "negligence" or "wilful act or omission" did not have to be decided, and the effect of a by-law had not to be considered; but Lamont, J., held, nevertheless, that "it is not negligence to do that which is authorized by law," and in this Newlands, J., concurred. This case has been reported as though the full Court agreed with Lamont and Newlands, JJ., and so it was treated by Elwood, J., in *Anderson's* case (see 33 D.L.R., at p. 421), but, in fact, Brown and McKay, JJ., while agreeing in the result in the *Koch* case, did not express any opinion as to the effect a by-law would have.

It is regrettable, perhaps, that certain of the Saskatchewan Judges in the *Anderson* case should have expressed opinions upon the meaning of "negligence" in sec. 294 (4) of the Railway Act, for the Court was unanimous in its decision that the act of the plaintiff in turning his cattle at large was "wilful," and it was, consequently, unnecessary to define "negligence." The definition was given, however, and was manifestly wrong, we submit.

In the *Greenlaw*, *Early* and *Anderson* cases the cattle were intentionally turned at large, and, therefore, no question of "negligence" properly arose, for the acts of the plaintiff were clearly "wilful." In the *Koch* case, the animals got at large through a broken gateway, and it was held that the plaintiff had not been remiss in relation thereto. The opinion expressed by Lamont, J., that "where there exists a valid by-law permitting it, an owner cannot be held guilty of negligence in allowing animals to run at large," was, therefore, *obiter;* he repeated it, however, in the above reported judgment, and it was concurred in by all the Judges, except Brown, J.

A Saskatchewan statute says that it shall be lawful to allow animals at large unless the municipality prohibits it. Section 294 (4) of the Railway Act says that no animals shall be permitted to be at large upon any highway, within half a mile of any railway crossing, unless in charge of a competent person. In the *Anderson* case the cattle got from the highway to the railway at a crossing. Assuming the constitutionality of both statutes, surely the Saskatchewan statute, the later of the two, should be read to mean that animals may be at large *where not by law prohibited.* If so, no "valid by-law" or statute permitted Anderson's cattle to be at large upon the highway at the point where they left it to go upon the railway, and consequently Anderson's conduct in allowing them to be there was both negligent and unlawful. The only effective answer which can be made to this is, that sec. 294 (1) is *ultra*

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vires the Dominion Parliament, and Judges in *Anderson's* case gave indications that they might hold this, if necessary, but they did not do so, and until a decision to that effect has been made the sub-section stands as law. Lamont, J., points out, however (*supra*), that being at large in violation of sec. 294 (1) of the Railway Act is not *per se* the "negligence" meant in sec. 294 (4), for despite the fact that animals were at large in violation of sec. 294 (1) the owner can recover under sec. 294 (4) unless the railway company can show that they were so at large by reason of the owner's "negligence" or "wilful act or omission." But while this is quite true, it is not a good answer for the purpose to which Lamont, J., put it, for he had said that there could be no negligence in letting cattle at large where a *valid* law permitted them to be, and the defendants had replied that no by-law could *validly* permit the cattle to be upon the highway at a railway crossing, unless in charge of competent persons; in other words, sec. 294 (1) was a good answer to the argument that the by-law (or provincial statute) was valid for the purpose of permitting the cattle to be on the highway at the point from which they got upon defendants' property. What Lamont, J., meant was, that breach of the duty imposed by sec. 294 (1) was not *per se* the "negligence" meant by sec. 294 (4); that is, that mere breach of a legal obligation to keep the animals from being at large is not the "negligence" meant. That is quite right, but what Lamont, J., seems not to have realized is, that if "carelessness" is the kind of negligence meant by sec. 294 (4), it is no answer that when it exists in fact its effect can be escaped by saying its result in enabling the cattle to be at large was permitted by a by-law or provincial statute, for breach of law is not the essence of the "negligence," but lack of care to keep animals from straying.

The "negligence" referred to in sec. 294 (4) of the Railway Act is not a narrow, thin-skinned legal conception; it is negligence in fact, that is, the careless as distinguished from the wilful act or omission of the owner. "Negligence is the absence of the care, skill and diligence which it is the duty of the person to bring to the performance of the work which he is said not to have performed" (*per* Willes J., *Grill* v. *General Iron Colliery Co.*, 35 L.J. C.P. 330). Sec. 294 (4) assumes that—it is the duty of the owner of animals, towards the railway, to prevent them from getting at large by his negligence or his wilful act or omission; it does not say "legally" at large, but at large in fact—and while on the one hand it is no proof of negligence or wilful act or omission, that the animals are in fact at large in violation of sec. 294 (1), it is equally no answer to proof of negligence or wilful act or omission under sec. 294 (4) that any provincial statute or municipal by-law permitted animals to be at large. The owner, in other words, who carelessly or intentionally enables his cattle to get at large, relying upon such a statute or by-law, takes the risk that he cannot recover damages against a railway if his animals are killed upon a right-of-way.

In reality, neither a violation of sec. 294 (1), nor permission accorded by by-law or provincial statute, has anything whatever to do with "negligence or wilful act or omission" under sec. 294 (4). The former prohibits under a penalty, and the provincial statute permitting animals at large merely means that being at large is not unlawful *per se*. The statute (ch. 32, Sask.) expressly says that nothing therein shall "in any wise affect rights or remedies at common law or otherwise for the recovery of damages *by any animals*." Surely it was equally not meant to affect liability to the owner of animals at large. If this be so, what in the world has this statute to do with the question whether

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Lamont, J., says that sec. 294 of the Railway Act is to be construed as saying that if an owner deliberately (*i.e.*, intentionally) allows his animals to be at large, and they are killed, he has no remedy. That is good law; is it not equally so to say that if his carelessness enables them to get at large he has no remedy? How can it reasonably be said that sec. 294 (4) penalizes "intention" and not "inattention?"

In the *Koch* case (32 D.L.R., at p. 394), Lamont, J., very concisely said: "Negligence (in sec. 294 (4)) means that the plaintiff did not take the precautions to prevent his animals getting at large which an ordinarily cautious and prudent man would," but later in the same case he says (p. 396): "Where there exists a valid by-law permitting animals to run at large, an owner cannot be held guilty of negligence in permitting them to so run." In relation to the duty the owner of animals owes to the railway, or, to put it another way, in relation to the basis of the railway liability (*i.e.*, that the animals shall not have got on the railway by default or act of the owner), what difference does it make that the owner's default or act was the exercise of a legal privilege?

The counterclaim for trespass was dismissed on the ground that the animals were at large lawfully (under the provincial statute), and that the defendants had not fenced their track. Here is where the constitutionality of sec. 294 (1) should have been considered, for if it is *intra vires* legislation, Anderson's cattle were not at large lawfully upon the highway at the point from which they escaped to the railway, and the whole argument drawn from *Tillett* v. *Ward*, 10 Q.B.D. 17, fell to the ground. That case was cited in support of the principle that if cattle are lawfully using a highway, their owner is not liable for their escape to adjoining lands. That is not the essence of that case. There the cattle were in charge of competent persons, and their escape was accidental. It is lawful to put your cattle on your own pasture, but you are liable if they escape therefrom to your neighbour's land, through your carelessness. Driving cattle along a road is necessary, and escape may be unavoidable; if it has been, you are not liable. But *Tillett* v. *Ward* did not mean that if the cattle there had been in the care of children, for instance, the owner would not have been liable. The Saskatchewan statute says that cattle may be permitted to be at large, but does not say that if they be, their owner is not liable for damages they commit on the property of other persons. On the contrary, it says that nothing in the Act shall affect the rights of other persons than the owner for damages for trespass on property. At common law, Anderson would have been liable in trespass for the entry of his animals on the railway. How then in face of the very words of sec. 2 of the provincial statute can it be said that he was not liable because the statute legalized the running at large by the cattle, and the railway was bound to protect its property by fencing its tracks?

All through this series of cattle cases the effect of local surroundings is seen in the interpretations placed by the Judges upon the statutes. To allow cattle at large, and to hold railways liable, is in the very air of the west.

The proper way to do that, if advisable, is by a new Dominion statute, not by fantastic interpretations of perfectly plain existing provisions.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 23, 1917.

VENDOR AND PURCHASER (§ I A—1)—MISREPRESENTATION AS TO LEGAL EFFECT OF CONTRACT—ERROR.

An innocent misrepresentation by a vendor's agent as to the legal effect of a forfeiture clause, based on an erroneous conception, whereby the purchaser was induced to sign the agreement of sale, is sufficient to render the agreement unenforceable on the ground of mistake.

Statement.

APPEAL by defendant from the judgment of Ives, J., in favour of plaintiff, in an action for the balance of purchase money under an agreement of sale. Reversed.

G. E. Winkler, for appellant; *R. D. Tighe*, for respondent.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—This action is brought to recover the balance of the purchase money due by the defendant under an agreement in writing for the sale by the plaintiff to him of certain land. The purchase price was $2,000, upon which certain payments have been made, the balance claimed as unpaid at the time of action brought including interest and taxes being $1,229.07.

The agreement contains the following clause:—

Time is to be considered the essence of this agreement and unless the payments are punctually made at the times and in the manner above mentioned these presents shall be null and void and of no effect, and all moneys paid thereon shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to peaceably re-enter upon and re-sell the said land together with all buildings thereon, without notice to the purchaser.

The defence relied upon to defeat the action, though most unhappily expressed in the pleadings, is that when the defendant was negotiating this purchase with the agent of the plaintiff who brought it about, the latter explained the above clause to him, and told him in effect that it meant that if at any time he wished to discontinue his payments under the agreement he could do so, and that while he would thereby lose his interest in the land, and forfeit the money which he had paid on it, he would be under no personal liability for the balance of the purchase money; and that, believing this to be a correct statement of the legal effect of this clause, he signed the agreement. Ives, J., who tried the case, refused to give effect to this defence, and from his judgment the defendant appeals.

The plaintiff had this property listed for sale with several agents, and amongst them the Royal Agencies, a partnership of which one Trudeau was a member. It was through Trudeau that

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this agreement was brought about. He and the defendant were witnesses at the trial and were the only witnesses who spoke of this matter. There is practically no difference in substance between their versions of what took place between them. Trudeau had with him a printed form of agreement, similar to that which the parties afterwards signed. The defendant says that he told Trudeau that he had not much money to invest, as he was carrying on business, and he did not want to buy more property than he could pay for, and that Trudeau then showed him what sort of an agreement he used, and explained to him that he could buy the property all right, and the only thing the vendor could do would be to take the property if he could not pay for it, and that "I would have lost the money, but he said they could not come back on me in Chauvin for the balance of the money, all they could do was to keep my money, and the seller would have to take his property back." Trudeau says practically the same thing. He says that he explained this clause as follows:—"I told Mr. Roy as far as I understood this clause, as far as it was interpreted to me, you could pay a certain amount of money on this property, and, if it should happen that you cannot pay the balance, the only thing they can take from you is the property in question." Further on he said that he told him that, if he bought the property, he would not be liable for any balance he did not wish to pay, but he would forfeit the money he had paid in. There is no reason to doubt the honesty of this evidence, and I think that we must take it as a fact that the defendant entered into this contract under the belief induced by what the plaintiff's agent, in all honesty, told him that the provision of the agreement above quoted stood between him and his personal liability for any unpaid balance of the purchase money that there might at any time be if he should eventually decide to abandon the contract, as he in fact did, and so notified the plaintiff before the commencement of this action.

These men unquestionably took a wrong view of the legal effect of this provision, for it is quite clear that it is one upon which the vendor alone can act, but which he may waive if he sees fit. The purchaser cannot, by a simple refusal to make the payments called for by the agreement, bring it and his liability under it to an end. The simple question for decision, therefore, is whether or not this agreement entered into under the circumstances which I have related can be enforced against this defendant.

The general proposition of law is that one who enters into a contract under an erroneous opinion as to its legal effect is not merely because of that, entitled to be freed from it. In the House of Lords case of *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108, Lord Watson, referring to the contention that the mere existence in the mind of the party seeking relief from it of an erroneous belief with reference to the nature of the contract affords a sufficient ground for annulling it, says, at p. 123:—

> By delivering his missive offering to Mr. Glendinning the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations construed according to their legal meaning, whatever that might be. He contracted, as every person does who becomes a party to a written contract, to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument. The result of admitting any other principle would be that no contract in writing could be obligatory if the parties honestly attached, in their own minds, different meanings to any material stipulation. As soon as one of them obtained the final judgment of a competent Court in favour of his construction the other would be at liberty to annul the contract.

Lord Herschell expressed the same opinion at p. 118. But it is quite clear from what is said in these same judgments that different considerations prevail where this erroneous belief is induced by the representations of the other contracting party or of some one for whose conduct he is responsible. Lord Watson, at p. 121, says:—

> Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that in the case of onerous contracts reduced to writing the erroneous belief of one of the contracting parties, in regard to the nature of the obligations which he has undertaken, will not be sufficient to give him the right (to rescind) unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract.

And at p. 123:—

> I am of opinion that the alleged error of the appellant is, by itself, insufficient to invalidate his consent; but that it will be sufficient for that purpose if it can be shown to have been induced by the representations of the respondent or of anyone for whose conduct he is responsible.

Lord Herschell merely touches the point in his judgment at p. 119 when he says that the authorities show

> that in the case of bilateral obligations it was always considered essential that the error which was sought to be taken advantage of by one party to reduce the contract should have been induced by the other party to it.

And Lord Macnaghten concurred in these judgments.

In *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, in the Court of Appeal, Lindley L.J., at p. 550, says:—

> But it was strongly contended that mistake in the meaning of the words used in drawing up the agreement is not enough, and in support of this con-

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tation reliance was placed on *Powell* v. *Smith* (1872), L.R. 14 Eq. 85, and *Stewart* v. *Kennedy*, 15 App. Cas. 75, 108. These cases decide that a written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed. This is a sound principle and, as pointed out in *Stewart* v. *Kennedy*, if it were not adhered to the security of written engagements would be destroyed. But a mistake by one of the parties as to the meaning of words used may be induced by the other party, and, if so induced, the above principle ceases to be applicable. *Stewart* v. *Kennedy* is an authority for this qualification.

Chitty, L.J., at p. 552, expresses the same opinion.

It is abundantly clear, as I have said, that the mistaken idea which the plaintiff formed of the legal effect of this provision, and consequently of his liability under the contract, was given to him by Trudeau, who was a person for whose conduct in the making of this sale the plaintiff was responsible. He was the only one who represented the plaintiff in the negotiations leading up to this agreement, and in the making of the contract. The plaintiff lived in Winnipeg and took no part in the matter beyond executing the agreement, which was forwarded to him for that purpose by Trudeau. Under the above authorities I am of the opinion that the defence set up is entitled to prevail, and I would therefore allow the appeal and dismiss the action.

In par. 1 of the statement of defence the pleader alleges the making by the plaintiff's agent of the representations as to the legal effect of the agreement, with which I have dealt, and then in par. 4 alleges that "the said agreement is void, and of no effect, owing to the fraudulent representations of the plaintiff's agent." There is not a scintilla of evidence to justify this characterization of Trudeau's representations as fraudulent, nor was there the slightest attempt at the trial to give them that character. A careful reading of the evidence of the defendant and Trudeau satisfies me that the latter was absolutely honest in the opinion that he gave the defendant. I am quite unable to understand why the solicitor, who framed this pleading, should have thought it necessary to impute fraud to him, unless, perhaps, he was then under the impression that he could not succeed in his defence unless he established it. It has often been thought proper to mark the Court's disapproval of the making of unfounded charges of fraud in pleadings by depriving the successful litigant who makes them of the costs to which he would otherwise be entitled, and we might be justified in this case in imposing some measure of

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punishment upon the defendant by withholding from him some part, at least, of his costs. Upon a consideration, however, of all the circumstances, I have concluded that the defendant's offence in this instance is not so flagrant as to call for more than this warning. It is quite apparent, from a reading of all of the case, that except in the use of this word "fraudulent" in this one instance, there was no idea in the mind of the defendant that there had been any fraud on Trudeau's part. Not only did he, in his own evidence, carefully refrain from imputing it, but he showed his entire confidence in Trudeau's honesty by making him his witness on the trial of the action. No one has been harmed in this instance by the use in one place of this objectionable word, and so I think we might, with propriety, let the costs follow the event. I would therefore order the payment by the plaintiff of the defendant's costs of defence, and of this appeal. *Appeal allowed.*

BLACKADAR v. HART.

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley and Chisholm, JJ. June 2, 1917.

1. DEEDS (§ II C—30)—DESCRIPTION OF LAND—COURSES AND DISTANCES—MONUMENTS.
When in a description of land there is a variance between the monuments and the courses and distances, the latter will be rejected as false description, in favour of the monuments.

2. VENDOR AND PURCHASER (§ I C—10)—SUFFICIENCY OF TITLE—POSSESSION—RESERVATION OF EASEMENT—"MODERN DESCRIPTION."
A break in the chain of title is no defect, if there is a sufficient possessory title, and no adverse rights are asserted; the reservation of an easement or right of way ceases to be a cloud on the title by a merger or union of the dominant and servient tenement; a vague description, as that used in previous deeds, is merely a defect in the form of conveyance, and the purchaser has merely the right to demand a "modern description."

Statement.

APPEAL from the judgment of Ritchie, E.J., in favour of plaintiffs, in an action on a promissory note for $4,000, given by defendant in part payment for lands purchased by him from plaintiffs for lumbering purposes. The defence was that plaintiffs had failed to make a good title to a portion of the lands agreed to be conveyed, and the defendant also counterclaimed for damages, to be set off against the plaintiffs' claim. Varied.

W. A. Henry, K.C., for appellant; *W. L. Hall*, K.C., for respondents.

Graham, C.J.

GRAHAM, C.J.:—This action was brought July 27, 1915, to recover the amount of a promissory note for $4,000 dated November 19, 1912, payable on November 15, 1913, with interest.

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The defence, with a counterclaim to the same effect claiming damages, is to the effect that there has been a breach of the agreement for the sale of the land to the defendant for which this note, as the last instalment with other notes now paid, in all $22,000, was given, inasmuch as the title to some parts or lots is defective.

The land is a large consolidated block of timber land, including a mill property at Millville, in the County of Kings, parts having been acquired through different titles.

I think there is not a defence to the note. The defendant may have a claim for damages, nothing more.

The last instalment as well as the note was to be paid on a fixed date. There is not a total failure of consideration for the note and the damages, if any, are not clearly ascertainable or a matter of mere calculation and cannot be treated as a good answer to part. Dart on Vendors and Purchasers (7th ed.), 1005.

In respect to the counterclaim, there was an agreement for sale of certain land included within red lines on a plan of the block and there is a schedule of lots by description. The defendant entered into possession and has been cutting the wood on the lots and has manufactured a large amount of lumber from it. His position, as I understand it, is this, to keep the land as far as he can do so and to make the plaintiffs pay damages for the alleged defective titles. He has not taken the deed. But as far as the lots involved in this appeal are concerned, there has been no eviction or an adverse claim put forward by anyone.

Take lot A for instance, he has registered the formal agreement for sale and has taken trees from that lot, the chief value to anyone. The plaintiffs cannot be expected to take it back. As that land as Crown land could be acquired for a small sum (the surveyor reported it as worth 3/.) per acre, it is easy to spend far more money on the title than the land is worth; and when timber land is acquired in this province there are generally some lots the chain of title to which is not perfect.

The registry law until quite recently, about 1900, did not require grants, wills and some other instruments affecting the title to land to be registered in the registry office for the county. The people did not always get their deeds registered and some instruments would not be registered in all of the counties in which the land comprised in the instrument was situated.

However, dealing with lot A, it is thus described in the schedule: Eleventh: Also all that certain parcel or tract of land, lying and situate in Aylesford and bounded as follows: Beginning on the north line of said lot on the east side of the brook intervale at a rock; thence south 50 chains by a line run by E. E. Armstrong to the south line of said lot to a pine tree; thence west to a fir tree on the corner; thence north to a pine tree on the shore of South River Lake; thence easterly by the shore of the lake to a bunch of maples; thence east to a pine tree marked E.D.D.; thence south to the place of beginning, containing fifty acres more or less, the same being part of tract No. 2386 granted to Gaius Balcom, and registered in Halifax, July 31, 1854, and deeded by said Balcom to W. A. Bishop, bearing date September 30, 1854, and recorded in the registry office at Kentville, being the same land mentioned in a certain deed from N. P. Spurr and Rebecca Spurr his wife, to the said John W. Lowe, bearing date July 9, 1904, and recorded in book 82, p. 678, of the records of King's County.

That goes back to 1854, and since 1854 the chain of title is quite clear. There has been possession under the deeds and ordinarily one would not in a search go back any further. But it is described as "part of tract No. 2386 granted to Gaius Balcom," and registered in Halifax, July 31, 1854. Now when you find an allegation like that, that it is part of a larger tract, in a conveyance made almost contemporaneously with the grant itself, in that very year, hardly any one would doubt its correctness. That the conveyancer was making a mistake is altogether improbable. But the defendant points to the Gaius Balcom grant, scans the description which presents a difficulty and says that the Balcom grant must be (in part at least) in another place. But the effectiveness of an alibi is not merely that the person was not there, that is very little, but that he was somewhere else. It cannot be contended for a moment that the A lot is part of a grant to someone else than Gaius Balcom, and if it is contended that it is part of ungranted land in that locality the evidence is overwhelming that there is no vacant or ungranted land there. I shall refer to it presently. So the defendant's argument is not at all complete.

But the fact is that the description in the Balcom grant is simply an erroneous description requiring something to be rejected as false description. It was one of the late E. E. Arm-

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strong's surveys, and as a juror one can take notice of that fact and of his surveys in that locality.

His report of the description was put in before me; something had evidently been omitted and it is now difficult to find out exactly what the mistake in the description in the grant was. It is wrong in course and distance apparently—north for south, or something of that kind. Neither party solved the difficulty at the hearing. It does not at all help the defendant. This is the description in the grant:—

> Grant from the Crown to Gaius Balcom, of Aylesford, in Kings County, Yeoman, dated March 18, 1854. No. 2386. Description: a lot of land, containing 150 acres, situate, lying and being in the said county, and bounded as follows: Beginning at a spruce tree marked G.B. standing on the western line of land applied for by Thomas Hudgins in the settlement of Lake George; thence running west 50 chains to a large rock; thence south 20 chains to a birch tree marked G.B. standing on the south side of a brook; thence west 12 chains, running into South River Lake; thence south 10 chains; thence east 62 chains to the base line; thence north 30 chains to the place of beginning.

But the trial Judge has dealt with the difficulty in the usual way. A rule has been adopted in America and followed in Nova Scotia that when there is in a description a variance between the monuments and the courses and distances, one rejects the courses and distances as false description in favour of the monuments. There is a very good reason given for that rule, namely, that a mistake may easily occur in writing out descriptions, or the surveyor may have been mistaken in either, whereas in respect to a monument the presumption being that the surveyor was at least on the ground could not so easily be mistaken in respect to the monument. That rule was applied to surveys of this same surveyor in this locality, owing to his recklessness with the Crown land: *Davison* v. *Benjamin*, 9 N.S.R. 474, at 480, 485.

Now here there is a natural monument, viz., South River Lake, and the only way one can get near South River Lake on the ground is to take the description of the lot A as contended for by the plaintiff. The Judge's conclusion is, to my mind, unanswerable, namely, "If the Gaius Balcom lot goes to the South River Lake, then lot "A" is included in the grant "G. 2," *i.e.*, the Gaius Balcom grant.

There is another boundary mentioned which the Judge relies on, namely, the line of land applied for by Thomas Hudgins. That line is established on the ground and is found by the Judge.

Further there is quite sufficient evidence to satisfy me that the large rock mentioned in the description has been identified. Reject these boundaries and you have something else to reject, namely, that the description in the deed made almost contemporaneously, namely, that it was part of the Balcom grant.

Turning to the testimony, I think the title to this lot "A" as it is called, for the purpose of the trial, is clearly good. This lot "A" is marked on the plan annexed to the agreement of sale as "J. W. Lowe and Son, 100 acres." The description in the schedule is the same as that in the deed from Spurr to the Lowes from whom the plaintiff purchased. That deed is dated July 9, 1904. The lot became vested by inheritance in Spurr through the death of Bishop, whose daughter married Spurr, and through the death of Mrs. Spurr and their daughter. This is admitted. Bishop bought from Gaius Balcom, the original grantee as the plaintiff contends, by deed of September 30, 1854. This will help one to understand the evidence, because "A," is sometimes spoken of as the Spurr lot and sometimes as the Lowe lot. Further, the shorthand writer's marks are as follows "G 2—the Gaius Balcom grant: G 3—a plan of survey by Hennigar J. Neily: G b—the plan of lands annexed to the sale agreement: G v—a section of the general Crown Land plan."

Archibald Foster is a surveyor of experience. He was called by the plaintiff and identified the lot A with the Spurr lot or Lowe lot and as part of the Gaius Balcom grant.

Later, he shews how mistakes must necessarily occur in plotting on the general County plan in the Crown Lands office from the surveys sent in by surveyors. This is obvious when scaling distances is resorted to and the monuments are not located on the County plan.

I am thoroughly convinced that this lot A is part of the Balcom grant and the only thing which can be said is that the defendant is getting twice as much land, namely, 102 acres, instead of 50 acres which he bargained for. But that no doubt resulted in part from Armstrong's liberality with the Crown lands.

I think there is a good and marketable title to the A lot.

I may add that the objection to this item in the schedule was first that the link wanting was between Bishop and Spurr, but when it was found that Spurr took by descent and the objection

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was without foundation, it was abandoned and this one was substituted.

2. The next title that is objected to is the Silvanus Morton 200-acre lot designated as the eighth in the schedule to the agreement for sale and as E on the plan used on the trial. This is the description in the schedule:—

Eighth: That certain interest in land situate in said County of Kings conveyed by William Phalen and wife to said Archibald A. McNeil, B. Roscoe McNeil and Frank H. Lowe by deed dated January 10, 1898, and recorded in said Registry of Deeds in Liber 70, folio 458.

The description in the deed of January 10, 1898, from William Phalen to Frank H. Lowe and the McNeils is as follows:—

Deed William Phalen, of Miltom, in the County of Queens, Lumberman, et ux., to Frank H. Lowe, Archibald McNeil and B. Roscoe McNeil. Dated January 10, 1898. Description: All their right, title and interest in or to a certain undivided piece or parcel of land situate in the County of Kings and Province of Nova Scotia, and lying on the west side of the west branch of Factorydale stream, and to the southward and eastward of Boot Lake, and bounded as follows: Commencing at the south-west corner of Sylvanus Morton's 190 acre lot and running westerly along the line of land owned by John B. Campbell to the north-west corner of the said John B. Campbell's land, then northwardly on a course parallel with the east line of Augustus Freeman's 276 acre lot to land owned by Eunice C. Uhlman, thence eastwardly along the said Eunice C. Uhlman's south line to the Collins lot; thence southwardly along the lines of the Collins lot, the James Gates lot and the Sylvanus Morton 190 acre lot to the place of beginning, the same containing 200 acres more or less.

The chain of title from that deed down to the Blackadars is complete. But there is a link in the documentary title wanting, namely, between Morton and Phalen. Phalen took possession in 1879 or 1880.

It appears that Silvanus Morton assigned under the Canadian Insolvent Act, of course in general terms, and the defendant says that the assignment was registered but there is nothing in the registry from the assignee or from Morton to Phalen.

I have referred to the weakness of our Registry of Deeds titles.

I think there is a very strong presumption after that lapse of time that Phalen had acquired the title. I am reluctant to assume that Morton's estate was never wound up, that the assignee did not perform his official duties. Phalen claimed to have purchased it in 1879 or 1880, and the first negotiations between him and McNeil took place in 1882, although the deed is dated in 1898. But in the meantime the possession legally was in

Phalen; at least there was no one in adverse occupation, and after he sold to McNeil and McNeil and then Lowe have been in possession; and no one has ever claimed adversely, and Phelan and his successors have operated it. Presumptions of this kind are given effect to even if there is a link wanting in a registry office. I refer to *Des Barras* v. *Shey*, 29 L.T. (N.S.) 592, at 595.

But it may be that the possession in that case was a better possession than that of Phalen in this case. Since the decision of the Supreme Court of Canada in *Wood* v. *Le Blanc*, 34 Can. S.C.R. 627, one hesitates before deciding what will constitute possession of wood land in a case in which there is not a documentary title. I think, following that case, that there cannot be held to be such a possession as would raise the presumption and make the doctrine which is mentioned in *Des Barras* v. *Shey*, 29 L.T. (N.S.) 595, applicable to this case.

The Judge at the trial dismissed this objection to the title on the ground that the words in the schedule, namely, "that certain interest in land" particularly in contrast with other descriptions in which the land itself was clearly bargained for, meant merely the defendant's interest and as the Statute of Limitations had for some time been in operation that the contract was satisfied and there are to support this view authorities: *Herrod* v. *Blackburn*, 6 Pa. St. 103; *Lull* v. *Stone*, 37 Ill. 224; *Sawle* v. *Pike*, 20 Maine 171; *Freme* v. *Wright*, 4 Madd. 364 (56 E.R. 739). But I think that the words "that certain interest in land" does not really mean "all their interest in" the lot. The words being vague are controlled by the words of the agreement "the inheritance in fee simple and absolute title." I think although quite confident that no one will come forward ever to attempt to assert a rival claim to this area that in law the defendant may object to it.

3. The next objection is one that was brought into the case by an amendment obtained by the defendant at the trial and was never raised before. If I read the notice of appeal correctly, p. 93 of the printed case, it does not find a place there. The item is thus described in the schedule:

> Fifteenth: the half of a narrow strip of undivided land lying between the land immediately above described and the mill lot bounded on the east by the aforesaid ash tree, on the west by Henry Ewing's land.

There is a reference to the previous description which is as follows:—

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Fourteenth: Beginning at the corner of land of Henry Ewing, east side of Nichols Road so-called, thence southerly along said road to lands formerly owned by James Gates; thence easterly along said Gates land to north-west corner; thence southerly along said Gates land to land owned by A. G. Morse; easterly by Morse's land to Guilford Chutes west line along Chutes line to an ash tree on the banks of mill pond westerly along the late Emerson Gates line to Henry Ewing's land, westerly along Ewing's south line to the place of beginning, containing eight acres more or less.

It appears from the evidence that this narrow strip was a roadway about a proper width for one into the mill yard, reserved by James and Emerson Gates, who owned the mill property with property adjoining, and when they conveyed to William S. Uhlman the mill they excepted this road in order to get to their back lot.

This, as I understand it, is the description, after the words "containing about one acre" there follow these words, "with the exception of a road running westerly the whole length of the lot a proper width for one." I take this from the abstract of title.

By the deed of June 16, 1898, from Mary E. Welton to John W. Lowe, she conveyed her interest in the roadway by the description already quoted from the schedule. I would think that this reservation by the Gates was a roadway or easement and as they conveyed the land in favour of which the reservation was made and it found its way to the predecessors in title of the plaintiff there would be a merger or union of the dominant and servient tenement and a good title is therefore vested in the plaintiffs. The undivided half of a right of way in this case would be as good as the whole. It is surrounded by the defendant's property on both sides and no one else can use it. But assuming it is not a right of way but land, surely the Statute of Limitations has run against the Gates who reserved it in 1870; moreover, the defendant has no right to demand any other interest than that described in the schedule. He cannot ask them for the half which they did not agree to convey him.

I think that the objection is not well taken.

4. The next claim for damages is set out as follows:—

A portion of the lands and property mentioned and referred to in the said agreement consists of a number of lots of land situate in the village of Millville, in the County of Kings. The descriptions in the conveyances by which the plaintiffs acquired the said lots are in many cases vague and uncertain and refer to monuments, trees and other marks which cannot be found upon the ground. The defendant has requested the plaintiffs to have the said lands surveyed and a new description or descriptions prepared by which the said

lots can be definitely located upon the ground, but this the plaintiffs have neglected and refused to do.

This involves an objection to the form of the conveyance tendered by the plaintiff, not as to the title.

The defendant at first at least did not raise this point, he was dealing with the title to specific lots as one of his early letters in the correspondence shews, and did not rely on this. A purchaser does not say much about the deed until he is ready with the price. I have read over the evidence and the correspondence and I cannot say that there has been a breach of the contract in this respect. In the first place, the contract provides for a "proper conveyance" and I think I would say it is in the usual form of conveyance in this country, and that the description generally used is the old description in the deed to the grantor which is generally safer than improvising one and which is that proposed to be given here. I refer on this subject to Williams on Vendor and Purchaser, 1904 ed., p. 547, note E, 557, 558, to shew that conveyancers differ.

That must be a matter for the Judge in an action for specific performance at least in settling the terms of the conveyance; but this is an action or rather counterclaim for damages. But as it appears in Halsbury's volumes that the vendee may require a modern description, it is possible that this would apply here, but as a matter for damages I say it is new, and I think it was not put forward in that way. I fail to see that the plaintiffs ever absolutely refused to give the defendant a modern description and they are not incapacitated from doing that now, therefore there cannot be said to be a breach.

There was no difficulty about the defendant finding the lots for the purpose of entering and taking the timber or using the land at the mill, in fact the plaintiffs identified the property and pointed it out to him on the ground. The defendant himself, who is not an expert, alone gives the evidence. I think a surveyor would not have difficulties in identifying the descriptions with the lands. This, I have no doubt, would all have been obviated by the parties coming by appointment to a meeting as the plaintiffs proposed and the defendant not meeting with them.

The trial Judge, who has not apparently dealt with this matter in the judgment, has still power to settle the terms of the deed, and I think the judgment should be varied to enable the descrip-

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tion to be modernized and settled by the Judge in the regular way.

The defendant's appeal, in respect to the action and counterclaim, will be dismissed with costs, as to each matter appealed from except in respect to the counterclaim, par 6, which will be allowed with costs, the matter to be referred with the other claims to the same referee; the costs of appeal to be apportioned by the taxing master.

Longley, J.
Chisholm, J.

LONGLEY, and CHISHOLM, JJ., concurred.

Russell, J.

RUSSELL, J. (dissenting):—The plaintiffs agreed to sell to the defendant a number of lots suitable for lumbering operations, with mills and machinery which they were operating as a going concern, the price to be paid in instalments to the total amount of $22,000, inclusive of $1,000 payable on the making of the agreement. All the notes given for the instalments have been paid excepting the last note for $4,000 which the defendants decline to pay, and on which the action is brought. The defence is that as to several of the lots described in the agreement the title is defective, and there is also a counterclaim for damages for breach of the agreement in respect to the same matters, as set forth in the statement of claim. The defendant conducted lumbering operations on the land for a period of a year, more or less, before the $4,000 note came due and has taken timber from each and all of the various timber lots comprised in the agreement. For this reason, I think it is too late for him to complain with effect that he has not got in the agreement what he calls a "modern description" by which he means a description defining each lot, by reference to existing monuments or by its relation to surrounding and adjoining properties, identified by the names of their present owners or occupants.

I do not think it is necessary to determine for the purposes of this decision to what extent the vendor can invoke the maxim *id certum est quod certum reddi potest* or in what degree it is sufficient for him to describe the subject of the sale in the terms of the deeds under which he holds it, which terms may not be intelligible in view of existing conditions of ownership or occupation and after the possible destruction of the monuments referred to in the descriptions. No doubt it is convenient to describe the land sold in terms that would be intelligible without extraneous evidence to

interpret them, and the draftsman should connect such descriptions with those contained in the older muniments of title. But it seems to me it must be too late to raise such a question after the purchaser has gone into possession of the land and, by taking off the timber, destroyed its principal value. The damages arising from the failure to furnish such a description as defendant claims must be in any case a difficult matter for assessment, and I can find no evidence on which it would be possible to make any assessment. If the matter were *res integra* and the plaintiff were asking for specific performance of the agreement to purchase, it may well be that the defendant could refuse to accept a deed that did not describe the property in the manner claimed. On that point I express no opinion.

The defendant has been adjudged to be entitled to compensation for defective title as to several of the lots mentioned in the agreement, but he claims that there were others as to which the like remedy should have been given. I think it is his burden to establish that the titles are defective and not that of the vendor to prove that they are good. If the claim is that the verbal description of the lots agreed to be sold does not cover and include the subject of the agreement for sale, it is for the defendant to prove this and not for the plaintiff to justify his description. The principal ground of complaint and that with which the appellant opened his argument related to a lot marked "A" within red lines on the plan according to which the lands were sold. The trial Judge has decided that this lot is described in the schedule forming part of the agreement.

The Judge has attempted to correct the faulty description, which it is conceded does not, as it stands, describe the land intended to be conveyed, but which it is contended may be made to describe it by disregarding the courses and distances. By ignoring these elements of the description and having regard to the fixed boundary afforded by a "well-defined line" known as the Hodgins line and the natural boundary referred to in the description, namely, the South River Lake, he is able to come to the conclusion that the description includes the lot marked "A" on the plan and included within red lines and that it is a part of the Balcom grant to which the plaintiff's title goes back.

I must confess that I was not able at the argument to follow

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the process by which it was sought to effect the desired reconcilement of the description in the agreement with the plan by which also the lots were intended to be identified. Mr. Foster was called by the plaintiff vendor as a surveyor, and said, among other things, that the lot marked "A" on the sketch plan by which the lots were sold was the same as a lot called the Spurr lot on another plan produced. The latter is practically a rectangle. It would be a rectangle but for the fact that one of its sides is broken by the shore line of the lake, and the opposite side by a slight jog. The figure "A" in the sketch plan is of an entirely different shape. Furthermore, a pine tree at the northwest corner of the Balcom grant, of which "A" is supposed to be a part, is said by the same witness, when speaking of the plan of the Spurr lot, to be on the northeast corner. Referring in more detail to the property in the cross-examination, this witness admits that the course "west 12 chains" in the Gaius Balcom grant, brings him to the west line of the grant and he is then some considerable distance east of the west line of lot "A" as shewn on still another plan. He seems to be able to say that by changing one of the courses and more than one of the distances he can bring the lot "A" into the Gaius Balcom grant. But this seems to me to be an operation by which, to use the language of Bishop Butler, "anything can be made to mean anything." I cannot, for my own part, make out that the lot "A" is included within the limits of the Balcom grant, nor can I say with any confidence that it is not capable of being identified as a part of it with reasonable certainty by a competent surveyor examining the land and consulting the monuments with the descriptions before him, as Mr. Foster claims to have been able to do.

As to the other lots referred to, I have no difficulty in agreeing with the trial Judge. Lot "E," numbered 8 in the schedule, is clearly described as merely being the interest conveyed by the grantors therein named to the grantee. As to the so-called mill lots, the case is the same and the same ruling has been, I think, correctly applied by the trial Judge. The defendant having gone into possession of the land, there has not been a total failure of consideration for the note. He has, at all events, received possession of the lots agreed to be sold, and the failure of consideration is, therefore, only partial. Nor is the partial

failure such as to constitute any defence to the action on the note, not being any definite or ascertainable sum, but only a claim for unliquidated damages. There has been no eviction, and the chances are strongly against any future eviction. The only claim, therefore, that the defendant can have is a claim for a breach of the agreement to give him a good title. I am unable to see that in respect of this breach, assuming the title to be defective, he has suffered any actual damage. Mayne, in his work on Damages, has said that there are very few cases in the English reports where damages have been claimed for breach of a covenant for title, and that the multiplication of independent jurisdictions in the United States renders the precedents from that country more bewildering than instructive (p. 249). I very greatly doubt the utility of any effort to examine the contentions of counsel as to the meaning and content of the descriptions by which the properties were agreed to be conveyed, for the reason that I am thoroughly convinced that the defendant has not suffered any substantial damage from any possible defect in the titles. Indeed under the case of *Bain* v. *Fothergill*, L.R. 7 H.L. 158, affirming the old case of *Flureau* v. *Thornhill*, 2 W.B.C. 1078, I doubt if there were any damages proved of a kind that plaintiff could recover. I assume that under his agreement for the purchase of the properties he will be entitled to a deed with the usual covenants and warranties. In the event of a disturbance or eviction he will still have his claim for damages, which, in that case, may be substantial. It might, in the event of such a disturbance of the defendant's enjoyment or of a successful action of ejectment against him, be prejudicial to his interests should there be a final judgment in the present case as to the condition of the titles. It seems that there are conflicting decisions or opinions on the point whether a judgment in an action for breach of covenant for title would not be an answer to any subsequent action for damages for a disturbance or eviction. That being the case, and no substantial damages having been proved, I think it best that the appeal should be dismissed without any determination as to any of the lots in question whether the defendant has or has not proved that the title is defective.

Judgment varied.

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BANBURY v. CITY OF REGINA.

Saskatchewan Supreme Court, Haultain, C.J., and Lamont and Elwood, JJ. July 14, 1917.

STREET RAILWAYS (§ III C—42)—COLLISION—ULTIMATE NEGLIGENCE.

The failure of a motorman to avoid a collision, when he could have done so, after seeing that the plaintiff was about to cross, is the ultimate negligence and the proximate cause of the accident, despite the plaintiff's contributory negligence in failing to look.

[*Calgary* v. *Harnovis*, 15 D.L.R. 411, 48 Can. S.C.R. 494, followed. See annotation, 1 D.L.R. 783.]

Statement.

APPEAL by defendant from a judgment for plaintiff in an action for damages to the plaintiff's automobile as a result of a collision with the defendant's street car. Affirmed.

G. F. Blair, K.C., for appellant; *H. Thomson*, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The Judge of the District Court before whom the matter was tried made the following findings of fact:—

> Now I am going to find that the motor car, as the result of the impact, was driven some 53 ft., and that the street car travelled some 55 ft. from the point of impact, and I am going to find that the motorman, immediately after the accident, made the statement that is given to me by some 4 witnesses at least, being the parties in the car who were present at the time, that after he saw the motor car start and saw that they were going to cross the road that he thought he could get past them and he speeded up his car. I find that that statement, or its equivalent, was made, and that it was a true statement of the actual facts. Now I find, furthermore, that the last look that the plaintiff gave to see what the condition of the street was before he started to drive the car across the track, was before he got into the car, and that he did not again take the precaution of looking down the street or causing anybody else to look, until he was struck by the car, and that nobody did look, except Carey Banbury, who looked just at the last moment, just a second or two before the actual striking. . . . I think, therefore, that, while there was contributory negligence on the part of the plaintiff, and I so find, nevertheless, I find that the defendants, subsequent to that negligence, could have avoided the accident, and that they did not do so.

and he gave judgment for the plaintiff for $217.35. From that judgment the defendants now appeal.

There was ample evidence to justify the above findings. We have therefore to deal with this simple situation. The plaintiff's automobile was on the side of a street on which the defendants had a street car line. The plaintiff started up his automobile in a direction which would take him across the defendants' car line. He was unaware of the approach of the defendants' car. The defendants' motorman saw the automobile start and realized that the plaintiff was about to cross the street car tracks; gauging the distance the automobile would have to travel before reaching the

tracks, he thought that by speeding up the car he could pass the point at which the plaintiff would cross before the automobile reached the track. Accordingly, he speeded up his car, but his judgment was at fault. The automobile reached the tracks first and was struck and damaged.

Counsel for the defendants contended that the only negligence of which the defendants were found guilty was in speeding up the car; that the plaintiff was guilty of negligence in not looking to see if a car was approaching; that the negligence of the plaintiff continued right up to the moment of the impact, and that, therefore, the accident was the result of the combined negligence of both parties, in which case the plaintiff was not entitled to recover. He further contended that, under these circumstances, there could not be any "ultimate" negligence on the part of the defendants rendering them liable notwithstanding the negligence of the plaintiff.

The facts of this case bring it, in my opinion, squarely within the decision of the Supreme Court of Canada, in *City of Calgary* v. *Harnovis*, 15 D.L.R. 411, 48 Can. S.C.R. 494. In this case the respondents drove their van across the track of the appellants' street car line without looking to see if a street car was approaching. The van was struck by the street car. The trial Judge found that the motorman, when he saw the respondents' van heading across the street, might, with the exercise of reasonable skill and diligence, have avoided the accident. The defendants were held liable. In giving judgment Duff, J., says, at p. 412:—

> The learned Judge also took the view that the respondents, when they directed their horse across the street, were sitting in their van carelessly oblivious of the dangers, actual or possible, of the car-track. The view of the trial Judge was that, although the respondents were in fault to such a degree as would have debarred them from recovering had it not been for the conduct of the motorman after their negligence became apparent, yet (in the circumstances of this case) as the motorman could have avoided the consequences of the respondents' negligence after he became aware of it, the plaintiffs were entitled to recover. In a word, the decisive negligence was found by him to have been that of the motorman. I agree with this view and I should dismiss the appeal with costs.

See to the same effect *H.M.S. Sans Pareil*, [1900] P. 267.

The facts of the present case are almost identical with the facts in the *Harnovis* case. The plaintiff was guilty of negligence in crossing a street-car line, upon which he knew cars ran, without looking to see if a car was approaching, but the defendants' motor-

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man when he saw the plaintiff was about to cross had still time, according to the evidence and the finding of the trial Judge, to have averted the collision as he could even then have stopped his car before reaching the point of contact. On seeing that the plaintiff was about to cross it was his duty to shut off the power, and to have applied the brakes. Instead, he accelerated his speed. It is not contended that a reasonably prudent man would have done this.

In *Jones* v. *Toronto & York Radial Ry. Co.*, 25 O.L.R. 158, at 167, Meredith, J.A., says:—

> Knowledge of imminent but avoidable danger gives rise to a new duty, a duty to even a trespasser, and failure to take reasonable care to avert the danger gives rise to a new cause of action if not averted.

The failure of the motorman to avoid the collision when he could have done so after seeing that the plaintiff was about to cross was the decisive negligence, and the proximate cause of the accident, and brings the case within the rule laid down in *Radley* v. *London & N.W.R. Co.*, 1 App. Cas. 754, which is that:—

> Though the plaintiff may have been guilty of negligence and although that negligence may in fact have contributed to the accident, . . . yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

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TAYLOR HARDWARE Co. v. HUNT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 5, 1917.

MECHANICS' LIENS (§ II—5)—RIGHT TO—SUBSTANTIAL PERFORMANCE OF CONTRACT.

Although an unimportant part of the contract remains unfinished, one who contracts to supply material or do work on a building is entitled to enforce a lien for the contract price less the cost of completing the contract.

Statement.

APPEAL by the plaintiff company from a judgment of the Judge of the District Court of the District of Temiskaming, in an action to enforce a mechanic's lien, in so far as the judgment disallowed the claim of the appellant company for a lien for the amount alleged to be due to it for work done and materials supplied to the defendant the Cochrane Public School Board, under a contract between the plaintiff company and the Board, dated the 22nd April, 1915, for the plumbing and heating of a school-house which the Board was having erected.

The work for which the plaintiff company's contract provided was completed, with the exception of the painting of a radiator, the cost of which would not have been more than $5, when the building was destroyed by fire.

A. G. Slaght, for appellant company.

G. H. Kilmer, K.C., for respondent the Cochrane Public School Board.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 10th November, 1916, pronounced by the Judge of the District Court of the District of Temiskaming, after the trial of the action before him on the previous 6th and 7th July. Meredith, C.J.O.

The appeal is from the judgment in so far as it disallowed the claim of the appellant for a lien for the amount alleged to be due to it for work done for and materials supplied to the respondent School Board under a contract between the appellant and the Board bearing date the 22nd April, 1915.

The contract is for the plumbing and heating of a new eight-room school which the Board was having erected, the principal contract in connection with which was made with W. G. Hunt.

The work for which the appellant's contract provides was completed, with the exception of the painting of a radiator, the cost of which would not have exceeded $5, when the school-building was destroyed by fire.

According to the terms of the contract, the appellant was to have completed what it contracted to do by the 15th November, 1915.

Eighty per cent. of the value of the work done was to be paid monthly on progress certificates, and the remainder of the contract price was to be paid and payment for any extras was to be made within sixty days after the completion of the works, and after the appellant should have rendered to the architect "a statement of the balance due" to the appellant.

The contract also provides that, if required, a certificate shall be obtained shewing that there are no mechanics' liens or claims registered against the lands on account of the appellant, and "thereupon and on or before the said sixtieth day after the completion of the said works a final certificate shall be obtained from and signed by the" architects "certifying to the balance due to

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the contractors on the said contract and for all extras in respect thereof but if from any reasonable cause whatever such final certificate should not be obtained or that the giving of the same should be refused by the architects the said contractors shall nevertheless after the expiration of the said sixty days be entitled to proceed at law to enforce payment of the balance due to them under the said contract and for all extra work in respect thereof and the production of a final certificate shall not in any case be a condition precedent to their right to recover the amount justly due and owing to them and such balance and the amount due in respect to extras shall be recovered if justly due without the necessity for the production in evidence of any final certificate and the right of action hereby provided shall not be controlled by the arbitrations clause hereinafter set forth."

The contract also provides that "all work and material as delivered on the premises to form part of the works are to be considered the property of the proprietors" and that "the proprietors shall insure the building from time to time to the extent of at least two-thirds of its value during the course of erection."

I have quoted the provision of the contract as to the final certificate because in the statement of defence the want of a final certificate is pleaded as a bar to the action. As far as I recollect, that position was not taken in argument before us, and it is manifestly untenable. So far from the production of the final certificate being made a condition precedent to the right to sue for the balance of the contract price, the very opposite is what is provided.

The case at bar, in my opinion, comes clearly within the principle of the decision in the recent case of *H. Dakin & Co. Limited* v. *Lee*, [1916] 1 K.B. 566.

That case, if I may respectfully so say, puts the law on a satisfactory basis, and the principle of the decision is not applicable only where all the work to be done has been done, but where it has been done negligently or in an improper manner.

A few references to the opinions of the Judges make that clear:—

Lord Cozens-Hardy, M.R., p. 579, said: "Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of oil paint, but in one of the rooms only two coats of paint are put on. Can anybody seriously say that under these circumstances the building owner could go and

occupy the house and take the benefit of all the decorations which had been done in the other rooms without paying a penny for all the work done by the builder, just because only two coats of paint had been put on in one room where there ought to have been three?"

Pickford, L.J., p. 580, said: "I cannot accept the proposition that if a man agrees to do a certain amount of work for a lump sum every breach which he makes of that contract by doing his work badly, or *by omitting some small portion of it*" (the italics are mine), "is an abandonment of his contract, or is only a performance of part of his contract, so that he cannot be paid his lump sum."

This, as it appears to me, just view of the matter, appealed to Mr. Williams, the respondent's inspector on the works, who on the 10th January, 1916, wrote to the appellant as follows: "Your statement to date shews that you have received $4,690.94. This leaves a balance of $1,291.06 on your contract. I beg to advise that a deduction of $5 will have to be made from this balance on account of basement radiator covering not being completed."

The provisions of the contract as to work and material becoming the property of the respondent, and its contract to insure, which I have quoted, make the case against the respondent stronger. The parties seem to have contemplated that as the work was done the property in it should pass to the respondent with the obligation on its part to insure, that is, to insure for the benefit of the contractors, and it is difficult to see how, in view of these provisions, the respondent can be heard to say to the appellant: "You have completed all the work you agreed to do for $5,982, except what would cost to complete $5, and, because that $5 worth of work was not done, we refuse to pay you any part of the $1,291 which we would have owed you had that $5 worth of work been done."

I would, for these reasons, allow the appeal with costs, reverse the judgment as to this claim of the appellant, and substitute for it judgment declaring the lien on the land and the insurance moneys which the respondent has received, with consequent provisions applicable in such cases, and direct that the respondent pay to the appellant so much of the costs of the proceedings in the Court below as was incurred in connection with the contestation of the appellant's claim. *Appeal allowed.*

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CALGARY BREWING & MALTING Co. v. McMANUS LIQUOR Co., Ltd.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 22, 1917.

GARNISHMENT (§ III—60)—SETTING ASIDE—IRREGULARITY—DETERMINATION OF ISSUE.

Under the Alberta practice rules, the right to have a garnishee summons set aside or dismissed, by a garnishee who has filed his answer denying the debt, for a delay in prosecution, is within the Court's discretion; it cannot be set aside for an irregularity; but an order should be made for the speedy determination of the issue, either by fixing a time and place for deciding it summarily, or by directing a formal issue to be tried.

Statement.

APPEAL from the judgment of Hyndman, J., affirming the Master's order setting aside a garnishee summons. Reversed.

A. M. Sinclair, for appellant; *J. M. Carson*, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—On February 14, 1916, the plaintiffs began an action against the defendant company to recover a certain sum as the price of goods sold and delivered. On the same day, the plaintiffs issued a garnishee summons in the usual form directed to a number of fire insurance companies.

The garnishees appear to have filed a joint answer to the summons, in which they denied the existence of any debt at the date of service. There was some question upon the argument as to the time when this answer was really filed. The date of the answer is November 27, 1916, but there is nothing in the appeal book to shew the date of filing. It seems, however, to be admitted that it was on file at the time of the hearing of the application out of which this appeal arose.

On January 25 the garnishees applied, upon notice, to the Master "for an order setting aside the garnishee summons issued herein by the plaintiff and for such further order as by the said Master may be deemed necessary."

The application was supported by an affidavit of one Lilly, the adjuster for the insurance companies, the garnishees. The facts sworn to in the affidavit were intended to shew that at the date of the service of the summons there was no debt due by the garnishees to the defendant. This was the purpose also of another affidavit filed in support of the affidavit made by one McGregor, an inspector of the Union Bank of Canada.

No affidavits were filed by the plaintiff company in reply. There were no grounds set forth in the notice of motion and we are left largely to the reasons for judgment given below for know-

ledge of the basis of the application. The Master made the order asked for, but gave no written reasons. On an appeal to Mr. Justice Hyndman the order of the Master was upheld and the plaintiff has appealed to this Court.

From the reasons for judgment given by Hyndman, J., it is apparent that, by him, at least, the matter was treated as a summary trial of the question whether there was or was not in existence at the date of the service of the summons a garnishable debt. If any question of procedure or irregularity was discussed before him it does not seem to have been very strongly urged upon his attention.

There is involved a question of the proper interpretation of the rules of procedure in regard to the attachment of debts.

Rule 648 sets forth the conditions upon which a plaintiff may obtain a garnishee summons. Rules 649 and 650 deal with the method of service and the legal effect thereof.

Rule 651 (1) provides that no order shall be made against the garnishee or for payment out of money paid into Court by the garnishee until after the expiration of 10 days after service, nor, if the summons is issued before judgment, until judgment has been obtained.

Then before any reference at all is made to the question as to what is to happen and what may be done if the garnishee neither pays money into Court nor answers the garnishee or to the question as to what is to be the procedure if the garnishee files an answer denying the debt, which two questions are covered by rules 653 and 654; rule 651 (2) provides at once for an application by the defendant or the garnishee or any person claiming to be interested in the moneys attached may apply to a Judge to set aside the garnishee summons *or for an order for the speedy determination of any question in the action or in the garnishee proceedings or for such other order as may be just.*

The words of the rule which I have caused to be italicized are new. Old rule 386 (2), from which the present rule is taken, stopped at the words "garnishee summons." Then old rules 389 and 390 dealt with the same matters as our present rules 653 and 654.

Rule 654 (old rule 390) lays down specifically what the plaintiff or any person interested (but not the garnishee) may do to

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have the matter settled and the dispute decided in case the garnishee files an answer disputing liabilty or claiming that the debt is not attachable. Then if no one moves in this way for two months after the filing of the disputing answer, rule 655 (old rule 391) provides that "the garnishee may apply for an order to set aside the garnishee summons."

In my opinion, the proper interpretation to be put upon this last rule 655 is to treat it as giving the garnishee a right analogous to the right of a defendant to apply to dismiss an action for want of prosecution. For instance, old rule 169, in regard to setting down for trial, provided by sub-sec. (2) that "if the plaintiff, having obtained an order setting a cause down for trial, neglects to set the cause down and proceed to trial in pursuance thereof, the defendant may apply to a Judge for an order dismissing the action and the Judge may thereupon make such order *as he may deem proper* (not necessarily, it will be observed, an order dismissing the action).

So also the present rules as to directions furnish, I think, an analogous situation. Rule 230 says:—

> If the plaintiffs or one of the plaintiffs, if more than one, do not, within 14 days after the pleadings are closed, apply for directions, the defendant or any defendant shall be at liberty to apply for an order to dismiss the action and upon such application the Judge may either dismiss the action on such terms as may be just, or may deal with such application in all respects as if it were a motion for directions.

Now, r. 655 does indeed say that the garnishee may apply for an order to set aside the garnishee summons, but it does not say that he must be given it in every case. It seems clear to me that, read with r. 654, this rule shews that it was intended to treat the issue arrived at between the plaintiff and the garnishee as a sort of subsidiary action even before a formal issue is directed to be tried and merely to give the garnishee a right to have the proceeding dismissed for delay in prosecution. It is true that the alternative discretion given the Judge by old rule 169 (2) and present rule 230 is not so specifically mentioned, but it is clearly implied. Obviously the Judge, unless in a case of gross delay, would not set the garnishee summons aside merely on account of delay, but would, if the plaintiff so desired, apply the provisions of r. 654, and either fix a time and place for deciding the matter summarily or direct a formal issue to be tried and, in a proper case, mulcting the plaintiff in costs for his delay and putting him

on terms to proceed thereafter promptly and speedily as was done under the old practice in regard to setting actions down for trial.

In my opinion, r. 655 was not intended to give any right to apply to set a garnishee summons aside for irregularity in its issue. No defendant who has unconditionally appeared to a writ of summons and filed a defence was ever allowed thereafter to apply to set the writ of summons aside for irregularity in its issue. So in this case the garnishees filed an answer to the garnishee summons denying liability. It is true they reserved their right to attack the regularity of the *service* of the summons but they said nothing in regard to the regularity of its issue. After filing that answer I think they had no longer a right to question the regularity of the issue of the summons. I refer to the provisions of rules 273 and 274. It may be that in such a case as this a garnishee after filing an answer might say that he had subsequently thereto and for the first time discovered that there was an irregularity in its issue. But the obligation of shewing want of knowledge would, I think, lie upon him and there is no evidence upon the matter in the case before us. Then, if he did shew that he had been ignorant of the irregularity at the time of filing his answer, I think his application to set aside for that reason should be treated as being made under rule 651 (2).

The garnishee is given a definite right by rule 651 (2) to apply immediately after service for an order setting the summons aside. This is his opportunity to question the regularity of its issue and I think it is plain from the words which were added by the new rule that it was not intended that the merits of a dispute as to the existence of a debt due from the garnishee to the defendant should, under those words of this rule, be enquired into. The added words give the alternative of applying for an order for the *speedy determination* of "any question in the garnishee proceedings." Obviously this was intended to give the garnishee a right to get the matter, as regard the merits, settled quickly without waiting for the procedure laid down in r. 654, and judging from the affidavits of the garnishees in this case, they sought a decision on the merits. If the garnishee cannot get rid of the summons for irregularity, that is, because the essential conditions giving the right to issue it are not shewn to exist or to have been complied with, then what he is entitled to is an order that the merits as between the garnishee and the plaintiff be speedily determined,

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not an order determining those merits forthwith, unless, indeed, the plaintiff asks for no time at all and is prepared to have the matter dealt with on the spot.

In the present case it appears that 2 months had not elapsed after the filing of the answer when the application was first launched by the garnishees. The answer being dated November 27, was, we may safely assume, not filed before that date, and the application to the Master was returnable on January 25. His order, however, is dated January 30, and if the application was actually heard on the 30th, as this would seem to indicate, it may be that it should be treated as an application after the expiration of the two months under rule 655. The reason for the adjournment does not appear.

But, it seems to me, this question is immaterial except perhaps on the question of costs. If the application was under r. 655, I think, for the reasons given, all that the Master should have done was to apply the provisions of r. 654 with a provision as to costs which would properly punish the plaintiff for the delay.

If, on the other hand, the 2 months had not elapsed, which perhaps is the strict position, then r. 651 (2) no doubt still gives the garnishees a right to apply for an order for the speedy determination of the issue raised as being "a question in the garnishee proceedings." But having filed an answer under r. 654, I think the right to set the summons aside for irregularity was gone, except in the possible case of prior ignorance of its existence. It is true the notice of motion asked for an order setting the summons aside, but it also asked for "such further order" as the Master should deem proper, and therefore I think the motion was not subject to dismissal absolutely, but could be, and should have been, treated as an application for an order for the speedy determination of the matter.

The irregularity suggested lies in the contents of the affidavit upon which it was issued. But that question, not being open, need not be now considered.

Therefore whether the 2 months had elapsed or not the practical result is the same. The only order which could properly have been made by the Master, unless he dismissed the application altogether, was an order for the speedy determination of the issue, that is, either by fixing a time and place for deciding it

summarily or by directing a formal issue to be tried. And inasmuch as the two months had in fact elapsed when his order was made, I do not think that he should have dismissed the application.

It is, of course, quite proper, if the parties agree to such a course, that when an application of this kind is made the Judge or, subject to the question of his jurisdiction, the Master should proceed at once to determine the merits. That is, the Judge may fix "here and now" as a time and place for determining the matter summarily, as under r. 654, or may make an order, as under 651 (2), practically to the same effect. In such a case no such order would of course ever be drawn up. Some such course was obviously involved in what was done by the Chief Justice in *Hartt* v. *Edmonton Steam Laundry Co.*, 2 A.L.R. 130. In that case the parties obviously tacitly assented to that course being taken.

In the present case, however, it is clear, even from the respondent's factum, that the appellant did object to the form of the procedure although the objection was not on the proper ground, or rather, the appellant did not hit the mark quite squarely in his suggestion as to what the right procedure would be.

I think, therefore, neither the question of the regularity of the issue of the summons nor the merits of the dispute as to liability ought to be considered by us on this application. The result is that the appeal should be allowed and the orders below set aside. The proper order to make would be either one fixing a time and place for disposing of the matter summarily or directing an issue. But I do not think it is convenient for us to do this. Either of the parties may apply again on notice to the Master for an order deciding which course should be pursued. The question whether there is or is not yet a judgment against the defendant would be a material question then to be considered. The garnishees may have the right to a decision of their dispute at once without waiting for a judgment between the plaintiff and defendant.

It appeared on the argument that the respondents by letter offered the appellant the opportunity of having the merits reopened and of having the same course adopted as we now direct. For this reason I think there should be no costs of the appeal.

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Moreover, the appellant appears to have felt determined to insist on his strict legal right. But this was, not to have the application dismissed outright, but to have an order made as we now suggest, and as the respondents afterwards offered him in the letter. The costs of the original application before the Master and of the appeal to Hyndman, J., should, I think, be costs in the cause, *i.e.*, in the garnishee proceedings, as between the plaintiff and the garnishees. *Appeal allowed.*

MATHESON v. CANADIAN PACIFIC R. CO.

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Lamont and Elwood, JJ. July 14, 1917.

WITNESSES (§ II A—32)—REFRESHING MEMORY—FROM PLEADINGS.

Where the original memoranda from which a declaration is copied has been destroyed, a witness may be permitted to look at the declaration for the purpose of refreshing his memory.

Statement.

APPEAL by defendant from the judgment of a District Court. Affirmed.

J. A. Allan, K.C., for appellant.

G. E. Taylor, K.C., and *J. W. Corman*, for respondents.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The question raised in this appeal is whether or not the District Court Judge was justified, under the evidence, in concluding that there were only 1,690 bushels of oats in the car which was received by the plaintiffs from the defendant company.

I am of the opinion that the District Court Judge erred in admitting as evidence ex. "F," being a declaration made by the witness Cook and delivered to the detective employed by the defendant company.

The next question is, was the District Court Judge correct in allowing the witness Cook to look at ex. "F" for the purpose of refreshing his memory.

The evidence shows that the original from which this declaration was compiled had been destroyed shortly after the declaration was made and that the declaration was made from the original memorandum containing the quantities of oats delivered to the various farmers. Apparently the original memorandum contained the gross weight of the oats, the weight of the wagon and the net weight. The declaration contained the net weights of the oats delivered to each farmer and the number of loads. Cook swears

that he compared this declaration with the original memorandum so as to find if the figures were correct or not, and it is the exact copy of the net weights in the original memorandum, and that it was checked over, on the day that the declaration was made, with the C.P.R. detective.

A number of cases were cited by Mr. Allan in support of his contention that the witness should not have been permitted to look at this declaration.

In *Jones* v. *Stroud*, 2 Car. & P. 196, the original paper was in existence; so, too, in *Doe* v. *Perkins*, 3 T.R. 749; (100 E.R. 838).

Kensington v. *Inglis*, 8 East 273 (103 E.R. 346), seems authority for permitting the witness to refresh his memory by looking at the declaration.

In *Horne* v. *Mackenzie*, 6 Cl. & F. 628 (7 E.R. 834):

> A., a surveyor, made a survey or report, which he furnished to his employers; being afterwards called as a witness, he produced a printed copy of this report, on the margin of which he had, two days before, to assist him in giving his explanations as a witness, made a few jottings. The report had been made up from his original notes, of which it was in substance, though not in words, a transcript.
>
> *Held*, that he might look at this printed copy of the report, to refresh his memory.

In *Taylor* v. *Massey*, 20 O.R. 429, a witness took notes of what took place at a meeting. From these notes a report of the meeting was subsequently published in a newspaper. After the destruction of the original notes, the witness who took them was allowed to refer to the printed report for the purpose of refreshing his memory as to what took place at the meeting.

The only doubt that I have in my mind as to whether or not the witness in the case at bar should have been allowed to refresh his memory by looking at the declaration is, that the declaration did not contain the gross and tare weights, and that, possibly, if these weights were before the Court, it might appear that the net weights were incorrect. As the evidence shows, however, that the declaration was checked over with the original memorandum by the witness and by the C.P.R. detective, I think the witness was properly permitted to look at the declaration for the purpose of refreshing his memory.

Apart, however, from this declaration, the witness swears that the total number of bushels which he sold to the farmers was 1,690. It is quite true that he showed perhaps some hesitation

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in definitely pinning his recollection down to 1,690 bushels apart from the declaration, yet his evidence was the sole evidence given on that point at the trial, and I think, therefore, on that evidence, the District Court Judge could have been justified in finding, and in fact should have found that 1,690 were the total bushels delivered.

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

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Re HORLICK'S MALTED MILK Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington and Anglin, JJ. May 1, 1917.

TRADEMARK (§ II—8)—SURNAME AS.

A surname, when uncommon and distinctive from long user, is registrable as a trademark under the Canada Trademark and Design Act (R.S.C. 1906, ch. 71).

[See annotation following case.]

Statement.

APPEAL from a judgment of the Exchequer Court on a petition by Horlick's Malted Milk Co. to register the surname "Horlick" as a trademark to be used in connection with the sale of food products (secs. 5, 11 and 42 of the Trademark and Design Act, R.S.C. 1906, ch. 71). Reversed.

H. Fisher and *R. S. Smart*, for appellant.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The application was disposed of in the Exchequer Court apparently on the assumption that the facts alleged in its support disclosed merely a case of passing off and that the goods had acquired a reputation on the market by reason of the superiority of their manufacture and nothing more.

The grounds on which the minister refused the application do not appear, but his right to refuse to register is limited by sec. 11 of the Act. Having carefully considered the different sub-sections of sec. 11, I assume that the minister exercised the powers conferred by sub-sec. (*e*) of that section to the effect that the trademark for which registration was sought did not contain the essentials of a trademark properly speaking. I am not quite clear as to what that language means, but, in any event, both before and after the statute, the office of a trademark was and is to point out the origin or ownership of the article to which it is affixed. In the words of the English Act, 1905, sec. 9, a trademark is something adopted to distinguish the goods of the proprietor of the trademark from those of other persons. Our

statute, sec. 5, enacts that all names adopted by a person in trade for the purpose of distinguishing an article manufactured and offered for sale by him shall for the purposes of the Act be considered as a trademark.

The evidence, as I understand it, and I have read the affidavits with some attention, does not refer, as the Judge below assumed, to the quality of the goods, but they establish that the word "Horlick" has been used as a sign or symbol to indicate the origin or ownership of the goods to which it has been attached, and, in the words of sec. 5, to distinguish the article manufactured and offered for sale. In these circumstances I fail to see how the application to register should be refused on the plain language of the sections of the Act. I do not think that the *Teofani* case, [1913] 2 Ch. 545, is applicable on the facts of this case. But in *Teofani's* case it was held "that a surname is not necessarily incapable of being a registrable trademark. It may be registered, for instance, where it is, as in this instance, an uncommon name, and its use has been so extensive that, in fact, it has become distinctive. Here the affidavits shew that the trademark has been in actual use and that such user has been sufficient to render it distinctive; food products in packages bearing as a conspicuous identifying feature the word "Horlick" have been sold in the United States and in Great Britain and the colonies for over 40 years, the approximate number of packages sold each year amount to 7,500,000, and the annual cost of advertising has been almost $500,000.

This case is distinguishable on the facts from the case of *R. J. Lea*, 29 T.L.R. 334, [1913] 1 Ch. 446, and our statute differs from the British Act; but the *Lea* case is very instructive.

I am of the opinion that the appeal should be allowed and the prayer of the petition granted.

IDINGTON, J.:—I think this appeal should be allowed. The use of names seems expressly provided for by sec. 5 of the Trademark and Designs Act, as one of the devices which may be adopted for use by any person in his trade, business, occupation or calling for the purpose of distinguishing any manufacture, etc. Idington, J.

Indeed it may by long use have become the most distinctive mark that the product of a man's manufacture can be recognized by.

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RE HORLICK'S MALTED MILK CO.

Idington, J.

The material before us indicates at least a right on the part of the petitioner to have this name registered as its trademark.

The minister may find some objection upon facts brought to his knowledge in any way which would entitle him, and might indeed render it his duty, under sec. 11 of the Act, to reject the application. We can only speak from what is before us.

The reference to English decisions is certainly not very helpful. There is such a wide difference between the frame and express language of the English Act and ours, that decisions under the former are often more apt to mislead than help, as to put us on our guard.

In that Act, in its latter form, the use of names seems expressly to require the authority of the Board of Trade.

Under either Act, of course, the use of a name may so tend to mislead that the history of its use, as well as possibility of it being a very common name in the country where the trademark is to be used, must be looked at to avoid misleading.

The Weekly Notes and Law Times come to hand since this appeal was heard contain notes of the decision of Neville, J., in *Re William Crawford & Sons* (116 L.T. 440), where he held the application for registration should not proceed by reason of the name being a common one. He relied on the remarks of Lord Cozens-Hardy, M.R., in the *Teofani* case.

All implied therein is very far from holding that the use of a name must be prohibited.

Anglin, J.

ANGLIN, J.:—We have not had the advantage of hearing counsel in support of the order made by the Judge of the Exchequer Court refusing the petition of the applicants for registration of a "specific trademark." After giving to the consideration of the appeal the utmost possible care, I am, with great respect, of the opinion that it should be allowed. The Judge apparently misconceived the purport of the evidence adduced. Its effect is not to establish that the products of the applicants "have acquired a reputation on the market by reason of their excellence" or "by reason of the superiority of their manufacture," but to prove that the use, in connection with the advertising, packing and sale of them, of the word "Horlick's" has been so extensive, so conspicuous and of such duration and persistence that that word has become distinctive of those products.

Having regard to the fact that the name itself is somewhat peculiar and uncommon and to the extent and nature of the user shewn, the objections usually made to the registration of a surname have not their customary force. The effect produced by the user made by the applicants of the word "Horlick's" is that it has become associated with them. It has become a name "adapted to distinguish the goods as the goods of one particular maker." The facts in evidence appear to bring this case within the recent decisions in the cases of *Cadbury*, [1915] 1 Ch. 331, and *Re Muratti*, 32 R.P.C. 9, 77, which seem to me more closely in point than the two authorities cited by the Judge. Reference may also be made to *Re Teofani*, [1913] 2 Ch. 545, 30 R.P.C. 446, 460. "The so-called trademark contains the essentials of a trademark properly speaking": R.S.C. ch. 71, sec. 11 (*e*); *Richards* v. *Butcher*, [1891] 2 Ch. 522, 536.

I am of the opinion that upon a case such as that made in the record before us the English Courts, under the somewhat narrower terms of their statute, would direct that an application for registration should proceed. Having regard to the broader provisions of our Act—that

> All . . . names . . . adopted for use by any person in his trade (or) business . . . for the purpose of distinguishing any manufacture, product, or article . . . manufactured, produced, compounded, packed, or offered for sale by him, applied in any manner whatever, either to such manufacture, product or article or to any package . . . box or other vessel or receptacle of any description whatsoever containing the same, shall for the purposes of this Act be considered and known as trademarks.

I think we should really be doing a serious injustice to the applicants, not compensated by any advantages to the public, if we were not to allow the registration which they seek to be effected. *Re Daimler*, 33 R.P.C. 337, 340. *Appeal allowed.*

Annotation—Registrability of surname as trademark. **Annotation.**

BY RUSSEL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

Sections 5 and part of section 11 of the Trademark and Design Act read as follows:—

5. "All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trademarks."

Annotation.

11. "The Minister may refuse to register any trademark—

"(*e*) If the so-called trademark does not contain the essentials necessary to constitute a trademark properly speaking."

Sec. 5 substantially as it stands was passed in 1861, 24 Vict. ch. 21, sec. 2.

For some years a fairly well-established practice has existed in regard to names tendered for registration as trademarks.

The Department of Agriculture has refused to register names and the applicant has been left to apply to the Exchequer Court. The Department of Agriculture has taken the position that it has no means of taking evidence, whereas evidence can be submitted to the Exchequer Court. Frequently, when applications have been refused, the Department has pointed out to the applicant that on a proper case being made out, registration will be ordered by the Exchequer Court. The senior Judge of the Exchequer Court, when making an order for registration, has frequently said that the order merely decides that the applicant has made a *primâ facie* case. He has pointed out that the order would not be binding in any subsequent proceedings, where different or additional facts might be before the Court.

Under the practice which has grown up very many registrations have been made. Among others, the following names have been registered:—

Crompton, for corduroy; Christie, for biscuits; Pickering, for governors; Winchester, for rifles; Yale, for locks; De Vilbis, for atomizers; Holmes & Edwards, for silverware; Harris, for lubricating oil; Kohler, for bathroom fixtures; Mueller, for plumbers' fittings; McCray, for refrigerators; Pillsbury's, for flour; Remington, for rifles; Pear's soap; Chartreuse, for brandy; Oliver, for ploughs; L. E. N. Pratte, for pianos; Lipton, for foods and beverages; Stifel, for printed textile fabrics; Smith & Wesson, for firearms; Stafford's, for writing inks, etc.; McVitie & Price, for biscuits, etc.

A signature or a surname printed in a distinctive form is a good trademark: *Welch* v. *Knott*, 4 K. & J. 707; *Massam* v. *Thorley's Cattle Food Co.*, 6 Ch. D. 748. A trader may do business under a name other than his own, or under a fancy name and acquire trademark rights in it: *Love* v. *Latimer*, 32 O.R. 231; *Re Holt*, [1896] 1 Ch. 711, (*Re "Trilby"*). A fictitious name may be used: *Templeton* v. *Wallace*, 4 Terr. L.R. 340.

A surname not represented in any special or distinctive manner is not ordinarily a good trademark. Its use is natural, but open to the inconvenience that there may be other traders in the same business with the same name. In *Ainsworth* v. *Walmsley* (1866), L.R. 1 Eq. 518, Sir W. Page Wood, V.-C., at p. 525, says: "Then, is not a man's name as strong an instance of trademark as can be suggested? Subject only to this inconvenience, that if a Mr. Jones, or a Mr. Brown, relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name." *Burgess* v. *Burgess* (1853), 3 De G.M. & G. 896; *Tussaud* v. *Tussaud* (1890), 44 Ch. D. 678; *Aikens* v. *Piper* (1869), 15 Grant 581. It is open for any person of the same family name to use it: *Slater Shoe Co., Ltd.* v. *The Eagle Shoe Co.* (1910), 16 R.L.N.S. 474.

Where a trader has, however, been long permitted to enjoy the exclusive use of a given surname, and where through such extended use and trade it has acquired a secondary trademark meaning in the trade, then his use of it may be protected and the name is entitled to registration: *Re Elkington & Co.'s Trademark*, 11 Can. Ex. 293; *Gramm Motor Truck Co.* v. *Fisher Motor Co.* (1913), 17 D.L.R. 745, 30 O.L.R. 1. When it is sought to register

Annotation.

a surname by reason of a secondary or distinctive meaning having been acquired, it is necessary to make application to the Exchequer Court. There is no machinery provided by which questions of this kind can be determined within the Department.

Surnames have had a somewhat chequered career before the English Courts. The contention that a surname in the possessive case was "in some particular or distinctive manner" and hence registrable under the Act, was disposed of in *Pirie* v. *Goodall*, [1892] 1 Ch. 35, 9 R.P.C. 17. Under sec. 9 (5) of the British Act of 1905 surnames could be registered by order of the Board of Trade upon evidence of distinctiveness being produced. The registrability of surnames under this section was first questioned in the matter of the application of *Pope's Electric Lamp Co., Ltd.*, for a trademark (28 R.P.C. 629), where Warrington, J., held "that the name 'Pope'" was in its nature not "adapted to distinguish" the goods of the applicants from those of other persons of the name of Pope who might at any time carry on trade in the goods. Later, Joyce, J., refused "McEwan's" and "Boardman's" on the same grounds: *Application of R. T. Lea, Ltd.*, and *Application of William McEwan & Co., Ltd.*, 29 R.P.C. 165.

The Court of Appeals confirmed this decision, but on the grounds that "the evidence fell far short of that which was required to prove distinctiveness within sec. 9," and that the word "Boardman's" was not "adapted to distinguish."

In the *Teofani* case (1909), 30 R.P.C. 440, the Board of Trade made an order for the registration, and this was reviewed by the Court of Appeals and supported. The Master of the Rolls, in his judgment, said: "It is only in very exceptional circumstances that a surname-application ought to be allowed to proceed. . . . If, as I think, a surname is not incapable of being a registrable trademark, it seems to me that the present is one of those exceptional cases in what the order of the Board of Trade cannot be considered improper, although even in this case I think the Board of Trade might well have refused the application. The name 'Teofani' is very uncommon, and the user of that name as a trademark for 20 years at least has been so extensive as to have made it in fact distinctive for cigarettes."

Following this, Neville, J., in the *Cadbury* case (32 R.P.C. 9) found "Cadbury" to be a distinctive mark for confectionery, and "adapted to distinguish" the applicant's goods.

The words "adapted to distinguish" do not occur in the Canadian Act. Sec. 5 refers to "names" which are "adopted for use . . . for the purpose of distinguishing." It would appear that the rather fine question of whether or not a given word is intrinsically "adapted to distinguish" the goods of the applicant does not arise in Canada as in England.

The Supreme Court, in *Canada Publishing Co., Ltd.*, v. *Gage* (1885), 11 Can. S.C.R. 306, held the plaintiff entitled to the exclusive use of the name "Beatty" in connection with copybooks.

The Court of Queen's Bench for Quebec (in *Thompson & Mackinnon* (1877), 21 L.C.J. 355) supported the phrase "Mackinnon's Biscuits" as a trademark. Cross, J., said: "The name thus used in not the individual designation of John Mackinnon, the assignor of the rights, but is merely the generic name of the Mackinnon clan, as such there can be no valid objection to its having become a trademark for distinguishing a particular manufacture of biscuits."

Annotation. Rival traders of the same name are required to take means to distinguish their goods from those of the earlier trader who has acquired trademark rights in the name: *Canada Publishing Co.* v. *Gage* (1885), 11 Can. S.C.R. 306; *Thompson* v. *Mackinnon* (1877), 21 L.C.J. 355; *Montreal Lithographing Co.* v. *Sabiston* (1899), 3 R. de J. 403, [1899] A.C. 610; *Cash* v. *Cash* (1900), 84 L.T. 349, 86 L.T. 211.

B. C.

C. A.

ANDERSON v. GERMAN AMERICAN INS. Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. April 3, 1917.

INSURANCE (§ VI B—250)—PROOF OF LOSS —GOODS IN HOUSE.

Where there is no affirmative evidence from which it may reasonably be inferred that goods insured were actually in the house at the time of the fire, it cannot be assumed that the fire caused a loss under the policy.

Statement. APPEAL by defendant from the judgment of Hunter, C.J.B.C., in favour of plaintiff, in an action on a fire insurance policy. Reversed.

Martin Griffin, for appellant; *McDiarmid*, for respondents.

Macdonald, C.J.A. MACDONALD, C.J.A.:—I would allow the appeal.

Martin, J.A. MARTIN, J.A.:—Several defences are raised to this action which are of weight, but, in my opinion, one of them at least, which meets us at the threshold and has to be faced, must prevail, viz., that there is, strange to say, no affirmative evidence from which it may reasonably be inferred, in the circumstances, that the goods insured were actually in the house at the time of the fire, and therefore it cannot be assumed that the fire caused a loss under the policy. This is an unsatisfactory ground to decide the case on, but I see no escape from it, and it is not our duty to aid the plaintiffs in supplying those proofs of loss which should have been given in the manner usual in such cases.

The appeal, therefore, should be allowed.

McPhillips, J.A. MCPHILLIPS, J.A. (dissenting):—In my opinion, the judgment of the Chief Justice of British Columbia should be affirmed. The judgment holds that the appellant is liable upon the two policies of insurance against fire upon the house and the contents thereof respectively. The trial seems to have been clouded with a large number of technical exceptions under which the appellant there as well as before this Court attempted to escape liability—all of which, in my opinion, are without merit and cannot be supported in law. I will proceed to dispose of the exceptions taken seriatim.

Firstly, with respect to the fire policy (for $2,500) upon the house, the plaintiffs (respondents) Matson & Coles were the mort-

gagees of the land upon which the house was situate and obtained a final order of foreclosure in respect to the land on March 14, 1915. Originally the assured was Mrs. James Anderson (one of the plaintiffs and one of the respondents). Her interest in the property would appear to have been acquired by the Pacific Coast Realty Co., a private partnership, of which she was a member, and later this interest was acquired by the Pacific Coast Realty Co. Ltd., and on July 30, 1915, the last named company assigned its interest to Matson & Coles, to which the appellant company assented. It is clear that at the time of the placing of the insurance Mrs. Anderson had an interest, as a large shareholder and director in the Pacific Coast Realty Co. Ltd., and as such had an insurable interest, and it was not necessary that that interest only should be insured. The company's interest was insured. (See *A. G. Peuchen Co.* v. *City Mutual Fire* (1891), 18 A.R. (Ont.) 446; *Riggs* v. *Connecticut* (1890), 125 N.Y. 7, 25 N.E. Rep. 1058; *Mannheim Ins. Co.* v. *Hollander* (1901), 112 Fed. Rep. 549; *Seaman* v. *Enterprise F. & M.* (1884), 21 Fed. Rep. 778; *Warren* v. *Davenport Fire* (1871), 31 Iowa 464; *Wilson* v. *Jones*, L.R. 2 Ex. 139.) At the time of the loss, on September 1, 1915, Matson & Coles had a final order of foreclosure and were entitled to be indemnified under the terms of the policy then subsisting, the appellant company having assented thereto, and upon the facts the company had entered into a distinct contractual relationship, with Matson & Coles, and it is impossible now for the appellant company to contend otherwise.

Secondly, with respect to the policy upon the contents of the house (the contents—being furniture, etc.—were in the house covered by the before-mentioned fire policy). The assured was Mrs. James Anderson. Her interest in the property would appear to have been acquired by the Pacific Coast Realty Co., a private partnership (as already mentioned), and later this interest was acquired by the Pacific Coast Realty Co. Ltd., and on July 30, 1915—the fire policy on contents of the house was first for $2,500, but later reduced to $1,500—the last named company assigned its interest to Matson & Coles, to which the appellant company assented, and the Pacific Coast Realty Co., Ltd., was at the time of the loss on September 1, 1915, the owner of the contents of the house, being furniture, etc., but having assigned its interest in the property under the policy then subsisting and the appellant

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company having assented thereto, to Matson & Coles, they are entitled to the moneys payable under the policy, a distinct contractual relationship existing between the company and Matson & Coles, and it is impossible now for the appellant company to contend otherwise.

Thirdly, with respect to the contention put forward that the Pacific Coast Realty Co. Ltd. cannot be looked upon as an existent company, as it failed to obtain an order of the Court on or before August 25, 1912, restoring it to the register under sec. 28 of the Companies Act (R.S.B.C. 1911, ch. 39), it stood dissolved; but the reply is that by the order of Morrison, J., made on May 26, 1915, it was ordered that the company be restored to the register in the office of the registrar of joint stock companies in pursuance of sub-sec. 4 of sec. 268 of the Companies Act, as amended by sec. 21 of the Companies Act Amendment Act 1913, and that by reason thereof, and as provided in the statute, the company being ordered to be restored to the register "shall be deemed to have continued in existence." It is, however, contended on the part of the appellant company that the order is a nullity, being made upon summons and in Chambers, and not by a Judge sitting in Court, and *Murphy* v. *Star Exploring and Mining Co.*, 8 B.C.R. 421, 1 M.M.C. 450, is cited as being a decision which upholds the contention made. The decision is upon a very different statute (Mineral Act, ch. 135, R.S.B.C. 1897, sec. 37), and the statute reads: "unless such time shall be extended by special order of the Court upon cause being shewn." There is no interpretation of the word "Court" in the Mineral Act, nor in the Interpretation Act (R.S.B.C. 1897, ch. 1), but in the Companies Act (R.S.B.C. 1911, ch. 39), in the interpretation section (sec. 2) we find: "The Court" used in relation to a company means the 'Supreme Court." It therefore follows that the jurisdiction is given to the Supreme Court; but does it follow that in making the order the Judge must be sitting in Court? It would seem to me that there is no force whatever in the contention advanced, and in thus expressing my view it is with the greatest respect to the decision of the Full Court in *Murphy* v. *Star Exploring and Mining Co.*, *supra*, and the Judges who composed the majority of the Court (McColl, C.J., dissenting). In that case, the statute was in very different terms and the case is easily distinguishable. Walkem, J., who wrote the leading judgment, referred to the

decisions of the Court of Appeal in England, dealing with the words "the Court or a Judge." But in the present case we merely have the words "the Court" and "the Court" means the "Supreme Court," and in the final analysis can only mean that it is within the jurisdiction of the Supreme Court; and without apt words, words of an intractable nature, why construe the words to mean that the order can only be made by a Judge sitting in Court? (See also sec. 54, ch. 58 R.S.B.C. 1911.) I cannot so construe the enactment. Lord Parmoor in the *City of London* v. *Associated Newspapers*, [1915] A.C. 674, at 704, said:—

> I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agree . . .

Then there is the view taken of this objection by the Chief Justice of British Columbia in the Court below, and I may say that I wholly associate myself with the views expressed by the Chief Justice upon this point.

Fourthly, with respect to the contention that the assured Mrs. Anderson, and the other plaintiffs, were without any insurable interest and that therefore the policies were illegal and void, the evidence, in my opinion, amply discloses a sufficient interest to satisfy the statute and the law governing insurance. I cannot help observing, though, that the transactions were most complex, and I cannot say that the trial helped much in elucidating the tangle of matters, and it is with some hesitation, I have ventured to be so positive upon this point; but I consider that the ends of justice are best conserved in so holding. Further, it is the province, if not the duty of the Court, to lean towards the establishment of insurable interest: *Stock* v. *Inglis* (1884), 12 Q.B.D. 564, Brett, M.R.; *Glasgow Provident* v. *Westminster Fire* (1887), 14 R. 947. In support of my view that there was an insurable interest or such dealings as between the company and Matson & Coles as would entitle the Court to hold that there is liability upon the company I would refer to *Wyman* v. *Imperial Insurance Co.*, 16 Can. S.C.R. 715. There, admittedly, there was no insurable interest of any nature or kind in Trefry, yet liability was imposed upon the insurance company. In the present case, the regularity of the assignments of interest were not objected to by the agents for the appellant, and upon the facts, and in con-

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sideration of the forms of assignment used, it is clear that the appellant was fully aware that the owners of the property were the Pacific Coast Realty Co. Ltd., and they were treated as being the assured company under the policies, and the assignments thereof were to Matson & Coles, and this was all assented to and there arose distinct contractual relationship and privity of contract between the appellant and Matson & Coles (and in passing it may be remarked, although it has no legal effect, that other insurance held in the same way was paid by another insurance company in respect of this same fire loss).

Fifthly, with respect to the contention that the house had become vacant or unoccupied under the terms of the contract of insurance. This is a question of fact, and the Chief Justice has found against this contention, and in his holding I entirely agree.

Finally, founded upon all the facts adduced at the trial, very involved and hard to be reconciled in great measure, I am upon the whole satisfied that legal liability has been established, the course of dealing and the contracts of insurance entered into by the appellant company and its assent to the change of interest and the continuance of the contracts of insurance preclude any of the defences pressed being acceded to. Contracts of insurance cannot always be viewed as contracts of indemnity only: *Dalby* v. *India & London Life* (1854), 15 C.B. 365. In the present case, upon all the facts and the surrounding circumstances taken therewith, I cannot arrive at a conclusion other than that which has been arrived at by the Chief Justice, and, being of the opinion that that conclusion was right, I would dismiss the appeal.

Appeal allowed.

MAN.

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DAVIDSON v. GREAT WEST SADDLERY CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. May 2, 1917.

CONSTITUTIONAL LAW (§ II A—194)—POWERS OF PROVINCE—REGULATION OF FOREIGN CORPORATIONS—B.N.A. ACT, SEC. 92.

Howell, C.J., and Cameron, J., agreed with the trial Judge, that a province has power, under sec. 92 of the British North America Act, 1867, to compel, under penalty, extra-provincial corporations, including Dominion companies, to take out a license for the privilege of carrying on business and holding lands within its territory. Part IV. of the Manitoba Companies Act, R.S.M. 1913, ch. 35, held *intra vires*. Perdue and Haggart, JJ., *contra*.

[*John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, considered. See also *Mickelson* v. *Mickelson* (Man.), 28 D.L.R. 307; *The Companies* case, 26 D.L.R. 293, [1916] 1 A.C. 598; *The Insurance* case, 26 D.L.R. 288, [1916] 1 A.C. 588; *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566; and annotations in 18 D.L.R. 364; 26 D.L.R. 295.]

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DAVIDSON v. GREAT WEST SADDLERY CO.

Statement.

APPEAL by defendant company from the judgment of Macdonald, J., enjoining it from carrying on business in Manitoba until it had obtained a license required by the Manitoba Companies Act (R.S.M. 1913, ch. 35, Pt. IV.). Court divided; affirmed.

The following questions as to the constitutionality of the Act were stated:—

1. Whether the provisions of the said Companies Act of Manitoba, in so far as they purport to apply to the defendant company, are *intra vires* of the legislature of the Province of Manitoba.

2. Whether the defendant company is precluded by reason of not being licensed under the said Companies Act of Manitoba from carrying out its objects and undertakings in the Province of Manitoba.

3. Whether the defendant company is subject to the penalties prescribed by the said Companies Act of Manitoba for carrying on business without being licensed.

4. Whether the defendant company is incapacitated or prohibited by reason of not being licensed as required by the said Companies Act of Manitoba from occupying and holding lands necessary for the purpose of the company's undertaking.

5. Whether the said lease is valid and binding upon the defendant company and whether the defendant company is precluded by reason of not being licensed as aforesaid, from registering the said lease in accordance with the provisions of the Real Property Act.

Wegenast and *A. E. Bowles*, for appellant; *J. B. Hugg*, for respondent; *John Allen*, D.A.G., for Province.

Howell, C.J.M.

HOWELL, C.J.M.:—The defendant is a company incorporated under the Companies Act of Canada, and the plaintiff is a shareholder in that company and brings this action to test the constitutionality of an Act of the Legislature of Manitoba, ch. 35, R.S.M. 1913, called also the Companies Act. In referring to these statutes I shall hereinafter refer to the former as the Canadian statute and to the latter as the Manitoba statute.

The case is of the same nature as *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, and the defendant contends that, in this case, the Manitoba statute should be disposed of as the British Columbia statute was in that case.

At the outset it seems to me well to consider the methods of taxation under Manitoba's provincial laws. The chief taxation under these laws consists of charges on all real and personal property levied by municipalities, the whole proceeds of which are received by the several municipalities and applied by them for municipal purposes. Occasionally there is legislation by which the municipalities are directed to levy a small charge on

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the ratepayers and collect and pay over the same to the provincial treasury for some special purpose, but this does not often occur, and the sums so paid are inconsiderable.

Through a provincial officer known as the municipal commissioner municipalities are required to levy certain rates to help keep up judicial divisions and the buildings therein and the funds so received are applied solely for this municipal purpose.

For general provincial purposes the province does not levy any rate, nor does it have any general charge upon property. For revenue it depends chiefly upon the Dominion subsidy, but supplements this by moneys received from charges for the incorporation of companies and from charges made against other joint stock companies and from licenses of various kinds. A considerable revenue is received under ch. 191, R.S.M., known as the Corporations Taxation Act. This Act provides for the taxation of banks, insurance companies, street railway companies, express companies, telegraph companies, and various other companies. Under this Act the amount to be paid is fixed in various ways. Banks, for instance, pay $800 if head office is in Manitoba, and various sums for the branches. That Act requires each company to make certain annual returns giving details of business done, various values of real and personal property held by the company and many other particulars. In case of a bank the only return is evidently the number of branches. A penalty is imposed for not making annual returns.

By ch. 193, R.S.M., called the Railway Taxation Act, railway companies are subject to taxation, and they are compelled to make returns annually under penalty.

It is to be observed that most of the companies taxed under these two statutes are companies necessarily incorporated under Dominion laws, and it is not their property situate in the province that is taxed, but it is really a charge against them because of doing business in the province. Each would also be liable to municipal taxation upon their property.

The Manitoba statute, the subject-matter of this suit, is an ordinary companies Act, giving the machinery for the incorporation of companies. Added to this statute, but a part of it, is Part IV., "Extra-Provincial Corporations." Secs. 107 and 108 are as follows:—

107. Corporations not requiring license.

Corporations of the classes mentioned in this section are not required to take out a license under this part, viz.:

Class I.—Corporations which have heretofore received from the Government of Manitoba a license to carry on business in Manitoba, or which have been authorized by Act of the Legislature of Manitoba to carry on business in Manitoba, so long as such license or Act is in force.

Class II.—Corporations now or hereafter licensed or registered under the provisions of the Insurance Act.

Class III.—Corporations liable to payment of taxes imposed by the Corporations Taxation Act or the Railway Taxation Act.

Class IV.—Corporations not having gain for any of their objects.

108. Corporations requiring license.

Corporations of the classes mentioned in this section are required to take out a license under this part, viz.:

Class V.—Corporations (other than those mentioned in sec. 107) created by or under the authority of an Act of the Parliament of Canada, and authorized to carry on business in Manitoba.

Class VI.—Corporations not coming within any of the foregoing classes.

Sec. 126 declares that "for a license to a corporation coming within class V. or VI. such corporation shall pay to His Majesty for the public uses of Manitoba such fees as may be fixed by the Lieutenant-Governor in Council and no license shall be issued until the fee therefor is paid." This is followed by a provision that if the capital of the company is used largely outside of the province the fee may be reduced.

Sub-sec. 2 provides for annual payments of $5 or $10 for the public use of the province to be paid with certain annual statements.

Sec. 88 provides that fees payable on charters issued by the province shall be fixed by the Lieutenant-Governor in Council and as a part of this case the Order-in-Council fixing these fees is before us, and also the Order-in-Council fixing the fees required under sec. 126 above referred to. In each case the fees are graduated according to the amount of the capital and in amount they are identical. Provincial companies therefore pay the same fees for incorporation that Canadian companies pay for licenses.

The defendant company is by that Order-in-Council required to pay, in order to obtain a license, the sum of $150, and under the statute it must pay annually $10, both sums being payable "to His Majesty for the public uses of Manitoba."

It is apparent that practically all companies doing business in Manitoba, no matter where or how incorporated, are

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Howell, C.J.M.

compelled to pay certain sums into the Treasury of Manitoba for the use of the province. In some cases it is called a tax, in others a fee for a license.

In the *John Deere Plow Co.* case, 18 D.L.R. 353 at 362, [1915] A.C. 330 at 342, Lord Haldane said:—

> It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by sec. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (*Colonial Building Association* v. *Att'y-Gen'l of Quebec*, 9 App. Cas. 157, at 164); or escape the payment of taxes, even though they may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*, 12 App. Cas. 575).

In *Brewers & Maltsters* v. *Att'y-Gen'l*, [1897] A.C. 231, the plaintiff was a Canadian company duly licensed by Canada to manufacture beer. The Ontario Act required the company to take out a license before they could sell in Ontario for consumption there. The Court held the Act *intra vires*, although it provided that no sale could be made until a license was procured. Lord Herschell held that this was direct taxation.

It is to be observed that the Ontario Act had many restrictions on, and regulated the methods of business of the licensee as, for instance, requiring the licensee, if he sold in bottles, to sell by dozens of bottles and of a particular size, and there are many other restrictions on their method of doing business.

The case of *Fortier* v. *Lambe*, 25 Can. S.C.R. 422, decided that a fee paid for a license by a trader to do business in Montreal was a tax and was within the legislative powers of the Province.

In *International* v. *Brown*, 13 O.L.R. 644, it was held that a license fee exacted once for all and an annual fee payable as in this Act was merely one phase of direct taxation.

It seems to me that the Manitoba statute was enacted for the purpose of completing the provincial scheme of direct taxation for the general purposes of the province by a general charge or tax on all corporations as in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, 586, Lord Haldane, in the language above quoted, held that a license to trade which affects Dominion as well as other companies is a tax within the powers of the province.

Sec. 109 declares the absolute right of the Canadian company to a license; sec. 110, however, does not give such an abso-

lute right to companies not having a Canadian charter, thus indicating the absolute right of the former to a license under the Act.

It was argued that the right of the local authorities to fix the amount of the license fee put into the provincial authorities the power to prohibit by high fees the company from carrying on business in the province. That argument was advanced in the *Lambe* case, *supra*, unsuccessfully. The fees charged in this matter, as above set out, are reasonable. If the fees were made excessive, then perhaps it would thereby become indirect taxation.

Sec. 114 of the Manitoba statute requires the applicant for a license to give proof that the charter is in existence and requires that a person resident in the province be appointed to accept service of process, and it is objected that the province has no power to require this. To my mind the language used by Lord Haldane in the *John Deere* case, *supra*, justifies all the requirements of that section.

The plaintiff has no grievance in this case, for he gets the benefit of sub-sec. 3 and does not require to produce a power of attorney.

Secs. 112 and 113 require consideration. They are as follows:—

112. A corporation receiving a license under this part may, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation or other creating instrument, acquire, hold, mortgage, alienate and otherwise dispose of real estate in Manitoba and any interest therein to the same extent and for the same purposes and subject to the same conditions and limitations as if such corporation had been incorporated under Part I. of this Act, with power to carry on the business and exercise the powers embraced in the license.

113. The powers of any corporation, licensed under the provisions of this part, with respect to acquiring and holding real estate, shall be limited in its license to such annual or actual value as may be deemed proper.

Sec. 67 of the Act, being Part I. referred to in sec. 112, provides that "every company so incorporated, subject to the limitations contained in its letters patent of incorporation, may acquire, hold, alienate and convey real estate requisite for the carrying on of the business of such company. . . ."

Sec. 29 of the Canadian Act is as follows: "The company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company."

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It seems to me that under sec. 112 the licensee being a Canadian company gets as wide powers as to real estate as it could get under the Canadian statute.

It is argued, however, that the terms used in sec. 112, "subject to the limitations and conditions of the license" and the vague language "shall be limited in its license" in sec. 113, and the similar limitations at the end of sec. 111, have vested in the provincial authorities power to put such onerous and rigid conditions and restrictions in the licenses as would prevent the company from carrying on business in the province.

It is to be borne in mind that in this case, unlike the *John Deere* case, there has been no application for a license and no refusal to grant a license, and no pretence that the license when granted will contain objectionable conditions or restrictions. At most, the objection is a fear that the licensing authorities, that is, the Lieutenant-Governor in Council of Manitoba, may under this statute exercise their power improperly and exceed the powers granted to the province by sec. 92 of the B.N.A. Act. This imaginary grievance, like the question of high license fee above discussed, is disposed of by the *Lambe* case.

There is another answer to these objections. The statute vests in the provincial authorities the power to issue licenses which may be subject to certain conditions and limitations set forth by the authorities. The companies are by the laws of Canada entitled to trade and carry on business in Manitoba, subject to the provincial rights under sec. 92 of the B.N.A. Act. Under sec. 110 of the Manitoba statute the company is absolutely entitled to a license, and it follows that the authorities must issue a license, and they have no power to put in the license any conditions or regulations which are beyond the legislative powers granted to the province by the B.N.A. Act.

The B.C. statute, the subject of the *John Deere* case, provided that the provincial registrar could refuse a license, and he did refuse such license in that case. In this case there is no power given to refuse the license and it seems to me the power vested in the provincial authorities to put limitations and conditions in the licenses are only those which can be gathered from sec. 109 and the following sections of the Manitoba statute. The statute does not at all events pretend or assume to give the provincial authorities power to insert in the license limitations and

conditions which are beyond the legislative powers of the province in these matters.

If a license issued to a company contained limitations which were beyond the power of the province to impose, the company would be licensed and would not be bound by those limitations.

However, to me this all seems wild speculation. I assume that the provincial authorities would act lawfully and within their powers and that if an application was made by the defendant company for a license one would be granted and that there would be no limitations or conditions in the license which could not by the province be lawfully and properly imposed.

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I would answer the first four questions in the affirmative.

The fifth question can have no bearing on the judgment in this cause. I would not answer the first sentence of this question, because the lessor is not before the Court. As to the second sentence, the Land Titles Act and the various provisions thereof as to such registration were not discussed before us, and I see no necessity to answer this part of the question.

The Court being equally divided the appeal is dismissed without costs.

PERDUE, J.A.:—The question involved in this appeal is whether the Legislature of Manitoba had power to enact Part IV. of the Companies Act, R.S.M. 1913, ch. 35, being the part relating to extra-provincial corporations, in so far as the defendant company is affected. The defendant is a company incorporated by letters patent under the great seal of Canada pursuant to the authority of the Companies Act, being ch. 119 of the R.S.C. (1886), (now ch. 79 of R.S.C. 1906), with all the rights and powers given by that Act. The chief place of business of the company is stated in the letters patent to be, and it is in fact, at the City of Winnipeg in the Province of Manitoba. The letters patent authorized the company to carry on throughout Canada a general wholesale and retail leather, harness, saddlery, boot and shoe, trunk and valise business, including manufacturing, buying, selling and trading in such goods and the materials used in them, with power to acquire, purchase, lease, sell, build, erect or construct buildings, factories, etc., for the business of the company. The company carries on business in the Provinces of Manitoba, Saskatchewan and Alberta and has offices or depots at Regina, Calgary and

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Edmonton. The company is not licensed as required by Part IV. of the Companies Act of Manitoba. For the purposes of its undertaking, the company occupies land in the City of Winnipeg under a lease.

This action was brought by the plaintiff, who is a shareholder of the company, to restrain the company from carrying on business until it shall have obtained a license under the Companies Act of Manitoba. He claims that he, as a shareholder, is in danger of suffering loss by reason of the penalties and forfeitures to which the company may be subjected through carrying on business in Manitoba while unlicensed.

Unless the present case can be distinguished from the one considered in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, the decision of the Privy Council in the last mentioned case will apply, and the portions of the provincial statute to which objection is taken must be declared to be *ultra vires*.

It is claimed on behalf of the defendant that Part IV. the Manitoba Companies Act is not distinguishable in principle from the legislation which was in question in the *John Deere Co.* case. The enactments which were in question in that decision were contained in Part VI. of the B.C. Companies Act.

In the Manitoba Companies Act, Part IV., the expression "corporation" means a company, institution or corporation created otherwise than by or under an Act of the Legislature of Manitoba (sec. 106). Corporations created by or under the authority of an Act of the Parliament of Canada and authorized to carry on business in Manitoba, referred to as Class V., are required to take out a license (sec. 108). To this there are certain exceptions, but these do not include the defendant. Class VI. includes corporations not coming within the preceding five classes. A corporation coming within the class to which the defendant belongs shall, upon complying with the provisions of Part IV. and the regulations made thereunder and paying the fees required, receive a license to carry on its business and exercise its powers in Manitoba (sec. 109). A corporation coming within the class to which the defendant belongs or within Class VI. "may, upon complying with the provisions of this part (Part IV.) and the regulations made hereunder, receive a license to

carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Manitoba as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein." See sec. 111. A corporation receiving a license may, subject to the limitations and conditions of the license, and of its own charter, acquire, hold and dispose of real estate in Manitoba (sec. 112); but it shall not be capable of acquiring or disposing of real estate unless it has been licensed (sec. 119). No corporation coming within the class which includes the defendant shall carry on any of its business in Manitoba unless a license has been granted to it and is in force, and no agent of the corporation may carry on its business in Manitoba until a license has been obtained; exception is made in regard to buying or selling by travellers or correspondence where the corporation has no resident agent or place of business in Manitoba (sec. 118). If such a corporation carries on business in Manitoba without a license it shall incur a penalty of $50 a day and, so long as it remains unlicensed, it shall not be capable of maintaining any action, suit or proceeding in any Court in Manitoba in respect of any contract made in whole or in part in Manitoba (sec. 122). If its agent carries on any of the business of such corporation in Manitoba while it is unlicensed he shall be liable to a penalty (sec. 123).

Upon comparing the above provisions with those of the B.C. Act summarized as relevant by Lord Haldane in the *John Deere Co.* case, we find the following differences: (1) Sec. 109 of the Manitoba statute declares that the corporation upon complying with the provisions of Part IV. *shall* receive a license; the word used in the corresponding section of the other Act is *may*. (2) Sec. 18 of the B.C. Act provides that the registrar may refuse a license when the name of the company is identical with or resembling that by which a company, society or firm in existence is carrying on business, or has been incorporated, licensed or registered, or when the registrar is of opinion that the name is calculated to deceive, or he disapproves of it for any other reason. There is no such provision found in the Manitoba statute, but, by implication, it would appear from sec. 111 of that statute, that the Lieutenant-Governor in Council may insert in the license limitations and conditions as to the exercise by the company of its powers in Manitoba.

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In the *John Deere* case the company had applied for a license and the application had been refused because a company had already been registered in British Columbia under the same name. It appears to me that the main difference between the two statutes is, that in British Columbia the registrar *may* refuse a license on one of the grounds specified in section 18 of the Act of that province, while in Manitoba the license *shall* be granted, but may be made subject to conditions and limitations. The license to carry on business in the province, which the government of Manitoba decides to issue to a Dominion company, whether the license be general or restricted in its terms, must be obtained and accepted by the company. Without a license, the company cannot within the province carry on its business, or exercise the powers, or enjoy the rights conferred upon it under the Companies Act of the Dominion.

I would refer to the following passage from the judgment in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, at 359:—

> The expression "civil rights in the province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of sec. 92 and also to much of the field of sec. 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one "not coming within the classes of subjects" "assigned exclusively to the legislature of the provinces," within the meaning of the initial words of sec. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order and good government of Canada."

It was held, in that case, that the Parliament of Canada had power to enact sec. 5 of the Dominion Companies Act and sec. 30 of the Interpretation Act, R.S.C. 1906, ch. 1, sec. 5, provides for the creation by letters patent of a company as a body corporate and politic, for any of the purposes or objects (with certain exceptions) to which the legislative authority of the Parliament of Canada extends. Sec. 30 declares that words making an association of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation was created.

Sec. 29 of the Dominion Companies Act enables a company created by letters patent to acquire and hold any real estate re-

quisite for the carrying on of the company's undertaking. The powers given by this section are necessary concomitants of those conferred by sec. 5.

Again I quote from the judgment in the *John Deere Plow Co.* case, at 360:—

> They (their Lordships) do not desire to be understood as suggesting that, because the status of a Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by secs. 91 and 92, which restrict its literal scope. It is enough, for present purposes, to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company, as such, cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96; *Colonial Building Association* v. *Att'y-Gen'l for Quebec*, 9 App. Cas. 157; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.
>
> It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is, in reality, whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

The provisions of the B.C. statute were therefore inoperative to compel the company (1) to obtain a provincial license of the kind in question, or (2) to be registered in the province as a condition of exercising its powers or of suing in the Courts. That being so, I see no reason for arriving at any different conclusion in the present case. In my reading of the judgment in the *John Deere Plow Co.* case, I cannot find that the matters wherein the statute under consideration in that case differed from the Manitoba statute are important in a consideration of the constitutional validity of either. As it appears to me, the essential matters

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upon which the judgment was founded were that the statute in question in that case sought to compel every Dominion company, to which it applied, to take out a provincial license before the company could carry on business or exercise its powers within the province; that it made it necessary to procure a provincial license to enable the company to sue or to hold land in the province; that if such company carried on its business without a license it would be liable to penalties; that the agents who acted for it would be similarly liable; and that such company, while unlicensed, cannot sue in the Courts of the province in respect of contracts made within the province. These provisions are also found in the Manitoba statute. There is a difference in the language used, but the effect is the same.

An argument was made by those seeking to uphold the Act in question in the present case that the words "may obtain a license" are used in the B.C. Companies Act (sec. 152), while the corresponding section in the Manitoba Companies Act is "shall . . . receive a license." With great respect for the opinion of other members of the Court who take an opposite view, I cannot see how the difference between these two expressions affects the constitutional question involved. The main point is that the object of each statute is to restrain Dominion companies from exercising within the province the rights conferred upon such companies by their charters, unless and until they are licensed by the province.

It is also urged that by the B.C. Act an extra-provincial company may not be licensed or registered by a name identical with or resembling that by which a company, society or firm in existence is carrying on business, or has been incorporated, registered or licensed, or so nearly resembling that name as in the opinion of the registrar to be calculated to deceive, or if he disapproves of it for any other reason (sec. 18); while there is not, it is said, any similar provision in the Manitoba section. This, it appears to me, is, if anything, only a difference in the degree in which each Legislature offends in exceeding its powers. The judgment in *John Deere Plow Co.* v. *Wharton*, *supra*, was not based upon sec. 18 alone of the B.C. statute. It was based upon other provisions common to both statutes which were "directed to interfering with the status of Dominion companies, and to

preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under sec. 92 (B.N.A. Act) to the provincial legislature."

It was argued by counsel for the Attorney-General of the province that the legislation in question in this case does no more than impose a tax, that the requiring of a license was merely a form of direct taxation within the province in order to the raising of a revenue for provincial purposes under No. 2 of sec. 92 of the B.N.A. Act. In support of this proposition he relied upon *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, and *Brewers and Maltsters* v. *Att'y-Gen'l of Ontario*, [1897] A.C. 231.

Bank of Toronto v. *Lambe* was not a case of licensing a corporation to do business in the province. A statute of the Province of Quebec enacted that every bank carrying on the business of banking in that province, every insurance company transacting the business of insurance in that province and every incorporated company carrying on labour, trade or business in that province should annually pay the several taxes thereby imposed on them by the Act. The tax so imposed was not either in substance or in form a license duty. The Bank of Toronto had its head office in Toronto, Ontario, but had an agency at Montreal in the Province of Quebec. The tax was held to be direct taxation within the province and to be valid.

In the *Brewers and Maltsters* case, the Liquor License Act of the Province of Ontario made it necessary that every brewer, distiller or other person duly licensed by the Government of Canada should first obtain a license to sell by wholesale under the Act the liquor manufactured by him, when sold for consumption within that province. This enactment was held to be direct taxation and valid within sub-sec. 2 of sec. 92 of the B.N.A. Act. There was nothing in the Act which prevented such brewer or distiller from manufacturing or keeping liquor on his premises within the province, and a license was only necessary when he sold for consumption within the province.

A province has power to tax a person or corporation doing business within the province, but the two cases just referred to furnish no authority for excluding a Dominion corporation, with powers such as those possessed by the defendant, from doing business within the province unless and until it has obtained

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a license of the nature of that required under the Manitoba Companies Act.

The Liquor License Act of Ontario mentioned in the *Brewers and Maltsters* case was a general law of the province which provided that no person (including a body corporate) should sell by wholesale or retail spirituous or fermented liquors without first having obtained a license under the Act: R.S.O. (1887), ch. 194, sec. 49. It was a law of general application enacted under sec. 92 of the B.N.A. Act, and corporations, even though licensed by the Dominion to do business throughout Canada, would have to obey it in the same manner as they would be bound by the provincial laws relating to real property, contracts, sales of goods, chattel mortgages, etc. See *John Deere Plow Co.* case, [1915] A.C. 342-343, 18 D.L.R. 353, at 362. A company incorporated under a Dominion Act with power to carry on the business of distilling and manufacturing alcoholic liquors in Canada would be bound by the provisions of the Manitoba Temperance Act, in so far as sales of liquor within that province are concerned.

The Manitoba Companies Act may have had in view taxation as one of its objects, but if that were the sole object why did not the legislature adopt a method similar to that in the Province of Quebec which was declared to be valid in *Bank of Toronto* v. *Lambe, supra*? Such a method has, in fact, been adopted by the legislature of Manitoba in the Corporation Taxation Act, R.S.M. (1913), ch. 191, under which banks, insurance companies, loan, trust, telephone, telegraph, express and other companies, whether incorporated by an Act of the Parliament of Canada, or otherwise, shall pay an annual tax as provided in the Act. If further taxation were required that Act might have been amended for the purpose.

It may be pointed out as a circumstance that the defendant company has its chief place of business at the City of Winnipeg where it has business premises and a depot of goods. Taxation, therefore, of the kind the province may impose, is readily enforceable against the company.

I am unable to distinguish the present case from that decided in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, at 363, [1915] A.C. 330, at 343. I would quote from the conclusion arrived at in that case (p. 363):—

In the opinion of their Lordships it was not within the power of the provincial legislature to enact these provisions in their present form. It might have been competent to that legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under sec. 92 to the provincial legislature. The analogy of the decision of this Board in *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, therefore, applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion government of companies with other than provincial objects.

I would answer the first four questions in the negative.

As to the first part of the fifth question, I would answer: in so far as the defendant's legal capacity to take a lease without being first licensed under the Manitoba Companies Act is concerned: Yes. To the remainder of the fifth question I would answer: No.

Cameron, J.A.

CAMERON, J.A.:—In 1877, the first legislation on the subject of extra-territorial companies, as they are now named, was passed by the Legislative Assembly of this Province. It will be remembered that Manitoba had entered Confederation only 7 years before, that its population was small, that the area of the province at that time was but a fraction of what it now is, and that then the province was, and for some years after remained, without railway communication. The Act passed in 1877, ch. 15, 40 Vict., was entitled An Act to Authorize Corporations and other Institutions incorporated out of the Province of Manitoba to lend and invest Moneys therein. It recited that it would greatly tend to assist the progress of public improvements within the province, if facilities were afforded to institutions and corporations incorporated out of the province, for the purpose of lending moneys, to lend within the province, and that it is expedient to confer on such corporations powers to contract and hold lands in the province. Sec. 1 provides that where any corporation

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is incorporated under the laws of Great Britain or of the Dominion of Canada for the purpose of lending or investing moneys it may apply and receive from the provincial secretary a license authorizing it to carry on business in the province, to transact a loaning business of any description in the province in its corporate name, except the business of banking, to take and hold mortgages of real estate, and railway, municipal, and other bonds, to sell and transfer such mortgages and generally to have the same powers with reference to the premises as any private individual might have, so far as the same might be within the legislative power of the province; with the proviso that such corporations should sell or dispose of lands acquired by foreclosure, etc., within 5 years from the date of such foreclosure. By sec. 2 a certified copy of the charter was to be filed with a power of attorney to the principal agent in the province, authorizing such agent to accept process in all suits against the company, and declaring service of process upon such agent binding on the corporation. By sec. 3 process may be served on such agent. By sec. 4, notice of the license is to be given in the *Gazette* and by sec. 5 the provincial secretary may issue a license on evidence of due incorporation and on receiving the power of attorney. By the same section the fee to be paid is to be fixed by the Lieutenant-Governor in Council.

In 1880, 43 Vict. ch. 19, the Act was amended extending its operations to companies incorporated by the late Province of Canada or of any of the provinces of the Dominion. It was further provided that any corporation incorporated under the laws of Great Britain or of the Dominion of Canada authorized to carry out or effect any of the purposes or objects to which the legislative authority of the province extends may obtain a license to carry on its business in the province in compliance with the provisions of the Act of 40 Vict. ch. 15.

In the Consolidated Statutes of 1880, the above legislation was embodied in ch. 30.

In 1883 the above consolidated Act was repealed and another Act, more extensive in its scope, was passed. This, with amending Acts, is to be found in the Revised Statutes of 1892, ch. 24. There was subsequent legislation on the subject which was embodied in the Revised Statutes of 1902, ch. 28, which was repealed in 1909, 9 Edw. VII. ch. 10, and An Act respecting Extra-Terri-

torial Corporations was passed, which, with its subsequent amendments, is to be found in the R.S.M. as Part IV. of ch. 35, and is now before us.

The defendant company is incorporated under the Companies Act of Canada, R.S.C. ch. 79, with its head office at Winnipeg, and is not licensed under Part IV. The action is brought to test the validity of the relevant secs. of Part IV. and certain questions are submitted for the opinion of the Court.

On the argument before us, counsel for the defendant corporation in seeking to impeach the validity of provisions of Part IV. relating to Dominion corporations directed attention more particularly to secs. 108, 109, 118, 119, 122 and 123 of the Act as being an invalid exercise of the powers of the legislature in respect of a company incorporated under Dominion authority. He rested his case mainly upon the decision of the Judicial Committee of the Privy Council in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, a case which arose under the provisions of the Companies Act of British Columbia, R.S.B.C. ch. 39. It was argued that the provisions of that Act which formed the basis of the judgment in that case are practically identical with those of the Manitoba Act called in question here.

In the case of a statute such as that before us the presumption is in favour of its validity, particularly when it has been in force in this province, in varying form, for 40 years. It had been generally assumed that legislation was justified by the decision in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, and decisions following that authority. Since that decision there has been no case decided in which provincial legislation regulating commercial transactions and particular trades has been successfully attacked until the recent decision in *John Deere Plow Co.* v. *Wharton, supra.*

It is, I think, clear that the invalidity of all or any of those sections, if so declared, would not affect the remaining sections of Part IV. of the Act. In the *John Deere Plow Co.* case certain sections only of the B.C. Act were found inoperative.

Under sec. 109 a Dominion company, such as the defendant company in this case, shall, upon compliance with the Act, secure a license to carry on its business and exercise its powers in Manitoba.

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Under sec. 110, an extra-territorial corporation, other than a Dominion company, may, upon compliance with the Act, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein.

Sec. 111 is as follows:—

A corporation coming within class V. or VI. may apply to the Lieutenant-Governor in Council for a license to carry on its business or part thereof, and exercise its powers or part thereof, in Manitoba, and upon the granting of such license, such corporation may thereafter, while such license is in force, carry on in Manitoba the whole or such parts of its business and exercise in Manitoba the whole or such parts of its powers as may be embraced in the license; subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the license.

That is, as I read the statute, a corporation of either of the two classes may apply for and receive a license to do part of its business in the province and may thereupon carry on that part of its business, but in the case of a corporation within Class VI., subject to such further limitations and conditions as may be imposed in the license under sec. 110. The similarity in the expression in the two secs. 110 and 111 "subject . . . to such limitations and conditions as may be specified" in such license, lends strength to this interpretation. There is evident an intention not to appear to encroach upon the Dominion jurisdiction, as is seen in the use of the word "shall" in sec. 108 instead of "may" as in sec. 109, and as appears in sec. 112 (3), and elsewhere in the Act. Moreover, I think we should in cases of doubtful construction, when the validity of a statute is in question, be slow to adopt that construction which might undermine the Act and which presumably the legislature could not have possibly intended.

The result is that, as I look at these sections, a corporation created by or under the authority of an Act of the Dominion of Canada and authorized to carry on business in Manitoba cannot have its license restricted so that it can only carry on such parts of its business or exercise such parts of its powers in Manitoba as may be specified therein. But even if a power in the Lieutenant-Governor in Council or in the provincial secretary to restrict the powers of a Dominion company can be drawn from the wording of this section, it must surely be clear that the legislature

could grant no greater power than it itself had. It must have contemplated that such a power would be exercised reasonably and subject to the provisions of sec. 92 of the B.N.A. Act, precisely as if that section had been set forth in its very words as a proviso to this section.

In *John Deere Plow Co.* v. *Wharton, supra*, the appellants had applied for a license, and their application had been refused on the ground that there was another company of the same name in the register, in which case sec. 18 of the Act (as amended by sec. 6 of ch. 3 of the B.C. statutes for 1912) prohibits the grant of a license. The effect of the amendment is to give the registrar power to refuse an application by a corporation, the name of which is identical with that of another already incorporated, licensed or registered, or so nearly resembling that other as might in his opinion be calculated to deceive "or by a name of which the registrar shall for any other reason disapprove."

Lord Haldane in his judgment summarises the provisions of the B.C. Act at p. 355. He refers to the provisions prohibiting companies from taking proceedings in the Courts in respect of contracts unless licensed under the Act and also to the provisions referred to in sec. 18 above. "The question," he says, "which has to be determined is whether the legislation of the province which imposed these prohibitions was valid under the British North America Act." Again, at page 356, he sets forth in greater detail the relevant provisions of the B.C. Act, secs. 2, 139, 141, 167, 168, and sec. 18, which he gives at some length.

It is of importance to note that we have in our Act nothing corresponding to or resembling sec. 18 of the B.C. Act. On the contrary, our sec. 109, applying to the corporation before us, says that it "shall" receive a license upon complying with the formalities prescribed by the Act.

It does seem to me that Lord Haldane considered the two prohibitions he enumerates (18 D.L.R. 355) together, that is, the prohibition on the corporation under sec. 168, against taking proceedings in the Courts if unlicensed, and the prohibition imposed under sec. 18. The legislation imposing these two prohibitions he holds inoperative. In the case before him the refusal of the license was the important fact and it was upon this refusal that sec. 168 applied. Had there been no right or auth-

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ority to refuse, the disability under sec. 168 would not have arisen. In fact, therefore, the crucial point of the case was sec. 18, and as we have no such provision, the *John Deere Plow Co.* case can, in that important respect, be distinguished from that before us. Had the B.C. Act contained, instead of sec. 18, a clause similar to our 109 and 111, it is conceivable that the decision might have been different.

It is necessary to consider other matters of distinction between the B.C. statute and our own.

Secs. 102 to 110 of the B.C. Act are made applicable by sec. 150 to extra-provincial corporations including Dominion companies. These are intricate provisions relating to mortgages and charges, the registration of the same, etc., and are not to be found in our legislation. These secs. 102 to 110 are not referred to in the judgment, but were discussed on the argument, and, as in the case of sec. 18 already mentioned, they go far to impose upon the B.C. statute as it relates to Dominion companies the character of an Act of reincorporation rather than that of an Act requiring a license and the payment of a tax therefor.

Our attention was also directed to other distinctions between the secs. of the B.C. Act and our own. Sec. 167 of the B.C. Act imposed a penalty on an extra-territorial corporation for carrying on in the province "any part of its business" which, it is said, conflicts with secs. 29 and 30 of the Dominion Companies Act. In the corresponding section of the Manitoba Act (sec. 122), the penalty is imposed for violations of sec. 118, which is restricted to carrying on business within Manitoba, thus being confined to purely provincial transactions within the decision of the *Att'y-Gen'l* v. *Manitoba License Holders*, [1902] A.C. 73. Similar observations can be made as to secs. 170 and 168 of the B.C. Act.

It is pointed out, however, that Duff, J., in *John Deere Plow Co.* v. *Agnew*, 48 Can. S.C.R. 208, at 232, 10 D.L.R. 576, 583, interprets the phrase "carrying on business" as it occurs in the B.C. sec. 166 (now 167) as appearing to indicate such conduct on the part of the company as would amount to a submission to the laws of the province, and that no company would come under the disabilities unless it had a fixed place of business within the province. This expression of opinion was not, as Duff, J., observes,

necessary to the decision. It is at least obvious that the provisions of the B.C. Act are wider and less guarded than those in the Manitoba statute.

Apparently sec. 141 of the B.C. Act assumes to give to a Dominion company the power to hold lands upon the Act being complied with. Whereas the Manitoba secs. 119, 112 and 113 expressly recognize the right of Dominion companies to hold lands. This illustrates the different viewpoint from which the two legislatures approached and dealt with the subject.

Sec. 152 of the B.C. Act provides that an extra-provincial company may obtain a license and thereupon, subject to its charter, shall have the same powers and privileges as if incorporated under the B.C. Act. On the other hand, sec. 109 of the Manitoba Act provides that a Dominion company, upon compliance with the Act, "shall receive a license to carry on its business and exercise its powers in Manitoba," thus again dealing with the subject from the point of view of recognition and not reincorporation.

There are provisions in the Manitoba Act not to be found in that of British Columbia, which are material. I refer to sec. 112 (2) and (3), and sec. 114 (3) and secs. 117 and 118. These provisions clearly show an intention on the part of the legislature to refrain from impairing the powers of a Dominion corporation except where necessary for the purposes which the Act in this part has in view.

In view of the foregoing considerations, I think the distinctions between the sections of the Manitoba Act and those of the B.C. Act, to which reference has been made, are sufficiently marked to render the decision of the Privy Council in the *John Deere Plow Co.* case inapplicable to the case before us. It seems to me that the view taken in that case was that the B.C. Act, in effect, compelled a Dominion company to reincorporate under the provincial statute. As is shown by a perusal of the argument must stress was laid throughout on the provision in sec. 18 of the B.C. Act vesting in the registrar the power to decline to license and the power to change the corporate name. It was evidently a strong factor with their Lordships in determining the true scope and object of the provisions of the Act there in question and in arriving at the conclusion that by them the

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province did "interfere with the status and corporate capacity of a Dominion company."

The prohibition imposed on a corporation forbidding it to carry on business without a license under sec. 118 and the other sections prescribing penalties, looked at in the light of sub-sec. 15 of sec. 92 of the B.N.A. Act, involves the test to be applied to a provincial law imposing punishment or penalty. "The proper way . . . is to lay out of view for the moment the penalty and see whether the principal subject enacted is competent," *per* Maclennan, J., in *R.* v. *Wason*, 17 A.R. (Ont.) 221. "The nature of the punishment to be inflicted has no bearing upon the question of constitutional validity." Clement, Canadian Constitution, p. 573. "It cannot be argued that the thing prohibited is brought within the range of the criminal law merely by reason of the high nature of the punishment that may be inflicted on the offender:" *per* Osler, J., in *R.* v. *Wason*, *supra*. "Of course, the imposition of a penalty means little. Both legislatures may impose penalties." And I cannot see that it would make any difference whether the provincial legislation in a subject within sec. 92 of the B.N.A. Act in imposing a penalty for its enforcement apparently invades the jurisdiction of the Dominion Parliament in respect of sub-sec. (27) of sec. 91 "the criminal law" or of any other sub-sec., such as (2) "the regulation of trade and commerce." If such penal legislation is imposed upon the breach of a law which in its true intent and meaning is within the jurisdiction of the province to enact, it cannot affect the validity of the enactment itself. It is well recognized that provincial legislation, particularly under sub-sec. 16 of sec. 92 "may consist of prohibitive enactments merely, and that this of itself affords no test as to the validity of the enactment." It has been held that the simple imposition of a penalty upon the doing of an act is in legal effect a prohibition without express words: *R.* v. *Pierce*, 9 O.L.R. 374, *per* Sir William Meredith, C.J.

Upon the subject of the positive jurisdiction of the province to enact the sections in question, I quote the following from Lord Haldane's judgment in the *John Deere Plow Co.* case (18 D.L.R., at p. 362).

[See the judgment of Howell, C.J.M.].

I understand the above statement as plainly not intended to be exhaustive, but as illustrative of the proposition that enactments

under sec. 92 may and can control Dominion corporations in their provincial operations. The above observations are directly applicable to the sections here challenged to the extent that they are of the nature of mortmain laws, that they require, as a means of revenue, a license to do business in the province and that they are an exercise of the powers of the province relating to property and civil rights.

I confess I am not altogether clear as to the meaning of the references in Lord Haldane's judgment to the necessity for "general" legislation under sec. 92, when he says, for instance, at p. 360: "This does not mean that these powers (*i.e.*, of a Dominion company) can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally." And later on (p. 361): "The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice." The language of Lord Selborne in *L'Union St. Jacques de Montreal* v. *Bélisle* (1874), L.R. 6 P.C. 31, would seem to indicate that under sec. 91 special legislation by the Dominion Parliament is prohibited. But such legislation has been repeatedly recognized. *Colonial Building Assoc.* v. *Att'y-Gen'l*, 9 App. Cas. 157. In cases under sec. 92, as under sec. 91, "the power is a plenary power of sovereign legislation in relation to all matters coming within the classes of subjects therein enumerated, as the Act expressly states. The power is not to legislate on each class as a whole (though that is necessarily implied), but on any matter, great or small, falling within the class." Clement, Canadian Constitution, p. 415.

This statement accords with the general view of the powers of the respective legislatures. I take it, therefore, that the generality referred to above is intended to relate rather to the subject of the legislation than to its object or its application and that it means that the legislation questioned is to be examined from this point of view to gather and determine its true scope and object, its "pith and substance," in order to determine whether it comes properly within sec. 92.

In reference to this branch of the subject it is to be noted that the fees payable for a license by extra-territorial companies and those payable by provincial companies on incorporation are identical; that companies of all classes are required to make re-

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turns; that letters patent of incorporation are subject to revocation as are licenses to extra-territorial corporations; that, as need hardly be pointed out, a provincial corporation cannot hold lands, nor can it carry on business, prior to its incorporation; that letters patent may be restricted in any manner that may seem desirable to the Lieutenant-Governor in Council, and that the holding of real estate by a provincial corporation is subject to the limitations of its letters patent under sec. 67, as a licensed corporation is authorized to hold subject to the limitations in its license under sec. 113.

I wish to refer particularly to the judgment in *Colonial Building Assoc.* v. *Att'y-Gen'l*, 9 App. Cas. 157, at 166:—

> What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business which are defined within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

Also to *Brewers and Maltsters Assoc.* v. *Att'y-Gen'l*, [1897] A.C. 231.

We must keep before us the provisions of the Ontario Act there in question, requiring that every brewer, duly licensed by the Government of Canada under the Inland Revenue Acts, shall first obtain a license under the Act, etc., under the provisions of the Inland Revenue Act then in force, to appreciate the importance and relevancy of this decision. It was held that the tax or fee demanded for the license was a direct tax and that the legislation was *intra vires* of the province, though it imposed a prohibition on a Dominion licensee. Lord Herschell expressed the opinion that such a license came within sub-sec. 9 of sec. 92, and refused to consider that rule of construction *ejusdem generis* applied to that sub-section, and that there was no genus which would include "shop, saloon, tavern" and "auctioneer" license, and which would exclude brewers' and distillers' licenses.

I refer also to the remarks of Duff, J., in the *Companies Case*, 48 Can. S.C.R. 331, at 421, 422, 15 D.L.R. 332 (affirmed in 26 D.L.R. 293, [1916] 1 A.C. 598), which still stand, except as modified by the decision in the *John Deere Plow Co.* case, and I think are quite applicable to the provisions of the Act before us.

In my humble judgment the provisions of the Act which are controverted in this action should be upheld as being provincial legislation enacted under sec. 92 of the B.N.A. Act with respect to licenses in order to the raising of revenue by direct taxation (secs. 108, 109, 111, 112, 113, 114 and 126); as legislation dealing with property and civil rights and particularly from the point of view of mortmain laws (secs. 112, 113 and 119); as legislation dealing with the administration of justice in providing for the appointment of an agent, service of process, etc. (sec. 114; but it is to be noted this section does not apply to the defendant company); and in providing for the making of returns (sec. 120); as legislation prescribing penalties to enforce these provisions (secs. 118, 119, 122, 123, 124, 125) and, generally, as legislation affecting property and civil rights and dealing with matters of a merely local or private nature in the province.

I would answer the questions set forth in the stated case in the manner in which they are answered by the Chief Justice in his judgment.

Haggart, J.A.

HAGGART, J.A.:—I cannot distinguish the present case from *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330. It is the latest decision of the Privy Council on the question. I think it is binding on us. *Appeal dismissed.*

B.C. INDEPENDENT UNDERTAKERS v. MARITIME MOTOR CAR CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. June 29, 1917.

SALE (§ I C—15)—LIEN OF CONDITIONAL VENDORS—ALTERATION OF CHATTEL—REDEMPTION—RESCISSION.

The lien of a conditional vendor covers the chattel in its altered condition and its equipment, as a touring car when converted into a hearse. Where under an acceleration clause the whole sum becomes due in a case of default, the purchaser, to be entitled to his right of redemption under sec. 32 of the Sales of Goods Act (R.S.B.C. 1911, ch. 203), on payment of the "full amount then in arrear," must tender the whole amount; the vendor's refusal to surrender possession upon a tender of the arrears does not amount to a repudiation of the contract.

Statement.

APPEAL by defendant from the judgment of Clement, J., in favour of plaintiff, in an action for replevin of a car seized under a conditional sale agreement and for rescission. Reversed.

Sir Charles Hibbert Tupper, K.C., for appellant; *A. Dunbar Taylor*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Some troublesome questions were raised in this appeal, but when the pleadings are examined it

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will be found that the complaint of the plaintiff in each of the consolidated actions is confined to the alleged wrongful *detention* of the car. The rightful taking of it by the defendant is in effect conceded in the statements of claim and in the letters of the plaintiffs' solicitors written at that time.

It is not in dispute that part of the purchase-money was more than a month in arrears at the time the car was taken. The agreement provides that in such event the whole of the purchase-money shall become due. Apart from this acceleration clause in the agreement the amount due at the time of the taking of the car was $259.20. The tender was refused, not because it was not the sum due apart from the acceleration of the balance of the purchase-money, but because defendants determined to stand by their rights under the agreement, except in so far as they were willing to modify them to effect a settlement with the plaintiff on other terms—that is to say, I think the conduct of the defendants' officers and the letter of the 18th of September, written by the defendants' solicitors to plaintiffs' solicitors, shews an election to take advantage of this acceleration clause.

The neat question therefore for decision in this view of the facts is: Was the proper amount tendered so as to make further detention wrongful?

The plaintiff relies on sec. 32 of the Sales of Goods Act, R.S. B.C. 1911, ch. 203, and argues that that section means that if the full amount in arrears, ignoring the acceleration clause of the agreement, be tendered, that is enough. I do not think that contention can be maintained. The language is plain, and read in its ordinary sense is quite unambiguous. The section reads as follows:—

> If any manufacturer, bailor, or vendor of such chattel or chattels, or his successor in interest where there has been a conditional sale or promise of sale, take possession thereof for breach of condition, he shall retain the same for twenty days, and the bailee or his successor in interest may redeem the same within such period on payment of the full amount then in arrear, together with interest and the actual costs and expenses of taking possession which have been incurred.

There is nothing in the context to indicate an intention that the words "the full amount then in arrear" should be restricted by adding thereto the further words "by effluxion of time." The detention therefore is not unlawful and the appeal should be allowed and the actions dismissed.

As regards the counterclaim, when judgment was delivered on June 5 last, liberty was given to counsel to speak to the counterclaim. That liberty was not taken advantage of, and I have since satisfied myself on the point, on which I had some doubt, and now think the defendants are entitled to succeed upon the counterclaim.

As far as the evidence in the case goes it would appear that the defendants have not sold the car, but retained it and are in a position to deliver it to the plaintiffs when the amount due is paid or tendered. The case is therefore distinguishable from that of *Sawyer* v. *Pringle*, 18 A.R. (Ont.) 218, where the property had been re-sold without authority in the conditional sale agreement to re-sell. Inferentially that case clearly sustains the view to which I have come in this.

GALLIHER, J.A.:—There are really two points in this case for determination: (1) Did the new body placed upon the chassis when altered to suit it become a part of the car and subject to the lien agreement? (2) Was the act of appellants in refusing possession of the car such an act as went to the root of the contract so as to amount to a repudiation thereof?

The car as purchased was a touring car, but it was understood and set out in the agreement that the respondents required it for funeral purposes and, to make it meet such requirements, the body was removed and the chassis lengthened at respondents' expense.

The original body, as per agreement, was sold, but brought only a small portion of its actual value and this was credited on the sale-price of the car.

The body was removed and the chassis lengthened by the appellants who delivered it in that condition to respondents, when it was taken to another firm and the hearse body placed thereon at respondents' expense.

It is argued that, under these conditions, the hearse body never became a part of the car or subject to the lien agreement.

The price of the car was $4,000—$3,000 for the chassis and $1,000 for the body—so by removing the body, if the substituted body which was attached to the chassis is not to be taken into account, the appellants' lien security would be diminished by the value of the original body less what it brought at what is termed a scrapped sale.

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Supposing the original body had remained on the car and there had been an accident by which extensive repairs had to be made to the body, there could be no question that the body as repaired would be subject to the lien or even if it had to be built anew I think the same result would follow. Is the principle any different under the circumstances here?

It is said that it was only the chassis that was delivered. Admitting that—it was altered and delivered under a clear and distinct understanding embodied in the agreement that another body was to be placed thereon.

The old body went with the car as sold, and when sale was made of it, credit was given.

Now a chassis is not a motor car, it is only a part thereof, and in the agreement, after providing for alteration of chassis to suit hearse body, and equipment by new tires and the crediting of parts not necessary to remain on the chassis, the respondents agree that until the whole of the purchase price is paid "*the said motor car*" shall remain the property of the Maritime Motor Car Co.

Now what is contemplated by "*the said motor car*"? Surely not the chassis alone but the chassis plus the alterations and equipment necessary to again constitute it a motor car.

I hold, therefore, that the hearse body was a part of the car and subject to the lien agreement, as were also the tires and other alterations or additions to the car.

In this view, I proceed to deal with the second point, and, at the outset, my opinion is that the acceleration clause in the agreement relied on by Sir Charles Tupper, and also below, cannot operate so as to take away or destroy the right to redemption given by sec. 32 of the Sales of Goods Act.

If I am correct in this, what was the position of the parties at the time the trouble arose?

When the car was taken by the appellants it was rightfully taken as there was default under the agreement, but upon tender made by the respondents within the time limited by statute of the amount actually in arrears, the respondents were entitled to receive back the car.

The appellants refused to return the car and the question is, did their act amount to a repudiation of the contract?

The appellants' contention throughout has been that under the acceleration clause in the agreement all the moneys became due and until all was tendered they were entitled to retain the car.

This is not a repudiation of the contract but an assertion of their rights under the contract, and under that assertion of right they say either pay us the full amount which we claim we are entitled to under the contract or give us further security—that is, they would only relinquish what they considered their then present rights if other satisfactory arrangements could be made, again not a repudiation but an assertion of right under the contract.

Holding, as I do, that sec. 32 of the Sales of Goods Act applies and the proper amount having been tendered and re-delivery refused, there was a breach under the contract and the statute combined, but not such a breach as constituted a repudiation of the contract, in fact, as I have pointed out, there never was any intention on the part of the appellants to repudiate the contract.

What then was the respondents' remedy, and here I may state that, in my opinion, they have misconceived that remedy.

They brought two actions which were consolidated and tried together, one of replevin of the body of the car and the tires, and one for rescission of the agreement, return of the moneys paid, and delivery up of the outstanding notes taken in payment.

It is clear from what I have already said that rescission cannot be had.

In my view, two courses were open to the respondents; replevin or action for damages for breach of contract.

When the proper amount was tendered and refused they could have replevied the entire car, not because the title was in them, but because they were entitled to possession under their agreement and the statute, and in so doing they would have been acting under the agreement.

They chose, however, to treat the agreement as having been repudiated by appellants and brought action to rescind.

They also replevied the body and tires of the car, not by reason of any rights they had under the agreement and the statute, but entirely outside same, claiming that they were not and did not become subject to the lien and were their absolute property.

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In view of my first finding I think this cannot stand, nor do I think we can assist the respondents by amendment as to do so would be to substitute a different cause of action for the one tried out.

The appeal should be allowed.

Under marginal r. 290 of our Supreme Court Rules, and if the respondents so desire, I would reserve leave to bring such other action as they may be advised but upon the terms, as a condition precedent, of the payment of the costs of appeal and of the abortive actions.

McPhillips J.A.

MCPHILLIPS, J.A.:—This is an appeal by the defendant (appellant) in the actions which were consolidated and heard at the same time by Clement, J., the Judge holding that the plaintiff (respondent) was entitled to the possession of the hearse body and the two spare tires replevied by it and nominal damages in the sum of $5, and directing the rescission of the conditional agreement of sale of the automobile and the return of purchase-money paid and that a reference be had to ascertain the amount so paid and that upon such reference there was to be taken into account what would be a reasonable rental for the use of the chassis of the automobile while the same was in the possession of the plaintiff, and also the amount due for supplies, repairs and services and the amounts be set off one against the other.

Upon the facts and the law it is manifestly clear that the plaintiff was entitled to the automobile, which would include the hearse body and spare tires, *i.e.*, the conditional agreement of sale covered the automobile in its changed condition. However, the plaintiff whilst setting up the right to the automobile in its entirety in the statement of claim merely claimed the hearse body and the tires, upon the contention that apart from the conditional agreement of sale they were entitled to same as their absolute property. Such was not the position in law. The hearse body and the tires were parts of the automobile and fully covered by the conditional agreement of sale, and the plaintiff was entitled to the automobile in its changed condition; but not having made tender "of the full amount then in arrear" (these words are the words of the statute—sec. 32 Sales of Goods Act, ch. 203, R.S.B.C. 1911), the plaintiff was not entitled to be given possession of the automobile. The default in payment of the instalment upon the purchase-price due and payable under the agreement of purchase

or conditional agreement of sale operated in accordance with the terms thereof to make due and payable the whole sum due and still payable thereunder.

The learned trial Judge gave effect to the claim of the plaintiff to the right to the possession of the hearse body and spare tires. In my opinion the plaintiff was entitled, had a proper tender been made, to the automobile in its entirety, but in default of so doing was not entitled to the possession thereof. Therefore I would allow the appeal in the first action.

And with respect to the appeal in the second action, that, in my opinion, must also be allowed. Upon the facts and upon the law, no case was made out for the rescission of the conditional agreement of sale; it must be held to be a subsisting agreement. It therefore follows that in the second action the claim of the plaintiff should be dismissed and the counterclaim of the defendant allowed to the extent of a declaration that the conditional agreement of sale is a subsisting agreement and judgment should go in favour of the defendant and against the plaintiff for the amounts tendered and for the further amounts due and set forth in the counterclaim, viz., $259.20, $88.35, and $405.55 and interest (if any) payable thereon. *Appeal allowed.*

WEXELMAN v. DALE.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ.
July 14, 1917.

1. TENDER (§ I—12)—BY CHEQUE—PAYMENT INTO COURT.
A cheque, though not legal tender, is a sufficient tender of payment for goods sold if not objected to on that account; upon a claim for the delivery of the goods, the amount tendered need not be paid into Court or be so pleaded.

2. PLEADING (§ III D — 328) — TENDER—SUFFICIENCY OF PLEA — READY, WILLING AND ABLE.
A plea of readiness and willingness to accept delivery of chattels sold, and to pay for them, implies an ability to do so, and is therefore a sufficient plea.

Statement.

APPEAL by defendant from a judgment in favour of plaintiff purchaser in an action for non-delivery. Affirmed.

C. E. Taylor, K.C., for appellant; *W. J. Perkins*, for respondent.

The judgment of the Court was delivered by

McKay, J.

McKAY, J.:—This is an action by the plaintiff against the defendant for the delivery of 6 head of cattle bought by the plaintiff from the defendant on June 5, 1916, for the sum of $500 and on which plaintiff had paid $200, and which cattle the plaintiff

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claims defendant refused to deliver, he having tendered the balance of the purchase-price; and in the alternative damages for the wrongful detention of the cattle, the plaintiff being ready and willing to take delivery of the same, and to pay the balance of the purchase-price.

The defendant denies tender of the $300, and claims that the agreement of June 5, 1916, required the plaintiff to take delivery of the cattle on June 12, 1916, and then pay the balance of the purchase-price, and that plaintiff did not fulfil his agreement, and defendant entered into a new agreement with plaintiff, whereby the time for delivery was extended to June 20, 1916, provided the plaintiff paid the balance of the purchase-price in legal tender and paid defendant for time and trouble for care and feed of the cattle and took delivery on that day, and that plaintiff failed to carry out this agreement. Defendant paid the $200 into Court and counterclaims for loss and trouble and for care and feed of said cattle.

The trial Judge found that, according to the terms of the agreement of June 5, 1916, the plaintiff had until June 17, 1916 (Saturday) to take delivery, and that on Monday, June 19, 1916, the defendant extended the time for taking delivery until June 20, 1916, but that no new conditions were imposed as claimed by the defence, and that on June 20, 1916, the plaintiff called at defendant's farm for delivery of the cattle and tendered his cheque for $300 as balance of the purchase-price, that defendant refused to accept the cheque as not being enough, wanting $50 more. The trial Judge gave judgment for plaintiff with costs, giving defendant the option of keeping the cattle upon his paying into Court within 10 days of the filing of his judgment the sum of $50 for plaintiff's damages, and in the event of the defendant failing to exercise his option of retaining the cattle, on paying into Court the said sum, the plaintiff to pay into Court the sum of $300 balance of purchase-price within 15 days from the filing of the judgment and to be entitled to peaceable possession of the said cattle and nominal damages of $1, and in default of the delivery of the cattle by the defendant to the plaintiff, the plaintiff to be entitled to the $200 paid into Court by defendant, and judgment against the defendant for $50 damages.

This appeal largely depends upon questions of fact, and I can

see no reason for reversing the trial Judge on his findings, as there is ample evidence to warrant the same. I am also of the opinion that he was right in holding the plaintiff's cheque was sufficient tender as defendant did not object to the form of tender, but to the amount.

Although, strictly speaking, a legal tender must be made in money if required, a tender in country bank notes or by a cheque, if not objected to on that account, will be sufficient: Smith's Mercantile Law (1905) 735.

See also *Polglass* v. *Oliver*, 1 L.J. Ex. 5. And in any event a legal tender in bank bills would have been fruitless and was waived as the defendant wanted $350 and not $300.

Counsel for appellant urged that as the sum tendered, the $300, was not paid into Court, plaintiff should not succeed, and cited the following cases in support: *Kinnaird* v. *Trollope*, 42 Ch. D. 610, at 615; *Bank of N.S. Wales* v. *O'Connor*, 14 App. Cas. 273, 284, and others.

These authorities deal with cases of debt, money actually due, and I do not think they apply to the case at bar, in which the defendant would not be entitled to the money until he delivered the cattle. The form of statement of claim given in Bullen & Leake, 7th ed., at p. 220, for specific performance of a contract to deliver ascertained goods which plaintiff has purchased is, I think, a good pleading, and in that claim tender is pleaded, without payment into Court. I am therefore of the opinion that it was not necessary for plaintiff to pay into Court the money tendered, or to so plead.

Defendant's counsel also urged that as the trial Judge gave judgment in the alternative claim for damages as amended at trial, defendant should be entitled to costs up to the time the amendment was made. It is to be noted, however, that the trial Judge has given judgment on the original claim for specific performance as well, but he has given defendant the option of retaining the cattle. Furthermore, the question of costs is largely a matter of discretion for the trial Judge, and the real defence in this case was that a new bargain was made on June 19, whereby it was agreed that plaintiff was to pay defendant the $300 in legal tender and for defendant's loss and trouble for the care and feed of the cattle, and the defendant failed in this. I therefore think the trial Judge was right in giving judgment to plaintiff with costs.

Some objection was also urged to the plea of readiness and

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willingness to accept delivery of and pay for the cattle, as being insufficient, but I think this plea is good, as there is ample authority to show this plea of readiness and willingness to perform an act implies the ability to do it. See Bullen & Leake, 7th ed., 678; *De Medina* v. *Norman*, 9 M. & W. 820 (152 E.R. 347); *Rawson* v. *Johnson*, 1 East 203 (102 E.R. 79). And the trial Judge found from the evidence that the plaintiff was ready and willing to pay the amount and was able to do so, and there is abundant evidence to support the finding.

With regard to the assessment of plaintiff's damages at $50, while I admit there is very little evidence of the damage, yet there is some evidence, and I think the trial Judge was justified in arriving at this amount.

For the above reasons I would dismiss the appeal with costs.

Appeal dismissed.

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The KING v. ARCHIBALD.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Drysdale, Harris and Chisholm, JJ. July 27, 1917.

FISHERIES (§ I B—5)—MUNICIPAL REGULATION—LICENSE—MANDAMUS.

The right of a riparian owner or occupant under ch. 18 of the Nova Scotia Statutes 1912, as amended in 1916, to receive a license from the municipal authorities for an exclusive fishing right, upon tendering the statutory license fee, is absolute, and cannot be destroyed by municipal regulation; the issue of the license may be compelled by mandamus.

Statement.

APPLICATION for a prerogative writ of mandamus directed to the municipal clerk of the municipality of the County of Halifax, commanding him to forthwith issue a license in the form in the schedule to ch. 18 of the Acts of the provincial legislature for the year 1912, as amended by ch. 27 of the Acts of 1916. Granted.

T. S. Rogers, K.C., in support of application; *J. J. Power*, K.C., *contra*.

Graham, C.J.

GRAHAM, C.J.:—The Indian River is a non-tidal, non-navigable river in this province. The relator, Mr. Hensley, in his affidavit for the mandamus says:—

I am a person having the right (exclusive of the public) to fish in a portion of the Indian River, being situate in the eastern part of the County of Halifax, as a tenant in common of lands abutting on said river, and including the bed thereof (the said lands being hereinafter particularly described). I being an occupant thereof, within the meaning of ch. 18 of the Acts of the Legislature of Nova Scotia for the year 1912, the said land not being timber lands, within the meaning of the said Act; and I am also the owner of said lands within the meaning of said chapter.

The law is quite clear as to his exclusive right to take fish in that river. *Re Provincial Fisheries*, 26 Can. S.C.R. 517; *Queen* v. *Robertson*, 6 Can. S.C.R. 52.

But the legislature by the statute, Acts of 1912, ch. 18, as amended in 1916, ch. 27, has sought to destroy this exclusive right and to throw lands which are uncultivated open to the public, provided that the owner may get back his exclusive right by obtaining from the municipal authorities what is called a license for which he is to pay a fee not exceeding $50 to be fixed by the municipal council of the County of Halifax in this case. The relator has applied for his license, offering to pay the maximum fee.

Act, 1912, ch. 18, sec. 2, is as follows:—

(1) Any resident of the province shall have the right to go on foot along the banks of any river, stream or lake, upon and across any uncultivated lands and Crown lands, for the purpose of lawfully fishing with rod and line in such rivers, streams or lakes.

(2) Any resident of the province shall have the right to go on, upon or across any river, stream or lake in boat or canoe or otherwise, for the purpose of lawfully fishing with rod and line in such rivers, streams or lakes.

(3) The rights conferred by this section shall not in any way limit or restrict the right of any owner or occupant to compensation for actual damages caused by any person going upon or across such lands for the purpose aforesaid, and shall not be construed to give the right to build fires upon such lands.

Section 3, as amended, is as follows:—

The rights conferred in the next preceding section shall not apply to the land of an occupant licensed under this Act. . . . but except as aforesaid no owner or occupant shall prevent, or hinder, any resident of the province from the exercise and enjoyment of the rights granted by said section.

Sections 4, 5 and 6 are as follows:—

4. Any occupant, other than an owner of timber land, may obtain a license in the form in the schedule to this Act, and while such license is in force, the provisions of section two of this Act shall not apply to the land and fishing rights described in such license.

5. Such license shall be issued by the municipal clerk of the municipality in which is situate the land to which the fishing rights referred to appertain, and in respect to which such rights are sought to be exercised, and shall be dated on the day of the issue thereof, and shall be in force for one year from such date.

6. (1) The municipal councils may by by-law provide for the issue of licenses under this Act, and fix and regulate the fees to be paid by occupants for such licenses in respect to fishing rights, appertaining to lands within their respective municipalities, but no fee payable for any license issued under this Act shall exceed the sum of fifty dollars. (2) Such by-laws shall, upon approval of the Governor-in-Council, have the force of law.

The municipal clerk in his affidavit as a ground for not complying with this application says:—

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Graham, C.J.

1. I am the municipal clerk of the Municipality of the County of Halifax, and have held such office since the year A.D. 1909, and am the person and official against whom George W. C. Hensley is applying for a mandamus, commanding me to issue a license to him, in the form in the schedule to ch. 18 of the Acts of the Legislature of Nova Scotia, 1912.

2. On Wednesday, the 12th day of March, A.D. 1913, the municipal council of the Municipality of the County of Halifax, of which body I was also then municipal clerk, took up and passed a motion, of which notice was given, on a previous day, by Councillors C. E. Smith and Longard as follows:—"Whereas the fish and game of this province are the property of the people, and whereas the people of Nova Scotia should have the right to enter upon all uncultivated lands for the purpose of catching their own fish and shooting their own game; therefore resolved, that the council refuses to issue licenses conferring exclusive rights to fish, but hereby puts itself on record as supporting the principle of free fishing upon all waters flowing through uncultivated lands.

3. Such resolution was the only action ever taken by the said municipal council under said ch. 18.

The municipal council clearly ought to have made regulations long ago under the provisions of the statute fixing a reasonable fee for such a license. However, under this answer, the council having refused to allow a license to be issued under any circumstances, the fact that it has neglected to make one fixing the fee is not now open. Having refused in advance to issue licenses under any circumstances, the pretence that they are exercising a discretion about issuing one in this particular case is quite absurd. The provision is mandatory. There should be a writ of mandamus. Under r. 60 of the Crown Rules we have power to order a writ peremptory in the first instance, and the application is granted with costs.

Russell, J.

RUSSELL, J.:—I concur.

Drysdale, J.

DRYSDALE, J.:—This application depends on the construction of the Acts 1912, ch. 18, and amending Acts. The scheme of the Act of 1912 seems to be to confer certain rights upon residents of the province along the banks of streams, with an express provision that the rights so conferred shall not apply to the lands of an occupant licensed under the Act. Provision is made that any occupant may obtain a license, and whilst such license is in force, the provisions of sec. 2 shall not apply to the lands and fishing rights described in the license. Express provision is made for the issuing of such a license by the municipal clerk of the municipality in which is situate the land in which the fishing rights appertain.

The applicant has complied with the provisions of the Act

entitling him to a license and the defendant municipal clerk has refused to issue such a license.

I am of opinion that no cause has been shown why the defendant should not issue the license applied for. I think the mandamus applied for should be granted.

HARRIS, J.:—The application is defended on the ground that the municipal clerk is not bound to issue a license until the municipality has made by-laws under the provisions of sec. 6 of the Act. Harris, J.

The waters in question are non-tidal and at common law the right to fish therein belongs exclusively to Hensley, the riparian owner. *Bristow* v. *Cormican*, 3 App. Cas. 641.

The scheme of the Act, so far as it refers to this case, seems to be to take away without compensation this exclusive right, and to give any resident of the province the right not only to fish in these waters, but also to go along the banks of the river upon, and across Hensley's uncultivated land for the purpose of fishing in this river—unless Hensley takes out a license under the Act.

Section 4 gives the applicant in this case the right to take out a license, and thereby to maintain his exclusive rights and to preserve his lands inviolate, and sec. 5 says that the municipal clerk shall issue such license.

It is impossible to find any words in the Act making the issue of the license contingent upon the good-will or discretion of the municipal council, or upon the exercise by it of the right to make by-laws. It is true that the municipal council may make by-laws providing for the issue of licenses but there is nothing which makes the issue of the licenses contingent upon the action of the municipal council. On the other hand, the Act expressly provides that the occupant has the right to take out a license and thereby prevent the public from enjoying his rights, and it expressly provides that the clerk shall issue such licenses.

I think the contention on behalf of the defendant fails and the application should be granted.

CHISHOLM, J.:—The application was opposed in Court by counsel for the municipal clerk who took the ground that in the absence of such by-laws by the municipal council it is not competent for the clerk to issue the license. Chisholm, J

Before the passing of the Act, the applicant and those interested with him in the lands described in his affidavit had the

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exclusive right to fish in that portion of the Indian River of which he and his associates owned the bed and banks on either side; and they may still have the exclusive right. The Act does not make it clear that any resident of the province may fish in those parts of a river, stream or lake which, at the time when the Act was passed, the riparian owner or owner of the bed had the exclusive right of fishing. The Act does not in specific terms take away the rights of such owner. It merely gives the public the right to go on foot along the banks or to cross in boats or canoes "for the purpose of lawfully fishing . . . in such rivers, streams or lakes." That may mean that the public may pass over private lands or lands covered with water to reach a place, such as Crown lands, where they may have the right to fish. The definition of the phrase "lawfully fishing" does not advance the claim any; and the right to take away "fish lawfully caught" does not define what "lawfully fishing" is. The most that can be said of the phrase "lawfully fishing" is that the fishing must not be in contravention of the laws and regulations made by the Dominion or by the province. Legislation intended to be of a confiscatory character must be read strictly; and, it seems to me, it is not clear upon a strict construction of the Act that the private rights of the applicant so far as the right to fish is concerned are taken away from him.

But, assuming that the applicant's rights in his fishery are affected, I think that the applicant is entitled to the relief he asks for. The statute in specific terms gives the occupant the right to obtain such license and imposes upon the municipal clerk the duty of issuing a license in the form given in the schedule in the Act. The contention made by counsel for the municipal clerk is that until the municipal council approves of the issue of such licenses and makes by-laws fixing the fee and otherwise regulating the same, the municipal clerk has not authority to issue the license. I cannot accede to that contention. Sec. 6 (1) of the Act says: that municipal councils *may* make by-laws providing for the *issue* of the licenses and fix the amount of the fees to be paid, which in no case shall exceed $50. In other words, they may provide machinery for carrying into effect in a particular way the general provisions of secs. 4 and 5 of the Act. The object of sec. 6 (1) must surely be to assist in the administration of what is provided in secs. 4 and 5, and not to enable the municipal authorities

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utterly to defeat the provisions of those sections by mere inaction or otherwise. I cannot read in the Act any hint of an intention on the part of the legislature to delegate to municipal councils the power to alter or in any wise defeat the express provisions of secs. 4 and 5 of the Act.

The form of license given in the schedule sets forth that the applicant "has paid the sum of . . . dollars"; and sec. 7 (*d*) enacts that the municipal clerk shall make and keep a record showing the amount of license fees paid. But I do not think the language of the last mentioned section or that of the schedule or that of both combined make it imperative that any specific sum of money shall be paid as a fee. A municipal council may decide that no fee shall be charged for the license and make a by-law accordingly. Power is given to them to fix and regulate the fees, if they think proper; it is not declared that they shall fix some fee. In my opinion, it is only where the municipal council had fixed a fee that the amount of the same is to be recorded by the municipal clerk in the license and in the book kept by him under sec. 7.

I think the application must succeed. *Application granted.*

GREGORY v. NICHOLSON.

MAN.
C. A.

Manitoba Court of Appeal, Perdue, Cameron and Haggart, JJ.A. June 25, 1917.

MORTGAGE (§ VI E—90)—WAR RELIEF ACT—RENTS—FINALITY OF ORDER.

The War Relief Act (Man.) 1915, as amended in 1917, empowers a Judge to make an order permitting a mortgagee to collect from a tenant of the mortgagor claiming protection of the Act, and from the sub-tenants, the rent due by them, and to have possession of the property in case of a default; but such an order is not necessarily final in its effect.

Statement.

APPEAL by defendant from an order of Prendergast, J., authorizing a mortgagee to collect rent from a tenant claiming protection of the War Relief Act. Affirmed.

C. P. Fullerton, K.C., for defendant, appellant.

B. L. Deacon, for plaintiff, respondent.

Perdue, J.A.

PERDUE, J.A.:—The applicant, Matilda Gregory, is the holder of a mortgage for $500,000, on the property known as the Clarendon Hotel in this city. The mortgage was made to her by her husband C. Y. Gregory, to whom she had sold the property, for the purpose of securing the purchase-money. The appellant, G. H. Nicholson, is the tenant of the premises under a lease made by C. Y. Gregory to him. The rent, at the rate of over $2,000 per month, is in arrear since August last. The mortgagee under the

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terms of the mortgage is entitled to the rents. Nicholson claimed the benefit of the War Relief Act, 5 Geo. V. ch. 88, and disputed the applicant's right to collect or distrain for rent either as against himself or his sub-tenants. An application was then made by Matilda Gregory under the amendment to the above Act, passed at the late session of the legislature, being 7 Geo. V. ch. 97, for an order permitting her to collect the rents of the premises, and to distrain for the rent, as if the War Relief Act had not been passed, and generally enabling her to exercise the powers contained in sec. 12, added by the amending Act. The application came before Prendergast, J., who made an order, of which the following is the important part:—

I do order that the rent of the property in question, namely, lots 424 and 425, block 3, D.G.S. 1 St. John, plan 129, from and inclusive of the month of May, amounting to $12,500, and all future rents, be collected and paid to the applicant, and in case the applicant is unable to collect the said sum of $12,500, and all future rents as per the terms of the lease of the said premises in question and taxes as provided for by the said lease, I do order that the applicant do have possession of the premises in question, namely, in the City of Winnipeg in the Province of Manitoba, and being lots 424 and 425, block 3, parish lot 1 of the Parish of St. John, plan 129, or such part thereof as is in the possession of the said Nicholson, so long as the said Nicholson is in default in paying the said rents and taxes, pursuant to the terms of the said lease.

I do further order that Matilda Gregory, the applicant herein, be permitted to collect the rents from the sub-tenants, namely Public Drug Co., Royal Optical Parlours, McIntosh Circulating Library and Harvard Shoe Store, from and after and inclusive of the month of December, up to and inclusive of the month of May, and all future rents and that the said Matilda Gregory apply all rents so collected from the sub-tenants on account of the rents due to her from the said G. H. Nicholson under the terms of the said lease.

The appellant claims that the Judge had no jurisdiction to make the order; that the applicant, Mrs. Gregory, was not a "person interested" within the meaning of the said amending Act; that the validity of the mortgage was being litigated between the parties in a certain replevin suit now pending; and that the amending Act only empowers a Judge to make an order conserving matters pending the final determination of the rights of the parties. Other grounds were urged, but not pressed upon the argument.

Sec. 12, added to the War Relief Act, by the amending Act, enables the Judge to whom the application is made, and who is satisfied that the necessary facts have been established, to make an order for any of the purposes mentioned in the portion of par. (*d*) of that section, commencing with the words "Such Judge,"

in the seventh line. Under this section the Judge may make an order directing the rents, etc., of the property to be collected and held by a receiver appointed by him pending the further hearing and final determination of the rights of the parties, which hearing and determination may, as I construe the section, take place in some other suit or proceeding instituted for the purpose. The Judge may also direct that the rents, etc., be applied in whole or in part towards paying the carrying charges on the property and preserving it, or may make such other disposition of the rents, etc., as may to him seem just, and the Judge may make an order as to the possession or preservation of the property pending the final determination of the rights of the parties interested, or as to the appointment of a receiver, or as to the prevention of waste.

The order made in this case directs that the rents of the property be collected and paid to the applicant. The applicant is in effect constituted a receiver for that purpose. The object of this is to pay the interest on the mortgage and the taxes which are "carrying charges" on the property, and for which Nicholson is responsible. If the applicant is unable to collect the rent, she is permitted by the order to enter into possession of the premises, or of such part as is in the possession of Nicholson, under the terms of the mortgage, and retain possession as long as there is default in payment of rent and taxes. This is authorized by the aforesaid sec. 12, which enables the Judge to make an order as to the possession or preservation of the property, pending the determination of the rights of the parties. The next clause of the order enables Mrs. Gregory to collect the rents due from the sub-tenants of parts of the property and apply them in the same way.

The provisions of the War Relief Act before the amendment, while affording protection to a deserving class of persons, were capable of being abused and made the instruments of great injustice. No better instance of this could be found than the case we are now considering. Nicholson claimed the protection of the Act, and declined to pay any rent for the hotel premises he occupied under his lease. The shops on the ground floor, which were not used as part of the hotel, had been sub-let by him to tenants, and the rents from these amounted in the aggregate to $850 a month. These rents he was collecting and retaining in-

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stead of applying them in paying the rent and taxes for which he was liable under his lease.

The amending Act was passed for the purpose of providing a remedy in cases where the provisions of the original Act might be capable of working a hardship or injustice. It should, therefore, receive a liberal construction. I think the Judge had power under the Act to make the order which is the subject of this appeal. I am of opinion that it was justified by the facts before him. It is not, in my view, the intention of the amending Act that an order made under it should necessarily be final in its effect, or should interfere with pending litigation involving substantial rights between the same parties in regard to the same subject-matter.

I think the appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A., concurred.

Haggart, J.A.

HAGGART, J.A.:—I would have put in the order appealed from some provision to the effect that nothing contained in that order should be considered as a final adjudication of the question in the pending suits. The majority of the Court think that such is the effect of the order as it stands, and the amending statute, ch. 97, statutes of Manitoba, 1917, and I am not prepared to dissent.

If the usual practice had been followed and minutes of the proposed order discussed before the proper officer there might have been no appeal.

With some hesitation I concur. *Appeal dismissed.*

MAN.

C. A.

ARMSTRONG v. C.N.R. Co.

Manitoba Court of Appeal, Howell, C.J.M., and Cameron and Haggart, JJ.A. July 19, 1917.

1. MASTER AND SERVANT (§ II A—80)—NEGLIGENCE—DANGEROUS TRAIN YARD—DEATH—REMEDY.

Insufficient space between tracks in a train yard, where snow and ice had been permitted to accumulate, the yard being inadequately lighted, is negligence which will render a master liable for the death of a servant who has been run over by an engine while at work thereat; the damages therefore may be enforced by an action at common law, under Lord Campbell's Act, and need not be restricted under the Employer's Liability Act.

2. DAMAGES (§ III I—187)—UNDER LORD CAMPBELL'S ACT.

An award of $3,500 for the death of a son 16 years old and earning $45 a month, upon whom the plaintiffs were dependent for support, is not excessive.

Statement.

APPEAL by defendant from a judgment for plaintiff in an action under Lord Campbell's Act. Affirmed.

O. K. Clark, K.C., for appellant; *W. P. Fillmore*, for respondent.

The judgment of the Court was delivered by

CAMERON, J.A.:—This action is brought by the plaintiff, the mother of Gerald Armstrong, deceased, as administratrix of his estate. He was a "wiper" or watchman in the Fort Rouge Yards of the Canadian Northern R. Co. and had been so employed for some months prior to the time of his death by accident on December 30 last, at 11 o'clock at night. On December 25 the deceased became 16 years of age. The duties of the wiper or watchman consist in looking after the engines and seeing that they are in proper condition for use after they have been brought out from the roundhouse by the "hostler" and placed by him on what is known as the "departure" track. In this case engine No. 2117 was taken out by the "hostler," J. McDonald, who dumped the ashes in the ashpit, took it to the water tank and filled it, then to the coal dock, to obtain coal and sand. After this he placed it on its proper departure track and left it in charge of the deceased. McDonald then went back and took out engine No. 2110 and backed it up. He was assisted by Barnowski, a wiper, one of whose duties was to hold the lever and let the water down from the tank. McDonald had another assistant or helper who is called John. After the engine had been put in order for use it was further backed up north some 50 ft.and left there. When Barnowski on the tender was attending to taking on water, which operation took about 7 minutes, he saw Armstrong, who, as he says, "was just at the corner of our track between the two engines." The other engine referred to was No. 1259, a "dead" engine which had been on the adjoining track for about 2 months. Barnowski saw deceased coming from an easterly direction and then turn south along the track and thought he was going to get on the engine promptly in order to look after the firing. There were a number of engines, some 18, sent out that night.

The three men who had been on engine 2110 left it and turned back, Barnowski leading, with McDonald next. Barnowski passed the scene of the accident without noticing anything, but McDonald caught sight first of the torch, which he says was 7 or 8 ft. south of the dead engine, and then, about 14 ft. further north, of the body lying partly on the track wiht the head dissevered, lying between the rails. The only wheel on which there was blood

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was on the front wheel of truck, this being the last wheel of the engine as it backed up and that passed over the spot where the deceased was when struck. There was no eyewitness of the tragedy.

At the trial in June of this year the jury brought in a verdict for $3,500. Questions were put to the jury and no exception is taken to the trial Judge's charge.

The deceased was, at the time of the accident, receiving about $45 per month. He was, according to McDonald, a careful and competent boy. He was one of the plaintiff's 9 children, 8 of them being boys, the other 7 being aged 17, 14, 13, 10, 5, 4 and 2 years respectively, and one a girl aged 3. The father, 42 years of age, was and is in failing health since 1916, and has been constantly ill since then, with, apparently, slight prospects of recovery, and spent the winter in the hospital. He has been receiving $100 a month in the employment of the government. Gerald, the deceased, was a strong, healthy boy, a dutiful son, who brought his money home to his mother and put it in the common fund for her support and that of the children and for the maintenance of the household generally.

It is unquestionably established that the deceased was properly where he was at the time of this most unfortunate accident acting in the due performance of his duties. There is nothing in the evidence to cast any doubt on this.

It was argued before us that there was no evidence whatever of negligence on which the jury could found their verdict. Various grounds of negligence were alleged in the pleadings. The main grounds that are insisted upon, in the light of the evidence brought out at the trial, are: (1) that there was an insufficient space or clearance between the two sets of track, that on which the dead engine No. 1269 was standing, and that on which engine No. 2110, the one that caused the accident, was being operated, the space leaving a distance of only 17 inches between engines on the two tracks; (2) that snow and ice had been allowed to accumulate between the two sets of track at the point where the accident occurred, and (3) that the yard was inadequately lighted. These conditions, it is alleged, constitute acts of negligence, responsibility for which the railway company cannot escape.

The torch, which the deceased was carrying, was found near

the body, standing up, lighted, and burning. There is some confusion in the evidence as to exactly where it was found. Barnowski says it was beside the body between the two tracks, and that he picked it up. But McDonald says that he discovered it 7 or 8 ft. south of the dead engine between the rails on which that engine was standing. We are assisted in understanding the facts by the photographs that were put in at the trial. Counsel for the company dwelt upon the circumstances connected with the torch as it was found as tending in some way to discredit the theory that the deceased had slipped and fallen. It was a singular occurrence, but it cannot be considered as absolutely inconsistent with the theory. It was one of the matters for the jury to deliberate upon in reaching their verdict.

Peter Carlson, roadmaster in charge of the Winnipeg and Transcona yards of the C.P.R. Co., a man of wide and long railway experience, stated that in his opinion, and as a matter of railway practice, departure tracks should be distant from each other 13 ft. less 4 ft., 8½ inches, which would leave a clearance of at least 36 inches between engines instead of the 17 inches as in the case of the departure tracks in question. This evidence was not controverted in any way.

There was evidence of the accumulation of ice and snow on the space between the departure tracks due to a heavy snow storm that occurred about the day after Christmas, which accumulation had not been cleared away. Barnowski says that when the 3 of them were walking back after leaving their engine they walked on the track and not between the tracks as "there was too much ice on there and snow." Geddes, the police constable, who arrived on the scene shortly after the accident, upon notification given by McDonald, says that it was nearly impossible to walk along there, and that the snow and ice formed what he called a "hog's back" sloping on both sides, but more towards the rail where the body was lying. Taylor, another police constable, present along with Geddes, says the snow between the tracks was a little over a foot high and at the head of the dead engine it was 3 ft. high. It was, he says, a sort of frozen ice. There is really no question about these facts.

There were 2 electric lights in the yard in the vicinity of the water tank. Geddes says that a man standing between the tender

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and a passing engine on the east track, as shown in front of Constable Taylor in photograph Ex. 1, could not see either light. McDonald says the lights were not very good. They were incandescent lights substituted for arc lights.

Counsel for the company argued that it was impossible for the deceased to have slipped and got his head under the cylinder owing to the small space there was for him to do this, and that he must have been attempting to climb into the cab of the engine and have fallen under it. That would have been a most unlikely, in fact an almost impossible, thing to happen, especially in the winter, and McDonald in his evidence taken on discovery so considers it. It was, in any event, a matter for consideration of the jury. I would imagine that the principal matter that weighed with them was the narrow space between the 2 departure tracks, coupled with the "hog's back" of snow and ice that had accumulated and been permitted to remain there, and coupled also with the inadequate lighting. All these were matters duly in evidence before them to which they were bound to direct their attention. I have no doubt they did so and that their conclusion was that the defendant company had been guilty of negligence that caused the accident. In view of the decisions of the Courts, it is not open to us, in my judgment, to question this finding.

In *Ainslie* v. *McDougall*, 42 Can. S.C.R. 420, the law was stated by Davies, J., in a frequently quoted passage:—

> Defective places in which to work, defective machinery with which to work, and defective systems of carrying on work, are none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ (p. 426).

See also *Weppler* v. *C.N.R. Co.*, 23 Man. L.R. 665 at 673, 14 D.L.R. 729; *Anderson* v. *C.N.R. Co.*, 45 Can. S.C.R. 355.

The rule to be extracted from the case *Metropolitan R. Co.* v. *Jackson*, 3 App. Cas. 193, seems then to be, that although there may be evidence of negligence in the conduct of the defendants in some part of their relations to the plaintiff, that in itself is not sufficient to entitle the plaintiff to have his case submitted to the jury; but the negligence must be connected with the accident by having more or less contributed to produce it. Beven on Negligence, p. 134, citing *Collender* v. *Carlton Iron Co.*, 9 T.L.R. 646, affirmed in the House of Lords, 10 T.L.R. 366. See *Grand Trunk R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, in which the earlier case of

Grand Trunk R.Co. v. *Hainer*, 36 Can. S.C.R. 180, is referred to and followed. MAN. C. A.

I do not consider that there can be anything said to support a suggestion that the deceased in this case was guilty of contributory negligence. He was rightfully where he was and there was no evidence whatever of want of care on his part and such cannot be presumed. See *Grand Trunk* v. *Hainer*, *supra*. ARMSTRONG v. C.N.R. Co. Cameron, J.A.

The action is properly brought at common law, and the damages are not to be restricted under the Employers' Liability Act. The amount awarded by the jury may seem large, but, after reflection, I do not feel that it is so excessive as to warrant the interference of an appellate tribunal.

The deceased was evidently a bright youth, who was capable of earning $45 a month at his age. Had he lived the way was evidently clear for him to rise in the world. It is to be noted that not only was his mother dependent on him to a certain extent, but so also were his younger brothers, his little sister, and the father, who has been in precarious health, and all these are interested in the verdict.

I would dismiss the appeal with costs.

HAGGART, J.A. (dissenting):—This action is brought for the benefit of the plaintiff (mother), her husband, and the brothers and sister of the deceased. The boy's wages amounted to $40 a month, and he was 16 years of age. Haggart, J.A.

As to the first ground of appeal, namely, that there was no negligence by the defendants, I have come to the conclusion that the jury were justified in considering the balance of probabilities and drawing inference from the circumstances proved, that the death of the boy Armstrong was caused by the negligence of the defendants. *Grand Trunk R.Co.* v. *Griffith*, 45 Can. S.C.R. 380; *Grand Trunk* v. *Hainer*, 36 Can. S.C.R. 180; and *N.E.R. Co.* v. *Wanless*, L.R. 7 H.L. 12.

As to the rule for estimating damages in cases of this kind, Mayne on Damages, 8th ed., 612, says that the jury may give such damage as they may think proportioned to the injury resulting from such death, to the parties for whose benefit it is sought, and are to divide it among them by their verdict. In assessing damages under this Act (Lord Campbell's Act), the jury are confined to the pecuniary loss sustained by the family, and cannot take into

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consideration the mental suffering of the survivors. As authority for the foregoing proposition, the author gives *Blake* v. *Midland R.Co.* (1852), 18 Q.B.93 (118 E.R. 35); *Rowley* v. *London & N.W. R. Co.*, L.R. 8 Ex. 221; *Armsworth* v. *S.E.R. Co.*, 11 Jur. 758. Brett, J., in the foregoing case of *Rowley* v. *London & N.W.R. Co.*, said:—

> To the best of my belief, the invariable direction to juries, from the time of the cases I have cited until now, has been, that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation. I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount which would be an equivalent for the pecuniary injury would be unjust.

Dalton v. *S.E.R. Co.*, 4 C.B.N.S. 296, was an action by a father for injury resulting from the death of his son through the negligence of the Railway Co. The son was 27 years of age and unmarried. He lived away from his parents and for the last seven or eight years was in the habit of visiting them once a fortnight, and taking them on these occasions presents of tea, sugar, and other provisions, besides money amounting in the whole to about £20 a year. It was held there that the jury were warranted in inferring that the father had such reasonable expectation of pecuniary benefit from the circumstances of his son's life as to entitle him to damages under the statute. But the plaintiff was not even allowed funeral expenses. Willes, J., who delivered the judgment of the Court, said, on p. 305:—

> The great question in this case is disposed of by the judgment of the Court of Exchequer in *Franklin* v. *S.E.R. Co.*, 3 H. & N. 211, by which it is decided, with our entire concurrence, that legal liability alone is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act, but that the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned.

The verdict of $3,500 given in this case, I do not think is warranted by the rules laid down in the foregoing authorities.

It is with reluctance that I would send the case back for a new trial, which would be a very serious matter to this plaintiff and her family, but I do not think this verdict should stand.

I would give the plaintiff a new trial.

Appeal dismissed.

UNION BANK OF CANADA v. WEST SHORE AND NORTHERN LAND Co.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. May 25, 1916.

ALTERATION OF INSTRUMENTS (§ II B—11)—MATERIALITY—MATURITY OF NOTE.

Changing a note, to make it become payable in two months instead of one month, is a material alteration which will void the note as against an obligor who has not assented thereto.

Statement.

APPEAL from the decision of Morrison, J., in an action tried at Vancouver on October 15, 1915, upon two promissory notes. Affirmed.

The judgment appealed from is as follows:—

MORRISON, J.:—The defendant company, the late J. C. Keith, and the defendant Whyte, had been for some time renewing and discounting a certain promissory note for $2,000 with the plaintiff bank, the time being one month. On June 20, 1914, a renewal was effected for 1 month, the defendant company making the note as before, which, as on previous occasions, was again indorsed by Keith and Whyte. This note fell due and a renewal was drawn up, signed, and indorsed as before, Keith's signature, as president of the company, appearing on the face of the note, and he, as well as Whyte, again indorsed. Keith at that particular time was at home and very ill. Mr. Rowley, then, was local manager of the plaintiff bank, but over him was Mr. Vibert, the superintendent. Mr. Rowley was apparently satisfied to follow the usual course respecting the renewals, but upon reference to Mr. Vibert a difficulty arose, he not being willing to take the renewal without another indorser and the defendant Hammond was named, who, upon being approached, refused to indorse a note for 1 month but agreed to do so if the time were extended to two months, which was accordingly done. The change was then and there made, pursuant to what I find was an independent collateral agreement between Hammond and the bank. Then arose the question of getting Keith to initial the alteration. Whyte declined to trouble him so soon after having already got his signature. It appeared that no one cared to do so, particularly at this juncture. The note, in this condition, was left with the bank, which in due course took the usual protective steps upon non-payment. Before the due date Keith died, without

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knowing anything of the alteration above referred to. Hammond did not hear anything more about the matter until proceedings were begun, or, at least, did not know that the bank was seriously trying to hold him liable. Now the bank is seeking to hold all the defendants liable on this note of August, 1914, altered as aforesaid. Hammond, in effect, states that he had practically no interest in the subject-matter of the note, and indorsed as an accommodation on the specific understanding that if Keith and company were to make a note for 2 months he would indorse. He expected Keith would initial the alteration. I accept Hammond's evidence as to how he came to put his name on the note. I am satisfied that, were Keith to be left out, he would not have considered the matter at all. That being my view, there will be judgment for him, with costs, and he is eliminated from this suit. Keith was ignorant of this material alteration, and, as far as this particular incident is concerned, there will be judgment for the defendant executrix, with costs. As to Whyte, he was vitally interested, and acquiesced in all that was done. He acted *bonâ fide* and sympathetically, and I do not think he is in any way trying to evade, by any formal defence, any just claim the bank may have against him. The plaintiffs claim alternatively on the note of June, and I think they are entitled to succeed. The attempt to effect another renewal of this note failed—it came to naught.

There will be judgment for the plaintiff on the note of June, 1914, as claimed in the alternative, with costs.

McPhillips, K.C., for plaintiff; *M. A. Macdonald*, for defendant company and Whyte; *A. M. Whiteside*, for defendant A. J. Keith; *Cassidy*, K.C., and *O'Brian*, for defendant Hammond.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the alteration was a material one and vitiated the note. In that view of the case, the judgment below should be sustained and the appeal dismissed.

Martin, J.A.

MARTIN, J.A.:—I have already expressed my views to a similar effect.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I agree. *Appeal dismissed.*

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Alberta Supreme Court, Harvey, C.J., and Stuart, Beck, and Walsh, JJ. June 21, 1917.

SALE (§ I C—15)—CONDITIONAL SALE—CONVERSION—COLLATERAL SECURITY—MERGER.

One acquiring, by exchange, goods subject to a conditional sale is liable in conversion to the conditional vendor, notwithstanding that the proceeds of the transaction were used to reduce the liability under the original sale; the relation of the parties under the conditional sale is not altered by a mortgage to the conditional vendor, as collateral security, on the property given in exchange, and does not operate as a merger. (Court divided.)

[*Wenbourne* v. *Case Threshing Co.*, 34 D.L.R. 363, affirmed; same in 27 D.L.R. 379, 9 A.L.R. 285, referred to.]

Statement.

APPEAL by plaintiff from the judgment of Hyndman, J., 34 D.L.R. 363, dismissing an action for injunction to restrain a conditional vendor from interfering with the property and sustaining the latter's counterclaim for damages for conversion. Affirmed; Court divided.

C. F. Harris for appellant.

Harvey, C.J.

HARVEY, C.J., concurred with Walsh, J.

Walsh, J.

WALSH, J.:—The plaintiff exchanged with one Haering his Huber engine and a Cockshutt plough for Haering's Case engine and Deere plough, paying him $1,600 in cash as being the difference in value between the articles so exchanged. The fact is that Haering had agreed to buy this engine from the defendant J. I. Case Threshing Machine Co. under a conditional sale agreement, under which the title, ownership and right of property in the same remained in the company until payment in full was made of the purchase price. This Court held last year in this action that the company had sufficiently complied with the requirements of the ordinance respecting hire receipts and conditional sales of goods to permit it to set up a claim of property or right of possession to this engine as against the plaintiff: 27 D.L.R. 379, 9 A.L.R. 285. Haering's original liability to the company for this engine was $3,875, which at the date of this exchange was wholly unsatisfied. He made some payments upon it after that date, but some two years later, when the company's notes were largely in arrear, it made a seizure of this engine under its conditional sale agreement, and set on foot proceedings for the removal and sale of the same to satisfy its lien. The plaintiff thereupon commenced this action for a declaration that the engine is his property free from the defendant's lien, and an

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injunction restraining the company from interfering with it, or, in the alternative, that the Huber engine and his $1,600 be returned to him. He obtained an injunction order restraining the company from interfering with, taking or removing this engine until the trial of this action. The company, besides defending the action, counterclaimed for the damages occasioned to it by the granting of this injunction, and at the trial was allowed to amend by alleging a conversion of the engine by the plaintiff and making a claim for its value in consequence thereof. Haering is a party defendant, but he did not defend. Hyndman, J., who tried the action, dismissed it, and gave judgment for the company for $3,400 on its counterclaim for conversion. From this judgment the plaintiff appeals.

The plaintiff's first contention is that Haering, in making this exchange with him, acted as agent for the defendant company, with whom, therefore, his contract of exchange or barter really was. This contention is based largely, if not entirely, upon the fact that, when it was made, Haering was the company's agent in that district. The Judge held upon the evidence that the plaintiff's contract was not with the company, but with Haering personally. I do not see how he could possibly have held otherwise. The contract, which is in writing, is made between the plaintiff and Haering, and signed by them individually, without a word in it which is even suggestive of the idea that Haering was acting for the company or otherwise than in his own right. The engine was then in Haering's possession, not as the company's agent, but under his contract of purchase with the company. The plaintiff's cheque for the $1,600 which he agreed to pay was made payable to Haering's order and was cashed by him. The evidence is so overwhelmingly against this contention of the plaintiff that it is unnecessary to take further time in discussing it, particularly in the face of the trial Judge's finding of fact.

Then the plaintiff says that, before the close of the deal with Haering, he telephoned the company's head office for Alberta in Calgary, and asked for the manager and had a talk with someone who represented himself to be the manager, in which he gave his name and place of residence, and asked if Haering had a right to sell that engine, and the party to whom he was talking

said that he had. He is corroborated in this by the evidence of one Bowden, who says that he heard the plaintiff's end of this telephone talk, which he gives in much the same terms as the plaintiff. The manager of the company, however, denies this. I have no doubt from what he says that the plaintiff did call him up and talk to him about this matter, but he says that he told him that the engine was not paid for, but he refused to tell him how much was against it without an order from Haering. Bowden, of course, did not hear what the manager said. As to that which is the essential part of the conversation, only the plaintiff and the manager speak, and the trial Judge, impliedly at least, accepted the manager's version of it, for he found against the plaintiff on this point. The onus of proving this was upon the plaintiff, and he failed to satisfy the Judge who heard his evidence and that of the manager that he had proved it, and I do not think we can say that he was wrong.

After this exchange was made, Haering gave the company certain mortgage securities for the payment of the balance of his indebtedness in respect of this engine. The plaintiff contends that Haering's simple contract debt and all the company's rights in respect thereof, including its property in this engine, thereby became merged in these specialties, and thus the company's title to and property in the engine is extinguished. These mortgages shew on their face that they are taken merely by way of collateral security for Haering's indebtedness, and they expressly provide that they shall not operate as a merger of the debt and that no lien or charge under or by virtue of any of the notes evidencing Haering's liability shall be n any way affected thereby. Whatever change in the form and nature of Haering's liability to the company may have been worked by these securities, as to which it is unnecessary to express an opinion, I am of the opinion that the company's right of property in and right to possession of this engine were in no manner affected thereby, and that the trial Judge was quite right in refusing to yield to the plaintiff's contention to the contrary.

These are the only questions which appear to have been discussed at the trial, but on the hearing of this appeal an argument arose out of certain facts which are disclosed by the evidence upon a point which seems to be covered by the notice of appeal.

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Of the $1,600 paid by the plaintiff to Haering, he at once paid the company $800, part of which was applied in satisfaction of his other indebtedness to the company and $487.19 was applied on the first of his notes given for this engine. It does not appear that the company then knew the source from which this money came. A couple of months later, however, Haering, at the solicitation of one of the company's agents, gave to the company a mortgage on the Huber engine which he had taken in exchange from the plaintiff, and this agent then learned all the particulars of the deal between him and the plaintiff. The company shortly thereafter wrote Haering that it had been advised by this agent "that you recently sold an engine for which you gave the above numbered notes for a consideration of $1,600 cash and a second-hand engine. You remitted this office $800 of this amount; $312.81 was used to pay your repair account and the balance, $487.19, was applied on your note No. 27811, still leaving a balance on this note." The letter then proceeds to state that the company will not stand any such treatment and that it has given instructions to get the amount then past due on the engine, otherwise to stop the engine. The contention is that this course of dealing between the company and Haering with respect to the money and the engine acquired by him from the plaintiff, with knowledge of the fact that he acquired them in exchange for the company's engine, amounts to a ratification by it of his dealing with the plaintiff or at any rate estops the company from now asserting its right against this engine under its conditional sale agreement with Haering.

Much as one would like to find a way for giving effect to his sympathy for a man who has been so shamefully treated as the plaintiff has been by Haering, I am unable to find any ground in law for helping him on this last remaining ground which appears to be open to him. Under what took place between him and Haering, the property in the Huber engine and in the $1,600 passed to Haering. They were legally his to do as he liked with. His sale or mortgage of the engine would have passed a good title in it to the purchaser or have created a valid charge upon it in favour of the mortgagee. It was liable to seizure by the sheriff under an execution against him. He was legally free to use the money as he saw fit. He, in fact, did so by keeping

$800 of it and remitting the rest to the company. That he should have exercised his undoubted rights in this respect by reducing his liability to the company out of the money and giving it security upon the engine for what he still owed it instead of turning them over to some other creditor, as he might have done, can not I think affect its title to the engine which Haering agreed to buy from it, even though it knew that the money and engine were the proceeds of a disposition which Haering had made of its engine. It accepted from him what he had a legal right to give it. His deal with the plaintiff was in no sense dependent upon its consent. I mean as a term of the bargain, and it is not even suggested that this money was paid to it or that this security was given to it for the purpose of securing such consent. The deal with the plaintiff had been absolutely closed before it received either money or security, and the plaintiff's position has been, in no manner, altered by its acceptance of them. I think that the fact is that the plaintiff and Haering each depended on the other's honesty in the making and carrying out of this deal. Their written agreement provides "that each will defend any claims that may hereafter appear against the ownership of either plows or engines," which affords very strong ground for the belief that each of them was quite willing to trust in the integrity and the financial ability of the other to protect the property which he took in the exchange from liens or encumbrances. Haering was then a man of some apparent substance. Besides this engine and plow, he seems to have had a lot of machinery around him and to have been the registered owner of 480 acres of land, and I do not doubt that the plaintiff placed every confidence not only in his honesty but in his financial strength and so let this deal go through in this slipshod manner. I think that his action was properly dismissed.

It is equally clear to me that the judgment against him on the counterclaim cannot be disturbed. When the company's agent demanded this engine from him in the spring of 1915 he refused to give it up and defied him to take it. He went further and commenced this action asserting his right to the engine as against the company and by the injunction which he obtained has secured to himself the possession of it for the past two years during which he has constantly made use of it against the company's will. There can be no question on these facts but that he has wrong-

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fully converted the engine to his own use when as is the case the company's ownership and right to possession of it is not open to dispute. The amount awarded as damages for the conversion, namely $3,400, is not seriously objected to and the evidence given of its value quite justifies it.

I would dismiss the appeal with costs. I think that the plaintiff is entitled, if he so desires to have an account taken at his own expense, of the company's claim against Haering in respect of this engine and upon payment to it of the amount found due in respect thereof to have assigned to him any securities which the company holds on that account. If he wants such an account I think the reference should be to the clerk at Calgary as the company's books and papers are no doubt at its head office here, and the reference can for that reason be more satisfactorily and less expensively carried on here. The formal judgment should provide for this reference and the assignment of the securities upon payment, but the company will doubtless obviate the necessity for a reference by giving the plaintiff a frank and full statement of the account.

Mr. Clarke, at the close of the argument, thought that the company might be willing to assign to the plaintiff its mortgage on the Huber engine, and I sincerely hope that he may be able to induce it to do so.

Stuart, J.

STUART, J.:—There is no evidence in this case from which it could be reasonably inferred that Atkinson told the plaintiff over the telephone that the engine in question had not been paid for. Atkinson says that some time or other, making no attempt to suggest a date at all, except that it was in the spring of 1913, someone telephoned from Taber and asked him if the Haering engine had been paid for, and that he told that person that it had not. Atkinson had no idea to whom he was talking, and makes no definite reference to time, so as to identify his conversation with the one spoken of by the pla ntiff. The trial Judge did not think that there was anything to shew that the plaintiff had been talking to Atkinson, or any person in authority and so he thought that the plaintiff had not made out an estoppel. But then if it was not shewn that the plaintiff was talking to Atkinson, it surely cannot be taken as shewn that Atkinson was talking to the plaintiff. Many other people around Taber might have enquired over

the telephone about the Haering engine, and in the absence of any reference to the date by Atkinson, it seems to me impossible to find—and indeed the trial Judge did not find—as a fact that Atkinson ever told the plaintiff that the engine was not paid for.

Neither is there anything in the judgment of the trial Judge which amounts to a finding that Haering told the plaintiff that the engine was not paid for. He makes no reference to that part of Haering's evidence. Haering swore that the plaintiff asked him, while the deal was in negotiation, whether the engine had been paid for, that he told the plaintiff that it was not, but that the plaintiff never asked him how much was due upon it. Obviously that was a deliberate falsehood on the part of Haering. It is expecting too much of our credulity to ask us to believe that an intelligent farmer in this country, who is seriously thinking of buying a certain machine and asks the proposed vendor if it is paid for and is told that it is not, would omit to ask how much was still due. That he should be willing to assume a risk without evincing any curiosity as to the amount of it is to my mind incredible and owing to Haering's conduct generally and his recklessness in certain other parts of his evidence, I feel justified in absolutely disbelieving him. We must also either believe or disbelieve the plaintiff when he says he enquired about Haering's right to sell. If we believe it then it shews that he did want to get a good title. If we disbelieve it, then the evidence is eliminated from the case.

There is, therefore, nothing to shew that the plaintiff intended anything else than to acquire the legal title to the engine. Whether he thought he was buying from Haering personally, or from the Case company, through Haering, as their agent, is, I think, immaterial so far as the question I am now considering is concerned. Whatever the truth about that is I am satisfied from the evidence that it was his intention, not to acquire a mere equitable interest in the machine, but to acquire the full legal title and ownership in it. He paid $1,600 good hard cash and gave up absolutely another engine, said to be worth $2,000 for it. I think the dealing between Haering and the plaintiff was made upon both sides upon that understanding. Haering, no doubt, was acting fraudulently in making such a bargain, but I have also no doubt that that was the bargain. Reference is made to a clause in the written agree-

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ment, but I am unable to see how this alters the situation in the slightest degree. Haering agreed "to give *his* 32 H.P. Case engine . . . in exchange for the following property of" Wenbourne's. It is added that "It is mutually agreed with both parties, that each will defend any claim that may hereafter appear against the ownership of either plows or engines."

I cannot make out of this last clause anything more than a guarantee of title, such as the law imposes upon a vendor of a specific chattel in any case. It is certainly a new proposition to me, to hear it contended that the insertion of a promise in a bill of sale by the vendor to protect his vendee in his title should be treated as evidence that a good legal title was not intended to be given. It is evidence, of course, that the question of title was thought of, but surely not that the actual passing of title was not expected by the vendee to be taking place.

There is, therefore, no doubt in my mind that Haering obtained the $1,600 cash and the Huber engine from the plaintiff by false pretences, by pretending to sell him the full title to the Case engine at a time when he knew he had no right to do so.

The rights of a vendor who has been induced to part with his property by false pretences are discussed in Benjamin on Sale, 5th ed., pp. 458-460. The legal property passes, but as long as no innocent third party has acquired rights in the property the vendor has a right to rescind and demand back his property.

Here the plaintiff Wenbourne was defrauded of his $1,600 and his Huber engine. These, he is not now seeking to recover. In this action he has endeavoured to maintain that he was not defrauded, but that he got a good title to the Case engine.

But in this action and by the judgment given below, at least, it has been shewn that he did not get a good title, that Haering had no right to sell him the Case engine. If this judgment stands he knows now, at least, that he was defrauded. Indeed, except for the action of the defendants in keeping his $800 and his Huber engine there is no doubt that, for the reasons given by my brother Walsh, the judgment below ought to stand. The trial Judge found that the transaction was between Haering personally and the plaintiff. I agree entirely with that finding. There was no pretence or suggestion of agency. Haering pretended to be selling his own property and to be giving a good title to it and so defrauded

the plaintiff. I also accept the trial Judge's view that the evidence is not sufficient to shew that any officer of the defendant company told the plaintiff that Haering had a right to sell. I also think there is nothing in the contention as to a merger.

It is unfortunate that the plaintiff brought an action wherein he endeavoured to prove his title to the Case engine on the grounds taken. He would have got along better if he had endeavoured to establish his title to the Huber engine.

But there is still, if we disregard the form of the pleadings, much to be said in the plaintiff's favour. It is true the defendants did not at first know where the $800 which Haering paid them had come from. But they soon learned. Mumford, indeed, ventured to assert, that when, on behalf of the company, he made the affidavit of *bona fides* for the chattel mortgage on the Huber engine he did not know where or how Haering had obtained it. I am inclined to think he did then know, but at any rate he very soon learned. More than that he very soon learned that the plaintiff who had paid the $1,600 to Haering and had given him also the Huber engine claimed to have got and honestly thought he had got a good and complete title. It was some time before September 22, 1913, at any rate, that the defendant company knew that the plaintiff thought he had got a complete title, because that is the only inference to be drawn from the letter of that date. Indeed, I think, that as soon as the defendant company learned what had been given for their engine they, knowing how large a sum they still had against it, must have known also perfectly well that the purchaser was not assuming the large debt due to them. Mumford admitted that the knowledge came to him eventually, that the plaintiff had paid in full for the engine.

And yet the defendant company kept the $800 and the chattel mortgage on the Huber engine, knowing all this in the summer of 1913, and never said a word to Wenbourne about the matter till the spring of 1914. And even then they made no attempt to assert their rights. Mumford said he just went out to see what shape the engine was in. He told Wenbourne that they intended to repossess the engine, but they never attempted to do so until February 24, 1915.

So they retained the $800 which they had got out of the $1,600 which they knew Haering had got from Wenbourne and retained

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it long after they must have known that he must have got it by fraud and they retained their chattel mortgage on the Huber engine which they must have known he had got in the same way. Their motto evidently was "What we have, we hold."

They made no offer to return the $800 and the Huber engine before attempting to seize the Case engine out of Wenbourne's possession. The defendant company were not innocent purchasers for value in respect of the money and the engine they got from Haering. They gave nothing at the time for these two pieces of property. They took them from a man who owed them some money, but they gave up no other property or security for them, they merely got more security. When they discovered, as they did, that the person from whom they obtained them had got them by fraud they held on to them. They made no communication to the party defrauded. They clung to the proceeds of the fraud knowing them to be such and they still cling to them with that knowledge.

By returning the $800 and the Huber engine at once they would not have been prejudiced in the least—they would have been just where they were before and they were at all times in a position to repossess the Case engine.

This is more than ratifying a pretended agency. It is associating themselves with Haering in the fraud and asking the Court to condone and approve of it. Associating themselves with Haering in this way I think they must associate themselves with him altogether and take the responsibility for his actions and stand in his shoes.

In these circumstances I would allow the appeal without costs and give the plaintiff judgment for a perpetual injunction as claimant without costs and would dismiss the counterclaim with costs.

Beck, J.

BECK, J.:—I think on the evidence that Haering committed fraud upon Wenbourne; that Wenbourne was made to understand that Haering was the owner, without encumbrance, of the Case machine, and therefore that he was fraudulently induced to part with his Huber engine. He was therefore entitled to rescind the bargain. Codd representing the defendant company had full knowledge of this fact. His knowledge was the knowledge of the defendant company. With this knowledge he dealt with Haering

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in such a way as to prevent, if his dealings stood, Wenbourne from taking steps to set aside the transaction with Haering at a time when, it would seem, Haering was financially good. By this action the defendant company it seems to me precluded themselves from enforcing their claim against Haering to the prejudice of Wenbourne.

I think the appeal should be allowed. *Appeal dismissed.*

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. June 25, 1917.

AUTOMOBILES (§ III C—310)—LIABILITY OF OWNER—NEGLIGENCE OR WILFUL ACT OF DRIVER.

The owner of a motor car driven by his daughter is not liable under the Manitoba Statute, 5 Geo. V. ch. 41, sec. 63*a*, for injury thereby, unless the injury was caused by the negligent or wilful act of the driver.

Statement.

APPEAL by defendant from a judgment of Mathers, C.J.K.B., awarding plaintiff damages in an action for personal injuries sustained in a collision with a motor car owned by defendant. Reversed.

W. H. Trueman, K.C., for defendant, appellant.

T. J. Murray, for plaintiff, respondent.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The plaintiff while riding a bicycle was struck down on the street by a motor owned by the defendant Herman Kobold, but operated at the time by, and occupied by, his daughter the defendant Rita Kobold.

It is claimed that both defendants are liable under sec. 63*a* of 5 Geo. V. ch. 41, which is as follows:—

In all cases when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at the time shall be liable for such loss, damage or injury, if it was caused by his negligence or wilful act, and the owner thereof shall also be liable to the same extent as the driver unless at the time of the injury the motor vehicle had been stolen from him or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof.

The action was tried by a jury and there was evidence given on both sides as to the cause of the accident.

The following questions were left to the jury:—1. Q. Was the plaintiff guilty of negligence? 2. Q. If so, in what did his negligence consist? 3. Q. If the plaintiff was guilty of negligence, could Miss Kobold, notwithstanding the plaintiff's negligence, by the exercise of reasonable care, have avoided the accident?

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4. Q. Whose negligence caused the accident? 5. Q. At what sum do you assess the plaintiff's damages?

Q. 1 was answered in the negative; Q. 5 was answered, $1,114.50 and no answer was given to any of the other questions.

Upon this the Chief Justice entered judgment for the plaintiff for $1,114.50.

Under the clause above set out the owner can only be liable if the injury was caused by the negligence or wilful act of the driver. The case being tried by a jury, all facts to justify the entry of judgment by the Judge must be found by the jury. The judgment entered must be the logical conclusion from the pleadings and the facts found by the jury. The accident or the damage to the plaintiff might have arisen from many causes; there could be but one cause which would make the owner liable.

I have not considered what construction should be put on sec. 63 in the original Act. It is sufficient to say that the jury have not found that the injury was caused by the negligence or wilful act of the driver of the motor.

Under the circumstances there should be a new trial.

The costs of the trial and of this appeal to be costs in the cause to the defendants. *New trial ordered.*

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. May 2, 1917.

COMPANIES (§ VII B—370)—EXTRATERRITORIAL POWERS AS TO DOING BUSINESS—INSURANCE.

A company incorporated for the purpose of carrying on the business of insurance has general power to do business and effect policies outside of the province of incorporation; a recital in the preamble of the Act of incorporation as to the purpose of carrying on the business "within the province" is no limitation upon its general powers.

[*Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, followed. See *Montreal-Canada Fire Ins. Co.* v. *National Trust Co.*, 35 D.L.R. 445.]

Statement.

APPEAL by defendant from a judgment in an action on an insurance policy. Affirmed.

W. L. McLaws, for appellant; *J. P. Foley*, K.C., for respondent.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The defendant was incorporated by an Act of the local legislature as an insurance company (52 Vict. ch. 53 (1889)). The first section of the Act states that the shareholders "shall be and are hereby created, constituted and declared to be a body corporate and politic under the name of the Manitoba

Insurance Association." This name was afterwards duly changed to that of the defendant.

Sec. 2 declares that the chief place of business of the company shall be in the City of Winnipeg, in the Province of Manitoba.

Sec. 3 of the Act is as follows:—

The company shall have power and authority to make and effect contracts of insurance or re-insurance with any person or persons, bodies politic or corporate, against any loss or damage by fire, lightning, tornado, cyclone, hurricane or hail storm on any houses, stores or other buildings whatsoever, and on any goods, chattels or personal property whatsoever.

And also to make and effect contracts of insurance and re-insurance with any person or persons, body politic or corporate, against loss or damage of or to ships, boats, vessels, steamboats or other craft, or against any loss or damage of or to the cargoes or property conveyed in, or upon such ships, boats, vessels, steamboats or other craft, and the freight due or to grow due in respect thereof, or on any timber or other property of any description conveyed in any manner upon all or any of such ships, boats, vessels, steamboats or other craft, or on any railway or stored in any warehouse or railway station; and generally to do all matters and things relating to or connected with marine insurance or re-insurance.

And also to make and effect contracts of insurance and re-insurance thereof with any person or persons, body politic or corporate, against loss or damage by death, disease or accident to horses, cattle and all kinds of live stock

And such contracts to be for such time or times, and for such premiums or considerations, and under such modifications and restrictions, and upon such conditions as may be bargained or agreed upon, or set forth by and between the company and such person or persons, body or bodies, politic or corporate.

And to cause themselves to be re-insured against any loss or risk they may have incurred in the course of their business, and generally to do and perform all other necessary matters and things connected with and proper to promote those objects.

And all policies or contracts of insurance issued or entered into by the said company shall be under the seal of the said company, and shall be signed by the president or vice-president, or a director, and countersigned by the manager or otherwise as may be directed by the by-laws, rules and regulations of the company in case of the absence of any of the said parties, and any moneys payable for any loss or damage thereunder shall by the terms of the policy or contract be made payable within the Province of Manitoba, and such policies or contracts, being so sealed, signed and countersigned, shall be deemed valid and binding according to the tenor and meaning thereof.

If insurance business on boats and vessels and marine insurance generally was intended, then it must be that vessels on the Red River running into the United States, and those on the Saskatchewan River running into the Province of Saskatchewan, were contemplated as matters of insurance by the legislature.

There is no limitation as to the locality of the property to

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be insured, but the policy of insurance is to be made payable in Manitoba.

If a man having property in Saskatchewan or Dakota applied to the company for insurance and a policy was issued in his favour here and was made payable here, it does seem to me that all this would merely be doing business here within the terms of the statute. In the *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, the company was limited to mining, and to mine in Yukon required them to operate and carry on business there. It seems to me the defendant company might issue a policy here to cover a loss by fire on a building in Dawson City and still only be doing business here.

However, this aspect of the case need not be followed further, for by 7 Geo. V. ch. 12 it is enacted as follows:

1. Every corporation or company heretofore or hereafter created . . . shall unless otherwise expressly declared in the Act or instrument creating it, have and be deemed to have had, from its creation, the capacity of a natural person to exercise its powers beyond the boundaries of the province to the extent to which the laws in force, where such powers are sought to be exercised permit, and to accept extra-provincial powers and rights and shall, unless otherwise expressly declared in the Act or instrument creating it, have and be deemed to have had, from its creation, the general capacity which the common law ordinarily attaches to corporations incorporated by Royal charter under the great seal.

The company thereby acquired the capacity of a natural person (if it did not previously have it) and all the rights of a common law corporation. They could go to the Yukon like the Ontario company and take out a company license as the Ontario company in the *Bonanza* case did, and start into insurance business. If no license is required, then, being a natural person, by the comity law they could do business there and have the benefit of the Courts there.

I have assumed that the local legislature had the power to vest in the company the powers which the Sovereign has in incorporating common law companies, and this is supported by the language of Lord Haldane in the *Bonanza* case, 26 D.L.R. 273, at 285, where he states his views as follows:—

The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity.

Again, in *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282, at 290, in discussing the powers of provincial legislatures, the law is stated as follows: "Within these limits of subjects and areas the local legislature is supreme and has the same authority as the Imperial Parliament." Such a legislature would have power to enact that a company incorporated for provincial purposes should have the capacity of a natural person, and if the Lieutenant-Governor, in the name of the Sovereign, could give them power to accept extra-provincial powers and could give the rights which common law companies possess, it seems to me the legislature could give that power also.

The company insured property in the State of Georgia, in the United States of America, and got their pay for it and issued a policy of insurance to the owner, who lives there. By the terms of the policy the loss is payable in Manitoba. The company's place of business is in Manitoba, but by correspondence risks are canvassed for and procured outside. The policy in question was duly executed here except bare delivery, which was intrusted to an agent in Chicago, who duly countersigned it and handed it over to the insured.

There is nothing in the evidence or admissions to shew that a company having the powers of a common law company required a license or other authority to carry on the business which this company did in this transaction in the United States, and, assuming that this transaction was really doing business outside Manitoba, it seems clear that this company by the law of comity of nations could do business there.

In the case of *C.P.R. Co.* v. *Ottawa Fire*, 39 Can. S.C.R. 405, 451, the Supreme Court held that a policy of insurance issued by an Ontario insurance company incorporated in the same way as the company in the *Bonanza Creek* case upon property in the State of Maine, in the United States, was binding upon the company. In that case no license or permit was taken out in that State in any way authorising the company to insure property in that State. In giving judgment, Duff, J., thought that the province had power to grant extra-provincial trading capacity to such companies.

In the preamble to the defendant's Act of Incorporation it is recited that whereas various persons have prayed to be incor-

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porated "as a company for the purpose of carrying on the business of fire, marine and live stock insurance in all its various modes and branches within this province," and then follows the clauses of the Act set forth.

It seems to me that these words in the recital do not in any way modify the wide and full powers granted in the Act, but, in any event, they are not such express declarations and limitations as would prevent the enabling Act of 7 Geo. V. above set forth from applying to the defendant company.

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

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MEREDITH v. PEER.

Ontario Supreme Court, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. April 3, 1917.

NEGLIGENCE (§ IC—37)—ICE FALLING FROM ROOF—REMEDY—DAMAGES—INJUNCTION.

There is a duty, apart from any obligation imposed by a municipal by-law, upon the owner or occupant of a building the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally and probably slide from the roof, to take all reasonable means to prevent the snow or ice from falling upon the adjoining property, or an adjoining highway, and causing damage to persons or property there; a failure to adopt such means of prevention will render him liable in damages for an injury caused thereby, but the case is not one for an injunction.

Statement.

APPEAL by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff, in an action brought in the County Court of the County of York, to recover damages and for an injunction in respect of injury and loss suffered by the plaintiff owing to the fall from the roof of the defendants' house, adjacent to the house and land of the plaintiff, of snow and ice which had been permitted to accumulate upon the roof, and by reason of slates falling or being blown from the roof of the defendants' house. Varied.

M. H. Ludwig, K.C., for appellants; *Shirley Denison*, K.C., for plaintiff, respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment of the County Court of the County of York, dated the 31st October, 1916, which was directed to be entered by His Honour Judge Denton, after the trial of the action before him sitting without a jury on the 16th day of that month.

This case raises a very important question as to the liability

of a land-owner to his neighbour for injuries sustained by him owing to the fall from the roof of the land-owner's building of snow and ice which had been permitted to accumulate there; and there is a dearth of English or Canadian authority bearing directly on the question.

Before dealing with the legal aspect of the case, it will be convenient to consider the facts as developed in the evidence and as found by the trial Judge.

The parties are owners of adjoining properties in Toronto, upon which are erected dwelling-houses.

The appellants' house was erected first, and it is built close up to the dividing line between the two properties; and, when the respondent's house was afterwards erected, a space of about 2 feet 6 inches was left between the wall of it and the dividing line, which was used as a passage-way to the rear of the house.

There was nothing unusual in the mode of construction of the roof of the appellants' house, but it was a slate roof and somewhat steep, and the probable consequence of the falling of the snow upon it would be that it and any ice that might have formed there, owing to the melting of the snow, would slide from the roof and fall upon the respondent's property.

There were during the month of February, 1915, several very heavy snow-falls, and the snow and ice which had accumulated upon the roof slid from the roof of the appellants' house and caused the injury of which the respondent complains, which was the smashing of his sun-room and the blocking up of the passage-way which led to the rear of his house. A claim is also made for injuries caused by slates falling or being blown from the roof of the appellants' house.

Neither of the parties appears to have apprehended danger from the accumulation of the snow on the roof of the appellants' house, and no steps were taken by the appellants to remove it or by the respondent to guard against injury to his property if it should fall.

The case for the respondent is rested upon two grounds: (1) that there was an absolute duty resting upon the appellants to prevent the snow and ice from falling on to his property; or (2) that the appellants were guilty of negligence in not adopting adequate means to prevent that from happening, when the

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probable consequences of the snow and ice falling would be to cause injury to the respondent's property.

I have been unable to find any reported English or Canadian case in which the question presented for decision in the case at bar has arisen. There are, however, some American cases, and cases both in Ontario and in the United States, in which the question of the liability of the owner or occupant of a building abutting on a highway for injuries caused to persons lawfully using it by snow or ice which had accumulated on the roof of the building falling into the highway has arisen; but the cases are conflicting.

In Massachusetts, the rights of a traveller on the highway are held to be the same as if he owned the soil in fee simple, and the liability for injuries sustained by a traveller in consequence of snow or ice falling from the roof of a building abutting on the highway is held to depend on the same rules and is to be decided on the same principles as if it raised a question between adjoining proprietors in which the lands or buildings of one were injured by the manner in which the other had seen fit to occupy or use his own lands and buildings: *Shipley* v. *Fifty Associates* (1869-70), 101 Mass. 251, 253, 106 Mass. 194, 197. It was held in that case that, by maintaining a building with a roof constructed so that snow and ice collecting on it from natural causes will naturally and probably fall into the adjoining highway, the owner of the building is liable, without other proof of negligence, to a person injured by such a fall upon him while travelling on the highway with due care.

In *Bellows* v. *Sackett* (1853), 15 Barb. (N.Y.) 96, the eaves of the defendant's building came within about two feet of a dwelling-house erected by the plaintiff upon his adjacent lot, and, owing to a want of suitable repairs to the gutter of the defendant's building, the water from his roof fell between the two buildings—it was assumed for the purpose of the decision on his own land—and by percolation found its way into the plaintiff's cellar through the wall to the injury of the wall and the lower timbers of his house. The plaintiff recovered, apparently on the ground that, "owing to a want of suitable repairs, the water falling upon an area of 25 feet by 13, is collected at a single point and precipitated in an unnatural and unusual quantity and manner so near the plaintiff's premises as necessarily to cause him an injury" (p. 102).

In a later New York case, *Walsh* v. *Mead* (1876), 15 N.Y. S.C. (8 Hun) 387, it was held that, where the roof of a building, in a large city, is so constructed as to render the snow falling upon it liable to be precipitated upon the sidewalk, and there is no adequate guard at the edge to retain it, it is, in judgment of law, a nuisance; for it imperils the safety of persons passing below it in the lawful use of the street upon which it fronts.

In *Garland* v. *Towne*, 55 N.H. 55, it was said by Ladd, J. (pp. 58, 59): "If a man must, at all hazards, keep upon his own premises the snow which is arrested in its natural fall to the earth by the roof of his house, it seems to me some very inconvenient, not to say absurd, consequences may follow. We all know that in this climate a heavy fall of snow is not unfrequently followed immediately by wind; and, when that happens, it is a probable if not an inevitable consequence that the snow, which has been arrested in its natural fall, and accumulated on roofs, will be carried off and deposited by the wind in a different place from where it would have finally rested but for the roof;—hence, in very many instances, the act of the land-owner in maintaining his building, concurring with the natural operation of the elements, will cast upon the premises of an adjoining proprietor snow with which, otherwise, such adjoining proprietor would not have been annoyed, incumbered, or damaged. I do not see why such a doctrine, if carried to its logical results and strictly applied, would not practically prevent the building of cities. I think the injury which results in such a way, from a customary and reasonable use by the land-owner of his property, he using due care (which would doubtless be a very high degree of care) to guard against damage to his neighbour, does not furnish a legal cause of action, but must be regarded as *damnum absque injuriâ*." Cushing, C.J., expressed the opinion (p. 60) that the defendant was not liable unless there had been a want of due care; and Foster, C.J.C.C., agreed that in the absence of negligence the defendant was not liable. Ladd, J., thought that "it was the general duty of the defendant to prevent the sliding of snow and ice from her roof upon the sidewalk; she was bound to guard against such a result by the exercise of due and proper care" (p. 56); and he also said that he supposed "the fact that ice slid from the roof upon the sidewalk on this particular occasion is evidence to be considered on the general question of the defendant's

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negligence;" and he added, "I see no reason why the jury might not legally find negligence from that circumstance alone, if unexplained" (*ib.*)

In *Underwood* v. *Waldron*, 33 Mich. 232, the question was as to the liability of the defendants for injury caused to the plaintiff's building by water flowing from the defendants' roof against it. The judgment of the Court was delivered by Cooley, C.J., who, referring to *Fletcher* v. *Rylands* (1886), L.R. 1 Ex. 265, *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, said there was in that case some strong language "as to the duty of one man to protect another against water flowing from his reservoir;" but the case had no analogy to the case he was considering in its facts, and that the governing principle should perhaps be different; and he went on to say that the injury "in that case was from the bursting of a reservoir into which defendant had gathered water on his grounds; and it was thought that under the peculiar circumstances, which need not here be mentioned, the party should, at his peril, have kept the water from inflicting injury to his neighbours. That was an exceptional case, but this was the ordinary case. Here are adjoining proprietors in a town, mutually improving their property with buildings. This is their right, and the policy of the law favours it. Neither of them is under obligation to permit his lot to remain vacant, because putting up a building will possibly throw water upon his neighbour. The respective duties of the parties to each other are those which the requirements of good neighbourhood in such a town would impose. Each must so use his own as not to injure his neighbour. But this means only that he shall use all due care and prudence to protect his neighbour; not that he shall at all events and under all circumstances protect him. Any injury that may result, notwithstanding the observance of proper caution, must be deemed incident to the ownership of town property, and can give no right of action. Undoubtedly the defendants were bound to put proper eaves-troughs or gutters upon their building, and to keep them in proper order, if the neglect to do so would be likely to injure the plaintiff. But if they did this, and were guilty of no negligence in that regard, the plaintiff can have no legal complaint against them. Injuries from extraordinary or accidental circumstances for which no

one is in fault, must be left to be borne by those on whom they fall" (pp. 238-9).

Underwood v. *Waldron* was followed in *Barry* v. *Severen Peterson* (1882), 48 Mich. 263, and it was there held that damages cannot be recovered on account of water dripping from a house on adjacent premises without proof that it was caused by some neglect of duty on the part of the house-owner.

The English case of *Hurdman* v. *North Eastern R.W. Co.* (1878), 3 C.P.D. 168, may also be referred to. That was the case of the surface of the defendants' land having been artificially raised by earth placed on it, in consequence of which rain-water which fell on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff and caused substantial damage, and it was held that the defendants were liable. Delivering the judgment of the Court, Cotton, L.J., said (p. 173): "The heap or mound on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against any one who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that . . . if any one by artificial erection on his own land causes water, even though arising from natural rain-fall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured." The question in this case arose upon demurrer to the statement of claim, and the nature of the artificial work does not appear, but it is probable that it was a railway embankment.

If a dwelling-house is an artificial work, within the meaning of this case, it would seem to follow that, where snow or ice accumulate on the roof of the building and fall from it on to a neighbour's property, causing damage, the owner or occupant of the building is liable for the damage so done.

The climatic conditions of Ontario are such as to make such an obligation very onerous; and it seems reasonable that in this country the obligation should be limited to providing reasonably sufficient means to guard against ice or snow falling from the roof.

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The Ontario cases leave the law in a state of some uncertainty.

Lazarus v. *City of Toronto* (1859), 19 U.C.R. 1, was the case of an action to recover damages sustained by a pedestrian owing to the fall of snow from a house which abutted on the highway on which he was walking; and it was held that, in the absence of evidence of fault or negligent construction of the house or roof, or of a municipal by-law requiring the owners of buildings to remove the snow from the roofs, there was no liability either against the owner or the tenant of the building. In stating his opinion, Robinson, C.J., said (p. 13): "The Municipal Act 22 Vict. ch. 99, sec. 290, sub-sec. 12, provides that the municipal council of every city may pass by-laws for compelling persons to remove the snow from the roofs of the premises owned or occupied by them. It was not shewn that any by-law had been made by the Corporation of Toronto, and that the defendants had infringed it, and I do not see in the evidence such proof of negligence as should render the owner or occupier of the house from which the snow fell liable to an action. What occurred here was such an accident as may occasionally happen and be attended with serious results, but I do not think that in the absence of any public regulation on the subject people are compelled to keep the roofs of their houses clear of snow, or to detain the snow on the roofs so that the snow cannot slide from them into the street. There may be in a particular case something so evidently faulty in the construction of a roof as to make it more likely to occasion accident from this cause than roofs in general are, but I do not see any proof that such was the case here." Burns, J., said (p. 17): "I know of no obligation imposed at common law, where people use their property in a manner similar to all others, to do any act to guard other persons against the acts of nature. This count assumes, from the fact of snow having fallen from the roof, and the plaintiff having sustained a severe and serious injury, that it was the duty of the defendants to have removed the snow from the roof of the house."

Skelton v. *Thompson* (1883), 3 O.R. 11, was the case of an injury sustained by a pedestrian owing to her having slipped upon ice which had formed there from the freezing of water that had been brought down from the roof of the defendants' house by means of a down-pipe; and it was held that, in the absence

of evidence that the defendants knew or ought reasonably to have known that the ice had formed there, the defendants were not liable. Hagarty, C.J. (p. 14), referring to the head-note in *Shipley* v. *Fifty Associates*, 101 Mass. 251, which is as follows, "For an injury resulting from the sliding of a mass of ice and snow from a roof upon a person travelling with due care in a highway, the owner of the building is liable, if the roof was subject to his use and control and he suffered the ice and snow to remain there for an unusual and unreasonable time after he had notice of its accumulation and might have removed it," said: "This seems reasonable enough. When the owner knows that ice or snow is accumulated on a sloping roof, liable of course, at any change of atmosphere or otherwise, to fall into the public street, he may properly be held responsible, if in reasonable time he do not take steps to prevent injury to passers by." Armour, J., dissented, being of opinion (pp. 16, 17) that "the pipe and spout were wrongfully upon the street and were kept there wrongfully by the defendants, and the conducting of the water from the roof of their building on to the street was a wrongful act on their part, and ice formed thereby being the natural, certain, and to them well-known result of their wrongful acts, they were just as much responsible for the obstruction so formed as they would have been if they had carted ice from the bay and placed it there."

In *Landreville* v. *Gouin*, 6 O.R. 455, *Lazarus* v. *City of Toronto* was commented on and distinguished. The action was for injuries sustained by a pedestrian being struck by snow and ice which fell from the roof of a building owned by the defendant which sloped towards the street and was covered with tin, and there was evidence that the defendant had been notified half an hour before the accident that there was danger of the ice and snow falling from the roof. Cameron, C.J., was of opinion that the *Lazarus* case did not preclude the Court from leaving the question of negligence to the jury, and pointed out that there was in the notice that had been given to the defendant an element of negligence that there was not in that case. *Skelton* v. *Thompson* was also distinguished upon the ground that "the principle on which" it "was decided was, that the act complained of was not the *causa causans*, and that, without neglect or unreasonable delay in removing ice formed upon the sidewalk by reason of water flowing in a harmless way on to the sidewalk from the water-spout

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of a house and then freezing, the owner was not liable for an injury to a person slipping upon the ice so formed, whereby he sustained injury" (p. 461). The Chief Justice also said (pp. 461-2): "I presume if the defendant had had a cart-load of snow and ice placed upon his roof, and it had fallen, he could not avoid responsibility to any one using the highway injured thereby, if it were found a negligent act to so place it. I do not then on principle see how he can avoid such responsibility when he constructed his roof, or used the building with a roof so constructed by others, so as to cause the snow to slide and pack and overhang the highway, or to be precipitated thereon, when he has had reasonable notice of the dangerous condition of his roof from the snow and ice accumulated there." Rose, J., concurred in granting a new trial, though he could not see, if, as he thought had been decided in the *Lazarus* case, "there is no common law duty cast upon the defendant to 'keep the roof of his house clear of snow, or to detain the snow on the roof, so that the snow on the roof cannot slide from it into the street,' and no statutory obligation of which the plaintiff desires to avail himself, the mere giving of notice to do that which, as against the plaintiff, it was not his duty to do, can give a cause of action to the plaintiff" (p. 466).

In *Roberts* v. *Mitchell* (1894), 21 A.R. 433, 439, Maclennan, J.A., referring to cases which illustrate the duty of a land-owner in respect of his neighbour's land, mentioned as one of them that "he may not shed the water from his roof upon his neighbour's land."

After giving the question for decision my best consideration, my conclusion is, that the owner or occupant of a building, the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally and probably slide from the roof, is bound, apart from any obligation imposed upon him by a municipal by-law, to take all reasonable means to prevent the snow or ice from falling upon the adjoining property or an adjoining highway and causing damage to person or property there, and that that is the extent of the obligation which the law imposes upon him.

There is no express finding by the learned Judge of the County Court that the appellants were guilty of negligence, but the judgment appears to be based on the theory that they were under

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an absolute duty to prevent the snow and ice from falling upon the respondent's land.

The proper conclusion, however, upon the evidence, is, I think, that the appellants, if they did not know, ought to have known, that the natural and probable consequence of the snow and ice accumulating upon the roof of their house would be that, unless some guard or other means of preventing them from sliding from the roof upon the respondent's land were provided, or unless the snow and ice were removed, they would so slide and fall; that there was no difficulty in adopting one or other or both of these means of prevention; and that the appellants were guilty of negligence in not adopting them, and are liable for the consequences of their neglect.

The slates which fell from the roof on to the respondent's land were, no doubt, brought down by the pressure of the snow and ice and the sliding of the mass; and for the consequences of their having fallen the appellants are equally answerable.

Although, in my opinion, the judgment is right as to the damages awarded to the respondent, the case was not one for an injunction; and I would vary the judgment by eliminating the provision as to the injunction which it contains, and I would make no order as to the costs of the appeal. *Judgment below varied.*

DANIELS v. ACADIA FIRE INSURANCE Co.

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Nova Scotia Supreme Court, Drysdale, J., Ritchie, E.J., and Harris and Chisholm, JJ. March 10, 1917.

INSURANCE (§ III E—80)—MISREPRESENTATION AS TO TITLE.

A lessor's covenant to convey does not give the lessee such an interest in the land as will warrant his representation that he is owner of the property when applying for insurance; his answer to that effect on the application amounts to a material misrepresentation which voids the policy.

Statement.

APPEAL from the judgment of Longley, J., dismissing with costs plaintiff's action on a fire insurance policy issued by the defendant company. The ground upon which the judgment appealed against proceeded was misrepresentation as to the state of plaintiff's title, a fact material to the risk undertaken under the policy. Affirmed.

W. E. Roscoe, K.C., for appellant; *W. A. Henry*, K.C., for respondent.

Drysdale, J.

DRYSDALE, J.:—This action is on a fire policy, issued by defendant company to the plaintiff, covering farm buildings on a farm

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at Dalhousie, in King's County, viz., $450, on a dwelling house, and $250 on a barn, such buildings being situated on a farm at Dalhousie aforesaid.

The action was tried before Longley, J., with a jury. That Judge directed judgment for the defendant company and this appeal is asserted against such direction.

It seems the farm and buildings thereon were owned by one Margaret Walsh, and that the plaintiff under an agreement with said Walsh, dated June 2, 1914, became the tenant of said farm for a term from July 1, 1914, to November 1, 1915. By a clause in the agreement creating the tenancy, there was a covenant by the lessor in words as follows:—

> And the lessor covenants that if on or before November 1, 1915, the said lessee pays to the lessor the sum of $570 that the lessor will convey to the lessee all her right, title and interest in all the property and premises hereinbefore described by deed, saving and excepting the right to cut, sell and deliver timber on the part and on behalf and for the benefit of the lessor as hereinafter contained, which clause or one similar thereto shall be embodied in the said deed.

During the tenancy, viz., on December 2, 1914, plaintiff made application to defendant company for insurance on the buildings. This application is in writing and appears on pp. 31 to 34 of the printed case. By its terms the applicant was required to answer a series of questions as description of the premises and as being material to the risk, the whole forming a part of the contract of insurance and a warranty on the applicant's part. One of such questions and the answer thereto, No. 9, is as follows: "What is your title to or interest in the property? Sole owner."

The application on its face was made the basis of the company's liability, and must be so considered. I am of the opinion the judgment below ought to be supported on the short ground that the said answer to question 9 in the application was untrue. The plaintiff had a tenant's interest which was insurable, but he was not presenting such an interest, and was not contracting with defendants in respect thereto. He was simply a tenant for a term, and under the facts disclosed never became anything more. It is true he had a covenant in his lease whereby he might acquire a title from his lessor provided he paid the lessor the sum of $570 on or before November 1, 1915, and time is made the essence of the agreement respecting this payment. At the time of the application for insurance he had not paid such moneys, or any part thereof, and it

seems to me quite plain that his only interest in the farm or buildings at that time was that of a tenant. In fact, as the evidence establishes, he never became anything but a tenant at any time. Counsel for appellant strenuously argued that the covenant above set out gave the plaintiff an interest in the land that justified him in calling himself "owner," relying particularly on certain English cases wherein a tenant was given an option to purchase during the lease, and wherein counsel contended it was established that a tenant with an option to purchase was to be considered as having equitable ownership. An examination of such cases will show that in all such cases there was a definite agreement to sell and on the tenant exercising his option, a completed agreement to sell and purchase was effected. Whatever may be said about such a tenant's position this can, and must be said, under the agreement in this lease plaintiff got nothing thereunder, except his tenancy, unless on or before a certain date he paid $570, and time was of the essence as to such payment. He did not pay and consequently got nothing, and whilst in this position, not having paid, he undertook to represent himself as sole owner of the property, and on such representation based the contract of insurance. He could have become owner if he paid the money. He did not do so, and looking at the agreement and covenant and the position of the parties disclosed by the evidence, I think it too clear for argument that at the time the insurance was entered into plaintiff was not in any sense an owner, let alone sole owner. This point I regard as conclusive of the case, and I do not deal with the many nice points submitted by counsel on both sides because I think it unnecessary.

I would dismiss the appeal with costs.

RITCHIE, E.J.:—I agree that the appeal in this case be dismissed with costs. Ritchie, E.J.

HARRIS and CHISHOLM, JJ., concurred. *Appeal dismissed.* Harris, J. Chisholm, J.

WRIGHT v. NELSON.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. April 14, 1917.

SALE (§ II C—36)—BREACH OF WARRANTY—SEED—DAMAGES.
A seller of flax seed, for seeding purposes, who supplies seed infected with wild mustard, is liable to the buyer for the loss occasioned thereby.

APPEAL by plaintiff from the judgment of Harvey, C.J., in an action brought to recover damages for loss occasioned through Statement.

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defendant knowingly supplying seed flax infected with wild mustard, knowing it to be for s[illegible]ing plaintiff's land in the spring of 1913. Varied.

A. G. MacKay, K.C., for appellant; *C. H. Russell*, for respondent.

BECK, J.:—I am ready to agree in the result arrived at by my brother Walsh. I think, however, that sec. 16 of the Sale of Goods Ordinance (Marginal note—"Implied conditions as to quality or fitness") is not the section which calls for consideration. That section applies to goods which, admittedly, either are the specified things sold, or fulfil the description of the things sold by description, but about which there is raised some question of their quality or fitness for a particular purpose.

In my opinion that, on the facts as disclosed by the evidence, is not this case. This case, I think, is one where goods were sold by description or, rather, by sample as well as by description, and therefore the section of the Ordinance brought under consideration is sec. 15 (Marginal note: "Sale by Description").

In applying that section the principle to be invoked is made clear in several decisions.

Gardner v. *Gray* (1815), 4 Camp. 144. That was a case of a contract for a sale of twelve bags of waste silk, without any warranty that it should correspond with the sample. Lord Ellenborough, in leaving the case to the jury, said:—

> I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony. This is not a sale by sample. The sample was not produced as a warranty that the bulk should correspond with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that, under such circumstances, the purchaser has a right to expect a *salable* article *answering the description* in the contract. Without any particular warranty this is an implied term in every such contract. Where there is no opportunity to inspect the commodity the maxim *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular *quality* or *fitness*, but the intention of both parties must be taken to be that it shall be *salable in the market under the denomination mentioned in the contract between them* . . . The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as waste silk.

Weiler v. *Schilizzi* (1856), 17 C.B. 619, 139 E.R. 1219. This was a sale of certain parcels described as Calcutta linseed. All the Judges were agreed in the view they took. Willes, J., said:—

The jury have in substance found that the linseed in question was so mixed with seeds of a different and inferior description *as to have lost its distinctive character*, and prevented its *passing in the market by the commercial name of* Calcutta linseed. The purchaser had a right to expect, not a *perfect* article, but an article which would be *salable in the market* as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for. As, if a man buys an article as gold, which every one knows requires a certain amount of alloy, he cannot be said to get gold if he gets an article so depreciated in quality as to consist of gold only to the extent of one carat.

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Drummond v. *Van Ingen* (1887), 12 App. Cas. 284, at 291:—

It is well settled that, upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer the specific description, but must be *merchantable under that description*. This doctrine was laid down in *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, where all the previous authorities on the point were reviewed

In the result therefore the question: Do the goods correspond with the description? is answered by asking another: would the goods be salable n the open market under the description to a person wishing to buy goods of that description and knowing the real character of the goods in question? I think that the flax seed in question here probably did not answer the description even of flax seed, *simpliciter*, much less did it of flax seed *for seed*.

I think it likely that a careful calculation would also show that the defendant committed a breach of sec. 13 of the Noxious Weeds Act (ch. 15 of 1907 as amended, ch. 4, sec. 26 of 1911-12) prohibiting the sale of seed intended for the purpose of seed in which there is more than one seed of any noxious weed or weeds per ounce of such seed.

Guarding myself in this way, I concur with Walsh, J.

Walsh, J.

WALSH, J.:—I agree with the conclusions reached by my brother Ives except as to the amount of damages to which the plaintiff is entitled, though I think that the defendant's liability is under the contract to supply clean seed rather than under sec. 16 of the Ordinance. A careful reading of the evidence satisfies me that it is impossible to assess with exactness the damages suffered by the plaintiff through the defendant's breach of contract, and that the best that can be done is to give him as general damages such a sum as is upon the evidence reasonably sufficient to cover them. This in my opinion the Chief Justice has done by his award of $75. I think that some of the items which go to make up the amount to which my brother Ives would increase the judgment are not properly chargeable against the defendant, and that

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substantial justice will be done to both parties by leaving the trial Judge's assessment of damages undisturbed. In the result, therefore, I would allow the plaintiff the costs of the commission evidence of which the Chief Justice deprived him, and otherwise I would dismiss the appeal with costs taxable under column 3, as, though the amount sued for slightly exceeds $2,000, the amount by which the plaintiff sought by this appeal to increase his judgment is under $2,000.

Stuart, J.

STUART, J., concurred with Walsh, J.

Ives, J.

IVES, J.:—The Chief Justice held that the sale of the seed was subject to the implied condition of sec. 16 of the Sale of Goods Ordinance, and upon examination of the evidence I think rightly. He also finds as a fact that the wild mustard which grew upon plaintiff's land in 1913 came from defendant's seed, and the evidence in the case is of such a character that the trial Judge's finding should not be disturbed.

There is some evidence of the serious injury done to farm land by the presence of this noxious weed, and of the methods that may be pursued to eradicate it. Both of these subjects have for some years been the object of widespread public instruction by experts to an extent that should now enable us to treat them as something of common knowledge.

The conclusion that the plaintiff became aware of the presence of this weed in his land during the growing season of 1913 is, to my mind, irresistible, and as a good husbandman he should have promptly sacrificed his flax crop by cutting at the proper time to prevent the mustard from ripening its seed. It is also certain from the knowledge we have of this weed that it would have been highly imprudent to have cropped the land in the following year, 1914, but during that season it should have been fallowed and treated to periodic cultivation in order that seeds failing to germinate in 1913 should be enabled to do so in 1914, and the seedling plants destroyed. If this method had been pursued by the plaintiff I have no doubt of his right to recover loss of crops for the two seasons, together with the cost of such work as would have been necessary over and above the work required to get the crops. But this plaintiff did not follow this method. He lived in Cadogan, 5 miles from his farm, and the farming operations were being directly carried on by one Selseth on a share basis in 1913 with the obligation on Selseth's part to leave the land in 1914 in a condition

to be seeded. But whether to be seeded in 1914 or not does not appear.

In 1913 the flax crop, with the mustard, was allowed to ripen, and was in due course harvested and threshed so that the plaintiff suffered no loss in that year except by dockage of 38 bushels, when he sold his half of the crop, and the cost of threshing and hauling that 38 bushels. This would, according to the evidence, amount in all to $63.34.

Now as to the season of 1914, I think the weight of evidence is clearly against the contention that it was the presence of mustard that prevented a seeding of the land. If it had been perfectly clear I do not think it would have been planted. No claim is made for 28 acres of the infected land, because plaintiff admits that it was time in the ordinary course of good farming to summer fallow this parcel.

As to the remaining 42 acres of the infected land it would seem clear that as Selseth failed in his obligation to prepare it for seed, the plaintiff could not get any one else to do it in season, and was without horsepower or appliances to do it himself, and did nothing to eradicate the mustard until notified by the weed inspector, to cut and burn it, on July 17. It was cut and raked, but not burned until later. The cost of doing this work, as claimed by the plaintiff, seems reasonable, viz., mowing and raking at 60 cents per acre and burning 1½ days at $3 making in all the sum of $29.70. This, then, was the plaintiff's total loss in 1914 by reason of the presence of mustard, and, in the beginning of the following year, he transferred the land to his wife. Under the circumstances here I would increase the sum allowed by the Chief Justice to $93.04.

The final item appealed is the disallowance of the costs of the evidence of the witness, Selseth, taken by commission. Selseth was a necessary witness for the plaintiff. He was the only person whose knowledge would enable him to say that the seed purchased from and delivered by the defendant was the same that was sown on plaintiff's land in the spring of 1913. Without his evidence on that point the plaintiff could not hope to succeed. I think the plaintiff should be allowed to tax the costs of this commission.

The result is, that the judgment below should be varied so as to increase the damages to $93.04, and to allow the plaintiff the costs of the commission for taking the evidence of the witness Selseth. The result of the appeal being a substantial success for the defendant he is entitled to the costs. *Judgm nt varied.*

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SELIG v. ARENBURG.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Harris and Chisholm, JJ. March 31, 1917.

MASTER AND SERVANT (§ I C—13)—SEAMEN'S WAGES—FISHERMEN—DESERTION.

A fisherman who unjustifiably deserts his ship before the performance of his contract cannot recover for his services upon the express agreement nor upon a *quantum meruit*.

Statement. APPEAL from the judgment of Forbes, J., of the County Court for District No. 2, allowing defendant's appeal from the magistrate's Court, and dismissing plaintiff's action for extra labour performed by plaintiff on board the schooner "Aquadilla" on a fishing trip in the season of 1914. Affirmed.

V. J. Paton, K.C., for appellant; *D. F. Matheson*, K.C., for respondent.

The judgment of the Court was delivered by

Graham, C.J. SIR WALLACE GRAHAM, C.J.:—This is an action brought by one out of eighteen fishermen fishing on shares on board of the schooner "Aquadilla" against the defendant, the managing owner, to recover under a special agreement the sum of $15.

The original articles of agreement dated 11th May, 1914, between the owner and the master and crew of that vessel are in the form set out in the judgment in the case of *Wentzell* v. *Weinacht*, 41 N.S.R. 406, 411. It is unnecessary to refer to that agreement except for the purpose of pointing out that it contains a provision as follows:—

That the said Clarence Selig, master or skipper, with the said fishermen will pursue the cod and other fisheries in the schooner "Aquadilla" during the present fishing season, and will use their best endeavours to procure all the fish, oil, etc., they can and for the success of the voyage they may go; and will be ready at all times and will never leave the said schooner "Aquadilla" without permission from the owner or master thereof, until the voyage or fishing season is ended.

Also this provision:—

And it is further agreed that if any of the crew refuse duty or absent themselves from the vessel, when required (sickness excepted), or wilfully attempt to intimidate others of the crew, or to attempt to break up or hinder the voyage they shall forfeit the whole of their share of the proceeds of that fishing voyage in said fishing vessel.

It also contains a definition of the term "fishing season" as follows:—

And it is further agreed by both parties that the term "fishing season" shall mean, from the date that said vessel sets out on her first trip until the 20th day of October of the same year, or it may terminate at an earlier date

if considered proper by the skipper. Cooks and hired boys to receive no wages until the trip or trips are settled.

It appears that on the second trip when the vessel was on its way to the fishing ground and going through the Straits of Canso it came into collision with another vessel, the "Augone," off Port Hawkesbury, and was obliged to go upon the marine slip there to repair the injury. The managing owner, apparently, proceeded there and, in order to get the fishermen to stay by the ship and complete the fishing voyage, he entered into an agreement with them at that port as follows:—

Port Hawkesbury, June 2, 1914.

We the owners of schooner "Aquadilla" agree to pay Frank Selig the sum of $15 providing he goes in said schooner and stays on board for the fishing season of 1914, same sum to be paid at Lunenburg at end of voyage.

WILLIAM ARENBURG, M.O.

It is upon this agreement that this action is brought by one of the crew.

The vessel thence proceeded to the fishing ground but the crew said the vessel leaked and the master returned to Lunenburg, the home port, where she went on the slip for further repairs. It is not unusual to return to the home port for repairs. In fact, sometimes it is the wisest thing to do financially. It does not indicate that the venture is thereby abandoned. The plaintiff says this about the reason for his leaving her after she had been there for 3 days:—

Did not stay on vessel during season of 1914. They moved. Crew left her on slip in Lunenburg and I did so myself after I found others had left. I told captain I would go if he got a crew and he tried to get a crew, and could not do so, and I said to him I would have to look around and make something for my family.

The managing owner says this about the plaintiff's leaving:—

At Hawkesbury collision. Went on slip. Crew refused. 18 in crew. I gave agreement men for the fishing trip only, and crew said ship leaked and brought her home. I asked plaintiff to go and he said he would not go if she had a golden stern.

I suppose the injury was in the stern.

I think there is no serious conflict in this evidence; if there is, the Judge below, in fact, the two previous Courts, must be taken to have decided in favour of the defendant.

The crew left on June 29, 1914. The question is whether the plaintiff can recover this sum of $15.

I pass by the question whether there was any consideration for the special agreement in suit; that depends upon whether

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there was anything in this special agreement which the plaintiff under the original agreement did not bind himself to do: *Stilk* v. *Myrick*, 2 Camp. 317.

Perhaps these sharesmen occupied a different position from ordinary seamen. But I think that the plaintiff did not on his part perform the conditions of the special agreement in suit. The fishing season was not closed and it was possible to repair and complete the fishing voyage. The end of the voyage when this sum of $15 was to be paid had not come. The crew, including the plaintiff, without justification, deserted the vessel before that period had arrived. It is true that after the sharesmen deserted, the owners sold the vessel, but the price and circumstances shew that this was a sale in the ordinary course, not a sale because the ship or venture was abandonable.

The special agreement is, I think, in the nature of an express salvage agreement, and therefore not having been completed the crew cannot claim anything under its terms, and certainly, it being an agreement of that nature, they cannot set up that it was dissolved by perils of the sea, and that they had a justification for their not performing that agreement. The owners in agreeing to pay them some $270 in the aggregate for these extra services are entitled to insist upon their performance of these substantial conditions. The plaintiff, because he was the last man to go, is in no better position than the others would be. Because, under the original articles, if a man deserted, he forfeits his catch it is contended he forfeits no more than that. I believe there were no fish caught. But this is a special agreement and that contention is irrelevant.

I think the owners, at the time the crew deserted, had done nothing on their part which constituted a breach of the contract.

The plaintiff then having unjustifiably left the ship cannot recover upon this express agreement the whole amount or any part on the ground of *quantum meruit*.

In *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch.D. 339, at 364, Bowen, L.J., says:—

> He (that is the servant) cannot sue in such a case on the original contract with the master, because the contract which his master has made is that he shall pay the salary only at the end of the current period which has not yet expired, and the servant by his wrongful conduct has prevented himself from

suing for that salary by non-performance of the condition precedent under the contract. He cannot recover therefore on the special contract, nor can he recover on a *quantum meruit*, because he cannot take advantage of his own wrongful act to insist that the contract is rescinded. As regards himself the contract is still open, although he has chosen to break it. Some confusion always arises, as it seems to me, from treating these cases between master and servant as instances of a rescission of the original contract. It is not a rescission of the contract in the sense in which the term ordinarily is used, viz: that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract has been performed. It really is only a rescission in this sense, that an act occurs which determines the relation of master and servant for the future, and you may regard that determination in two ways: it is either a determination in conformity with the rights of the master which arise under the contract itself, there being, as I have said, in every contract of service an implied condition that if faithful service is not rendered the master may elect to determine the contract, and the determination takes place on that implied condition; or you may regard it under the more general law, which is not applicable to contracts of service alone—you may treat it as the wrongful repudiation of the contract by one party being accepted by the other, and operating as a determination of the contract from that time, that is, from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract which election, on his part, emancipates the injured party from continuing it further. It is not a rescission of the contract in the ordinary sense in which the term is used in common law. It is for that reason that it becomes plain beyond all doubt, as it seems to me, that the servant cannot sue on a *quantum meruit*, any more than he can sue under a special contract.

For these reasons I think that the plaintiff cannot recover and that the appeal must be dismissed with costs.

Appeal dismissed.

LANNING, FAWCETT & WILSON Ltd. v. KLINKHAMMER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 27, 1916.

GARNISHMENT (§ I C—19)—OF "DEBTS, LIABILITIES, OBLIGATIONS"—DAMAGES.

A sum of money agreed upon in settlement of a claim for damages arising out of breach of contract and tort is within the category of "debts, obligations and liabilities, owing, payable or accruing due" within the meaning of the Attachment Act (R.S.B.C. 1911, ch. 14, secs. 3, 4), and subject to garnishment.

Statement.

APPEAL from an order of Howay, Co.J., made at New Westminster on February 1, 1916, dismissing an application by the judgment debtor to set aside a garnishee order of December 13, 1915. The plaintiffs obtained judgment for $215.15 on December 18, 1914. On August 3, 1915, the judgment debtor gave a promissory note to the plaintiffs, payable in 1 year, for the balance due. When the attaching order was issued on December 13,

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Statement.

1915, there was still due on the judgment $188.65. In October, 1915, the judgment debtor was employed by the municipality of Delta as a policeman and collector of taxes. After an interval he was dismissed, and criminal proceedings were taken against him, at the instance of the municipality, for, it was alleged, misappropriating certain moneys he had collected for taxes. On the trial it was discovered that the municipality had made a mistake in their accounts, that no moneys were missing, and the charge was dismissed. The judgment debtor then threatened the municipality with action for wrongful dismissal and malicious prosecution, and A. D. Taylor, K.C., acting for the judgment debtor, and C. B. Macneill, K.C., for the municipality, discussed settlement. Affidavits by Mr. Taylor and Mr. Macneill were read on the motion, in which they both stated a final settlement had not been arrived at between them, but a letter dated December 10, 1915, from Mr. Macneill to the municipality, that was put in evidence, recited that the judgment debtor's counsel wanted $150 as damages for malicious prosecution and $75 for a month's salary in lieu of notice of dismissal; that he (Mr. Macneill) stated he was of opinion that the claim for salary could not be recovered, and Mr. Taylor then said that if he could not get the month's salary he would want $225 as damages for malicious prosecution, and it then went on to say that Mr. Taylor would not accept less than $225, and he advised the municipality to pay this sum in full settlement. The council of the municipality met on December 11, and by resolution decided to pay the $225. The garnishee order was served on the municipality on December 13, and on the following day a cheque for $225 and the garnishee order were handed by the municipality to Mr. Macneill to carry out the settlement. The judgment debtor sought to set aside the attaching order on the grounds (1) that no settlement had been arrived at between the municipality and the debtor when the garnishee was served; (2) that the only substantial claim they had being for malicious prosecution, damages arising out of a tort were not subject to an attaching order; and (3) a promissory note that was still current had been accepted for the debt. Upon the dismissal of the application, the judgment debtor appealed.

The order appealed from is as follows:—

HOWAY, Co.J.:—This is an application to set aside an order attaching certain moneys to which the defendant is entitled. The

ground of the application is mainly that the moneys in question arise under such circumstances as will not allow of their being attached. These moneys arise out of two separate claims for damages by the defendant against the municipality of Delta; one of these claims is for damages for wrongful dismissal from his office as a policeman; the other is for damages for malicious prosecution. Before the attaching order was issued, the corporation of Delta had recognized their liability to the defendant, but the amount thereof had not been settled. There is no doubt whatever that under the law, as it exists in England, neither of these sums can be attached. O. XLV., r. 1, of the English rules shews that, in order to be attachable, the "moneys must be debts owing or accruing." The strictness with which this order has been construed is shewn by such cases as *Holmes* v. *Millage*, [1893] 1 Q.B. 551; *Howell* v. *Metropolitan District R. Co.* (1881), 19 Ch.D. 508 at 515; *Webb* v. *Stenton* (1883), 11 Q.B.D. 518. But the point which I have to consider here is whether the words of our statute, R.S.B.C. 1911, ch. 14, secs. 3 and 4, are wide enough to include these claims, or either of them. Under sec. 3 are attachable "all debts, obligations, and liabilities owing, payable or accruing due," so that I must concern myself with the construction and meaning of the words "obligations and liabilities." It is to be observed that the trend of legislation in connection with this subject has been towards bringing additional property of the debtor into liability to satisfy a judgment, and also to enable moneys to be retained pending the decision of the defendant's liability. Our statute finds its origin in Consolidated Statutes of Manitoba, 1880, ch. 37, sec. 44, Administration of Justice Act, now rules 741 and 742 of the Queen's Bench Act, 1895, of Manitoba, and it does not seem improper that, in construing a statute with such an origin, I should, in analogy with the rule in *Trimble* v. *Hill* (1879), 5 App. Cas. 342 at 344, be governed by the interpretation which the Court of that province had placed upon this statute. In *Gerrie* v. *Rutherford*, 3 Man. L.R. 291, cited with approval in *Lake of Woods Milling Co.* v. *Collin*, 13 Man. L.R. 154, at 162, Killam, C.J., held that a claim against a railway company for damages may be attached by a creditor of the person injured. Though, at that time, no action had been brought in respect thereof, and the amount of damages recoverable remains unsettled, he had

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no difficulty in finding that such a claim is a liability within the meaning of the statute. It will be noticed that the liability in this case was one arising out of contract—a claim for damages for breach of contract to carry the defendant safely. Sec. 4 of our statute dealing with the meaning of the term "debts, obligations, and liabilities," states that these words shall include all claims and demands of the defendant against the garnishee arising out of trusts or contracts where such claims and demands could be made available under equitable execution.

> There is no doubt that such provision widens the range of debts, obligations and liabilities which may be garnishable. It means that certain claims and demands which could not be reached by ordinary proceedings in law, but which might be the subject of equitable relief and could be made available by the appointment of a receiver, can now be attached by garnishing order.
>
> *Per* Dubuc, J., in *Lake of Woods Milling Co.* v. *Collin*, 13 Man. L.R. 154 at 170-1.

The nature of the claim in this matter which has been attached is twofold; one a claim for damages for breach of contract; (2) a claim for damages for tort. I have no doubt, as regards the second heading, that any moneys arising thereunder are not the subject of an attaching order, inasmuch as they do not arise upon a claim originating in either "trust or contract"; but, as regards the other heading, it is a claim arising out of contract, and is a liability within the meaning of secs. 3 and 4 of ch. 14. see *Gerrie* v. *Rutherford, supra; Lake of Woods Milling Co.* v. *Collin, supra; Canada Cotton Co.* v. *Parmalee* (1889), 13 P.R. (Ont.) 308; and *Brookler* v. *Security National Insurance Co.* (1915), 23 D.L.R. 595, 25 Man. L.R. 537; *Simpson* v. *Chase* (1891), 14 P.R. (Ont.) 280, which was specially relied upon by Mr. Taylor in support of the application, is not applicable, inasmuch as there was not in the Division Courts Act, which was being interpreted, a section corresponding to r. 935, upon which the *Canada Cotton Co.* case was decided.

As, therefore, the garnishee was, when served with the attaching order, liable to the defendant within the meaning of ch. 14, the application to set it aside will be refused, with costs.

Taylor & Campbell, for appellant; *Whiteside, Edmonds & Whiteside*, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the Judge came to the right conclusion in dismissing the application to set aside the order

of attachment. Without expressing any opinion about the propriety of the procedure taken in this case, I think we can decide it on what is before us, and let it go back to be disposed of by the Judge in the ordinary way in which garnishee proceedings are disposed of.

There is a resolution of the council passed on December 11, 1915, after perusing the letter of the solicitor of the council, advising that at an interview with the solicitor for the judgment debtor, the solicitor for the judgment debtor had offered to take $225 in settlement of the matters between himself and the council. With that letter before them, the council accepted the advice of their solicitor and passed that resolution, and thereupon on that date, December 11, the claim for damages in respect of malicious prosecution, and the claim for damages for breach of contract of hiring, became merged in a contract to pay $225 in money, which could have been recovered in an action against the council. If that be so, the debt was undoubtedly subject to attachment. In that view of the case, the Judge took the right course in dismissing the application to set aside the writ.

Macdonald, C.J.A.

MARTIN, J.A.:—I think that as there was the agreement to pay the money, and the money therefore became due, consequently the Judge came to the right conclusion, and the appeal should be dismissed.

Martin, J.A.

GALLIHER, J.A.:—I agree.

Galliher, J.A.

MCPHILLIPS, J.A.:—In my opinion, the Judge in the Court below was entirely correct in his view of the law, but, if the order had carried out his decision upon the law, the order would have been limited to $75. An error, in my opinion, took place in regard to the order when it was drawn up. In my view, the decision of this Court ought to be that the order should be reformed to limit it to the $75. *Appeal dismissed.*

McPhillips, J.A.

LADOUCEUR v. AIRD.

QUE.
C. R.

Quebec Court of Review, Archibald, A. C. J. and Greenshields and Lamothe, JJ. April 2, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—BAKERY DRIVER.

One employed as an assistant on a bakery waggon is protected by the provisions of the Quebec Workmen's Compensation Act (R.S.Q. 1909, art. 7321), and is entitled to compensation for a partial permanent disability sustained in an accident in the course of employment.

[See annotation 7 D.L.R. 5.]

APPEAL from a judgment for plaintiff in an action under the Workmen's Compensation Act. Affirmed.

Statement.

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Statement.

The plaintiff claims: (1) The sum of $78; (2) 37½% of his wages for 4 months; (3) when his partial physical disability shall become permanent, an annual rental equivalent to half of the reduction which the accident had made in his salary, namely, 20%. He sets forth the facts thus:—

On and before March 23, 1916, he was working, delivering bread, for the respondent, on his waggon for $2 per day. On March 23, 1916, he was thrown from the waggon belonging to the defendant, and in his fall he sustained serious injury by the dislocation of his right shoulder and right arm; he was then on the waggon as assistant carter, employed by the defendant, who, as a result of the latter's negligence, imprudence, and carelessness through bad driving, caused the waggon to upset, and, as a result of this accident, the plaintiff has been injured and unable to use his right arm. He is still suffering with it and will always suffer with it. He shall remain physically unfit for the rest of his life, suffering from anthritis of the elbow joint. He is only able to use his arm in a very limited way and with difficulty. His ability for work has been permanently lessened in a partial way, at least to the extent of 40%, giving him thus the right to claim 20% of his salary and to count 4 months from July 12, 1916.

The defendant denies the liability, and pleads that, although the plaintiff had been in his employment 4 days before the accident, he was under no duty to indemnify him in virtue of the law of workmen's compensation, and that this law did not apply to this case.

The Court has granted the demand on the following grounds:—

Judgment.

Considering the provisions of art. 7321, R.S.Q. 1909.

Considering that the plaintiff has proved the allegations necessary to his statement; that it is proved that on or about March 23, 1916, the plaintiff worked for the defendant, delivering bread to his customers; that while in the employment of the defendant, doing his work, he was thrown out of an overturned waggon belonging to the defendant, and in his fall he suffered a serious dislocation of the shoulder, and other injuries.

Considering that it is proved that the respondent carries on a business for which machines moved by a force other than that of man or animal are used; that it is the nature of the enterprise in which a workman is engaged and not the nature of the

work carried on by him which determines the adjustments of the law of accidents during work.

Considering that the business carried on by the defendant exposed his employees to danger, the plaintiff has a recourse against him in virtue of the law relating to workmen's compensation.

Considering that it has been admitted by the parties, at the sitting of the Court, that if that law is to be applied, he ought to receive the sum of $600.

Considering that it is established that the plaintiff suffered from partial permanent incapacity to work, and has a right to the annual income of half the reduction in his salary caused by the accident. Estimating the partial permanent incapacity to work as 20%, then the appellant has the right to a yearly income of $62.40, this being the amount decided by the parties in the case should it be decided that the plaintiff has a right to a reduction of 20%.

Considering that the plaintiff has asked for the total amount of the annual income, which, according to the decision of the parties, should be $1,042.70, the annual income being $62.40.

Considering the defendant has not proved the essential allegation for his defence;

Reject the defence, and condemn the defendant to pay to the plaintiff the sum of $38 plus the sum of $1,042.70, all with interest and expenses, including the expenses incurred by the opposition to the judgment.

Perron & Taschereau, for plaintiff; *Barnard, McKeown & Choquette*, for defendant. *Appeal dismissed.*

GREAT WEST LIFE ASSURANCE Co. v. HOWDEN.

Manitoba King's Bench, Galt, J. February 14, 1917.

MORATORIUM — PLEADING—AMENDMENT — "MORTGAGE OR OTHER INSTRUMENT CHARGING LAND"—BOND.

If a litigant intends to rely upon the Moratorium Act (Man.), he must, as a general rule, set it up in his pleading; but some of its provisions, which introduce specific changes in the status of all litigants, will be recognized and applied whether they have been pleaded or not; and leave to amend should be given or refused in accordance with the principles applied to the Statute of Limitations. A bond as collateral security for a mortgage is not a "mortgage or any other instrument charging land with the payment of money," within the meaning of the Moratorium Act.

[See annotation on Moratorium, 22 D.L.R. 865.]

ACTION upon a bond.

Statement.

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C. P. Fullerton, K.C., and *J. P. Foley, K.C.*, for plaintiff; *F. M. Burbidge*, for defendants.

GALT, J.—This action was commenced against the defendants on February 3, 1916, and in it the plaintiffs claim $9,440.62 due upon a bond dated May 30, 1905, given by the defendants by way of additional security to a mortgage made by the Neepawa Hotel Co. Ltd., and the plaintiffs, bearing even date with the bond.

The mortgage was for $16,000, secured upon certain lands in Neepawa, payable as follows:—$4,000, part thereof, to be paid in 4 equal consecutive annual instalments of $1,000 each on July 1, in each year, the first of such instalments to be paid on July 1, 1906, and $12,000, the balance thereof, to be paid on July 1, 1910.

The condition of the bond was that if the said mortgagor, the Neepawa Hotel Co. Ltd., its successors or assigns, do or shall pay or cause to be paid to the said plaintiffs, their successors or assigns, on the days and times, and in the manner mentioned in the said mortgage, the said sum of $16,000 in and by the said mortgage secured, and by the said mortgage covenanted to be paid, and intended so to be, together with all interest which shall accrue due and payable thereon. together with all costs, charges and expenses, which the said mortgagee, its successors or assigns, should incur or be put to in relation to the lands on the mortgage thereon accrued, and which should be properly chargeable to and payable by or out of the said lands, or by the said mortgagor, its successors and assigns, and that the said mortgagor should observe and keep all the covenants on its part in the said mortgage contained, then the said bond should be void, otherwise the same should remain in full force and virtue.

The main defence relied upon by each of the defendants is as follows:—

3. (*g*) A long time prior to the month of June, 1910, the mortgagor sold the lands and premises in the mortgage referred to, subject to the said mortgage, to Mrs. Mary J. Alguire, who covenanted with the mortgagor to assume and pay off the said mortgage, and who then became the owner of the said lands and premises and entitled to the equity of redemption thereof. In or about the month of June, 1910, the plaintiff entered into a binding agreement with the said Mrs. Mary J. Alguire, whereby the terms of payment of the moneys due under the said mortgage were altered and the time for payment thereof was extended and time was given to the said Mrs. Mary J. Alguire, without the defendant's consent, whereby he was prejudiced to the extent of $9,500.

In reply to these defences the plaintiffs say:—

2. As to the whole defence, the plaintiffs say that the bond sued on herein contained the following clause, namely:—That the said mortgagees, their successors and assigns, may, at any time or times, extend or agree to extend the time for payment of all, or any of the moneys secured by the said mortgage or release from the said mortgage any part or parts of the lands therein mentioned, and that either upon, or without obtaining payment of any portion of the morgtage moneys secured thereby, and any such extension agreement, or release, shall not affect the liability of the said obligators, and each of them under the above obligation.

On December 21, 1907, the Neepawa Hotel Co. Ltd. sold the property to Mary Jane Alguire, and the transfer was expressly made subject to the said mortgage.

In the month of June, 1910, an agreement was entered into between the Great West Life Assurance Co. and Mary Jane Alguire reciting the said mortgage and that Mary Alguire claimed now to be seised of the equity of redemption of the lands, and had applied to the company to extend the time for payment of the said mortgage moneys, and it was further recited that

Whereas there is now owing to the company in respect of the said mortgage, the sum of $11,000; Now, therefore, it is hereby declared and agreed that the said $11,000 shall be payable as follows: $250 half-yearly on January 1, and July in each of the years, 1911, 1912, 1913 and 1914; $250 on January 1, 1915, and the balance on July 1, 1915, with interest from July, 1, 1910, at the rate of 7% per annum payable half-yearly on the 1st days of January and July in each year until the principal be fully paid as well after, as before maturity, etc.

The extension agreement also contained the following provision:—

It is declared and agreed that these presents shall not create any merger or alter or prejudice the rights and priorities of the company as against any sureties, subsequent encumbrancers, or other person interested in the said lands and not a party hereto, or the rights of such sureties, subsequent encumbrancer or other person, all of which rights are hereby reserved.

At the trial before me the above documents were put in evidence, and the amount due to the plaintiffs under their mortgage was duly proved.

At the end of the case for the plaintiff, Mr. Burbidge, on behalf of the defendants, moved for a nonsuit, on the ground that the action was premature, inasmuch as no action could have been brought upon the mortgage by reason of the Moratorium Act, for no interest was shown to have been in arrear for over 1 year, and the bond was so intimately related to the mortgage that the obligors were entitled to similar relief. He also asked for leave to amend, if necessary, by pleading the Moratorium Act.

Mr. Fullerton, on behalf of the plaintiffs, pointed out that no

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defence based on the Moratorium Act, even if applicable, had been pleaded, and furthermore that if such a defence were set up the plaintiffs were in a position to show that taxes had been overdue for 2 or 3 years.

The question as to whether the Moratorium Act is applicable to litigants who have not pleaded it, does not appear to have been made the subject of any reported judgment in our Courts. It is an important and intricate question; important, because it applies to so many cases in practice, and intricate, because some of the provisions of the Act expressly alter the existing law, while others merely provide a ground of defence if a party chooses to rely upon them.

Take, for instance, sec. 3 of the original Act passed on September 18, 1914 (re-enacted by sec. 4 of the Act passed on April 1, 1915), the period to be allowed for redemption, whether by the Court or by the Master on a reference, is fixed at 1 year, whereas formerly this period was usually fixed at 3 months.

Then again, under sec. 4 of the earlier Act (re-enacted by the Act of 1915 with a variation), "proceedings are hereby stayed for a period of 6 months."

These provisions, and perhaps other ones, must be applied whether a party pleads them or not.

On the other hand, sec. 2 of the earlier Act (amplified by sec. 3 of the later Act) provides that no proceedings (or action) shall be taken until after some interest or taxes or premium of fire insurance, etc., is unpaid, and in arrear for 1 year. This section, and there are others like it, is expressed in similar phraseology to the Statute of Limitations; and it is trite law that, as a general rule, this latter statute must be pleaded in order to secure its benefit. It is true that sec. 2 of our earlier Act (sec. 3 of the later one) contains a further absolute provision that "Any sale made or purporting to be made in contravention of this section shall be absolutely null and void." But this does not necessarily interfere with a party's right to bring an action and recover judgment, and register it.

The ground upon which parties are not allowed the benefit of the Statute of Limitations unless it has been pleaded, is based upon the maxim *quilibet potest renunciare juri pro se introducto.* By not setting up the statute in their defence, they waive the

benefit of it. But when a party's rights are wholly extinguished under the provisions of a statute, different considerations apply.

For instance, in *Dawkins* v. *Penrhyn* (1878), L.R. 4 App. Cas. 51, the plaintiff sets up facts which shewed that the time had expired within which he had a right to make an entry or claim to certain real property. The defendant demurred on the ground that the statement of claim was bad in law, denying that there was any trust "and on other grounds sufficient in law to sustain this demurrer."

Upon the argument of the demurrer the defendant relied upon the Statute of Limitations, although no such defence had been expressly raised on the pleadings.

The House of Lords held that this defence was open to the defendant on the demurrer. Earl Cairns, L.C., thus deals with the question, at pp. 58 and 59:—

I conceive that there can be, and ought to be, no doubt at all upon that point. The analogy which was referred to of the Statute of Frauds is not an analogy of any weight. The Statute of Frauds must be pleaded, because it never can be predicated beforehand that a defendant, who may shelter himself under the Statute of Frauds, desires to do so. He may, if it be a question of an agreement, confess the agreement, and then the Statute of Frauds will be inapplicable. With regard also, to the Statute of Limitations as to personal actions, the cause of action may remain even although 6 years have passed. It cannot be predicated that the defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the Statute of Limitations or not. But with regard to real property it is a question of title. The plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations, with regard to real property, says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way he may have it. Therefore, if upon the face of the bill the plaintiff states that the period allowed by the statute has expired, he states in law that his title is extinguished, unless indeed he can bring himself within some of the exceptions under which the statute allows his title to continue. It is, therefore, clearly a case in which a demurrer, where the facts appear upon the bill, is applicable as a mode of defence, and I repeat that there could have been no surprise in this case, because it is obvious upon the face of the claim itself, that the plaintiff felt the difficulty by reason of the Statute of Limitations.

But even in such a case as *Dawkins* v. *Penrhyn*, a plaintiff is not allowed to be "taken by surprise" where it is possible that some circumstance or exception might be shown by him in reply or by amendment, had he known that the defendant would rely upon

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the statute. Lord Penzance deals with this aspect of the case very fully at pp. 64 and 65, and finds that in that particular case the plaintiff had evidently, in his statement of claim, anticipated that the statute would be pleaded, and so could not claim to have been taken by surprise.

Very much the same principle applies to questions of illegality. If the facts clearly disclose an illegal claim or defence the Court is bound to apply the law.

But if no such clear case appear, either in the pleadings or evidence, the Court is not bound to spell out an illegality from mere inferences of fact.

In *North Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461, Viscount Haldane, L.C., says, at p. 469:—

> 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.

These authorities support the view that if a litigant intends to rely upon the Moratorium Act, he must, as a general rule, set it up in his pleading; but that some of its provisions, which introduce specific changes in the status of all litigants, will be recognized and applied, whether they have been pleaded or not.

This distinction is very necessary to be observed in cases of motions for judgment by default of defence.

In all cases the Court has wide powers of amendment, just as in the case of the Statute of Limitations, and leave to amend should be given or refused in accordance with the principles applied to that Act.

In the present case, the defendant applied for leave to amend if necessary. Thereupon the plaintiff adduced evidence establishing that taxes had been in arrear for more than a year. I must, therefore, treat the case as though the Moratorium Act had been pleaded.

If the Act be applicable the plaintiff's rights would be restricted as to a large portion of the relief claimed. (See Manitoba Statutes, 1916, ch. 21, sec. 1.) But in my opinion the Moratorium Act does not apply to this case.

The Act applies only to "any mortgage of land, or agreement to sell or purchase land or any other instrument charging land with the payment of money." The bond in question does not fall within any of these descriptions.

I am also of opinion that the plaintiffs had a perfect right, under the terms of the bond, and of the extension agreement, to give time to the purchaser or assignee of the principal debtor and to alter the terms of payment as they did.

The plaintiffs are entitled to judgment for the relief claimed.

Judgment for plaintiff.

CLIFTON v. TOWERS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 3, 1917.

INSOLVENCY (§ II—10)—CHATTEL MORTGAGE—UNJUST PREFERENCE—INTENT.

A chattel mortgage obtained by a creditor from an insolvent debtor, within 60 days before an assignment for creditors, whether voluntarily or under pressure, is *primâ facie* an unjust and intentional preference under sec. 5 (4) of the Assignments and Preferences Act (R.S.O. 1914, ch. 134).

Statement.

APPEAL by defendant from the judgment of Britton, J., as varied, in an action by a chattel-mortgagee, against the assignee for the benefit of creditors of the chattel-mortgagors, to recover, out of the proceeds of goods sold by the defendant, the amount of the plaintiff's claim upon the chattel-mortgage. Reversed.

May 4, 1916. BRITTON, J.:—This action is brought to recover, out of the proceeds of goods sold by the defendant, the amount of the plaintiff's claim upon a chattel-mortgage made by one Forgie and wife to the plaintiff, dated the 25th August, 1915. The Forgies and the plaintiff made an exchange of properties, each party putting an estimated price upon each parcel. At the close of the transaction, on the 11th January, 1915, the Forgies owed to the plaintiff upon the real estate exchanged $574.45, for which amount the Forgies gave to the plaintiff their promissory note, payable two months after date, with interest at six per cent. per annum. This note was not paid at maturity, but was renewed twice, interest apparently being added on each renewal. On the 25th August,

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1915, the amount had reached $621.92, and the plaintiff, with a witness, one Hill, who was then a constable, attended at the Forgies' house and insisted upon the Forgies executing a chattel-mortgage for the amount of the debt. The chattel-mortgage was executed. Before its execution, namely, on the 12th August, the Forgies had given a chattel-mortgage to the Bank of Toronto for $375, on practically the same property as that covered by the mortgage to the plaintiff.

On the 14th October, the Forgies made an assignment to the now defendant for the benefit of creditors. The defendant then was the manager of the Brantford branch of the Bank of Toronto. Mr. Muir was solicitor for the Bank of Toronto in procuring the chattel-mortgage to the bank. He acted as solicitor for the assignors—or the bank, or both—in drawing and having the assignment executed; and the same solicitor is now acting for the defendant in this action and in winding up the estate of the assignors.

The plaintiff filed his claim in due course, shortly after the notice of assignment, but the defendant took no action to test the validity of the plaintiff's claim. On the 25th October, at the meeting of creditors, a resolution was passed, upon a motion seconded by the defendant, for the appointment of inspectors, and that these inspectors, with the assignee, should proceed to sell (and they did sell) all the personal property of the estate.

Even then, there was apparently no desire on the part of the inspectors or the defendant to take any action either to admit or contest the plaintiff's claim; so, on the 8th February, 1916, the present action was commenced.

The defendant pleads that, when the plaintiff's mortgage was taken, the Forgies were in an insolvent condition, and that the mortgage in question was a preference over the other creditors of the mortgagors, and that the mortgage was obtained by the plaintiff by threats, duress, and fraud.

There was not, in my opinion, any duress or fraud as against the Forgies. The mere fact that Hill, who accompanied the plaintiff, and who signed as a witness, was a constable and wore a badge, would not constitute duress. Mrs. Forgie stated that she felt nervous, but it was because of threats of legal proceedings to recover the debt; and I am of opinion that these were no more

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than any creditor would have the right to use when honestly pressing for security or payment of a just and undisputed debt, when such threats are made under ordinary circumstances.

The defendant sold the personal property, and now holds the proceeds. There was conversion, and the plaintiff has a right of action and is entitled to recover, unless it is open to the defendant to prove, and he does prove, his defence. The real defence is, that the chattel-mortgage is fraudulent and void against the assignee, representing the creditors.

Section 5 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134,* requires the evidence to void the transfer to shew that it was made with the intent to defeat, delay, hinder, or prejudice. It is clear that the Forgies had no such intent. I do not think that the plaintiff had. Sub-section (2) requires the intent. Sub-section (3) does not apply, as this is not an action

*5.—(1) Subject to the provisions of section 6 every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, shall, as against the creditor or creditors injured, delayed or prejudiced, be null and void.

(2) Subject to the provisions of section 6 every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over his other creditors or over any one or more of them shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be null and void.

(3) Subject to the provisions of section 6 if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them it shall in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction be presumed *primâ facie* to have been made with the intent mentioned in sub-section 2, and to be an unjust preference within the meaning hereof whether the same is made voluntarily or under pressure.

(4) Subject to the provisions of section 6 if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of his creditors, be presumed *primâ facie* to have been made with the intent mentioned in sub-section 2, and to be an unjust preference within the meaning hereof whether the same be made voluntarily or under pressure.

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brought to set aside the transfer. Sub-section (4) is invoked because this sub-section provides that a transfer made within sixty days from the date of an assignment for the benefit of creditors is one that is presumed, *primâ facie*, to have been made with the intent mentioned, and also that such presumption arises whether the transfer was made voluntarily or upon pressure.

This presumption is rebuttable: *Wade* v. *Elliott* (1907), 10 O.W.R. 206; *Craig* v. *McKay* (1906), 12 O.L.R. 121; and I think the plaintiff has satisfied the onus cast upon him of negativing any intent to defraud or defeat, hinder or delay, the creditors of the mortgagors in the recovering of their claim.

The plaintiff did not, at the time of taking the chattel-mortgage, know of the insolvency of the Forgies. It is argued that the Forgies told him they could not pay. What was said by Forgie or his wife had reference to the payment within the time mentioned in the mortgage rather than any ultimate inability. Time to get in the crop and to get it threshed and marketed was spoken of as the means they would have of paying, rather than to sell the chattels.

It is quite clear that the defendant, acting for the Bank of Toronto, did not think the Forgies insolvent on the date of the mortgage taken by the Bank of Toronto, the 12th August, 1915. Nothing occurred between the last mentioned date and the 25th August to hasten insolvency.

The Forgies were apparently in a prosperous condition, owning a very large amount of stock, occupying a farm of the value of $15,000, as stated in the conveyance, in which they had considerable equity. In war-time the farm would not sell for as much as before the 1st January, 1915.

The Forgies, for some reason, were not favourable to the plaintiff; but, according to their evidence, they expected to be able, later on, and in part from their crop of 1915, to pay part of their indebtedness. The chattel-mortgage was given under pressure, and pressure will not save a transfer, if pressure had the result of procuring the transfer, with the intent to defeat, etc. Even if a transfer such as the one now in question has the effect of defeating, delaying, hindering, or prejudicing a creditor, it is not void unless made with fraudulent intent.

The circumstances of this case being such, a person in the

position of the plaintiff, dealing with another in the purchase of land, might well believe that person to be in solvent circumstances, when in fact the person was insolvent.

I find that the chattel-mortgage was not made with such intent as to render it void.

There will be judgment for the plaintiff for $621.92, with interest at seven per cent. per annum from the 25th August, 1915, to the 15th October, 1915, and at five per cent. per annum from the 15th October, 1915, on $621.92, with costs, The debt will be payable out of the estate of the Forgies, in the hands of the defendant as assignee. The costs will be payable by the defendant personally, but with liberty to the defendant to apply to be indemnified by the estate as to those costs. Application should be made by the defendant on passing his accounts.

The plaintiff having died since the trial, the widow and administratrix of his estate moved to vary the judgment as entered.

September 15, 1916. BRITTON, J.:—Since the trial of this action, Joseph G. Clifton, the original plaintiff, has died. This motion is on behalf of Alberta Mabel Clifton, widow of Joseph G. Clifton and administratrix of his estate. The motion is for an order varying the minutes or terms of the judgment herein at issue so as to make it clear that the plaintiff is entitled to be paid by the defendant personally the amount of the chattel-mortgage as found by the trial Judge, and that, upon such payment by the said defendant, he is to be allowed to reimburse himself out of the estate of Hugh D. Forgie and Mary Ann Forgie, and that there be stricken out of the second paragraph of the said judgment issued herein, the words "A. S. Towers, the assignee of the estate of Hugh D. Forgie and Mary Ann Forgie," and varying the third paragraph of the said judgment by providing that the said defendant may repay himself out of the estate of the said Hugh D. Forgie and Mary Ann Forgie the amount so paid by him, or for such variation as will enable the plaintiff to have the intention of the trial Judge carried out, by payment to the plaintiff by the defendant of the amount of the chattel-mortgage on the chattels wrongfully taken and sold by the defendant, A. S. Towers, and for such other variation of the said judgment as will fully and completely set out the intention of the trial Judge in granting recovery against the defendant for the said sum; and for an order declaring the true construction of the judgment, and for such an

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order in the premises as under all the circumstances the justice of the case may require—and for an order pursuant to Rule 566 and other Rules, under the Judicature Act, declaring that the applicant is entitled to execution against and may issue execution against the defendant herein for the said sum as found by the trial Judge, excepting costs, which have been paid by the defendant.

The motion is practically, in part, that the minutes of judgment and the judgment itself should conform to and be in accordance with my findings of fact as trial Judge.

Hugh Forgie and wife, being the owners of a large number of chattels of considerable value, executed two mortgages thereon—one to the Bank of Toronto and one to the plaintiff in this action. Within sixty days from the date of the mortgage to the plaintiff, the Forgies made an assignment for the benefit of their creditors to the defendant. The defendant relied upon the presumption against the chattel-mortgage to the plaintiff, but took no proceedings to set that mortgage aside. After considerable delay, the defendant sold all of the chattels, and realised from the sale more than sufficient to satisfy both mortgages, but he refused to pay the plaintiff, and finally this action was brought. It was tried before me, and I found in favour of the plaintiff.

In my opinion, the plaintiff's motion should prevail. The plaintiff is entitled to have the judgment against the defendant personally. The judgment as taken out contains a mistake that should be rectified. The minutes of judgment as settled and the judgment as issued do not carry out my intention in giving judgment for the plaintiff on the trial of this action.

It is contended by counsel for the defendant that it is too late to correct such a mistake, even if mistake has been made. I do not think it too late.

The contest in the action was as to the validity of the chattel-mortgage. I found in favour of the mortgagee. The original plaintiff therefore was, and the administratrix is, entitled to what follows from success in the action in reference to that property.

It was the defendant's act that deprived the plaintiff of his property. The defendant treated the proceeds of the property of the mortgagees as belonging to the estate. The conversion was by the defendant, so the defendant should be liable; and the defendant should not escape liability by reason of any mistake in acting upon the supposition that there were assets sufficient

to pay the judgment, when in fact, if it be a fact, all the assets had been so used by the defendant as not to be available for payment of the present judgment.

Mr. Justice Anglin, in the late case of *Quebec Jacques Cartier Electric Co.* v. *The King* (1915), 51 S.C.R. 594, 24 D.L.R. 424, held that the Court appealed from could correct the formal judgment in so far as it did not express the intention of the Judge.

I have read the cases cited by Mr. Brewster, and, in my opinion, the present case is distinguishable.

This judgment as taken out will work a wrong to the plaintiff that was not intended. It will leave the plaintiff in no better position—except as to costs—than if defeated in the action. It will relieve the defendant, although a wrongdoer, from liability, from the result of his wrongful act. It will allow payments wrongfully made by the defendant out of the proceeds of the plaintiff's property.

There will be no costs of the motion.

W. S. Brewster, K.C., for the appellant; *J. D. Bissett*, for the plaintiff, respondent.

The judgment of the Court was read by

HODGINS, J.A.:—The question involved is, whether the respondent has successfully rebutted the statutory presumption under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5, sub-sec. (4), or whether the giving of the chattel-mortgage in question to him was null and void as an unjust preference. Hodgins, J.A.

Sub-section (4), as I read it, deals with a transaction such as is mentioned in sub-secs. (1) and (2), which results in preferring a creditor. If it takes place within sixty days of an assignment, there are two presumptions—one that the transaction is in fact an unjust preference, and the other that it was so intended. If, therefore, there be insolvency, or inability to pay debts in full, or consciousness that insolvency is impending, the creditor must, in order to discharge the statutory onus, shew that there was no intent to prefer unjustly.

It is expressly enacted that the presumption shall be made, whether the transaction is voluntary or is induced by pressure, and it is not enough to shew pressure to rebut the intent, because, if the presumption arises in the first instance, notwithstanding proof of pressure, it is needless to say that pressure continues to be immaterial throughout.

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The question therefore is, has the respondent demonstrated that the debtors were able to pay their debts in full, and that the security was not given with intent unjustly to prefer him to the other creditors?

The learned trial Judge has confined himself to finding that the respondent had satisfied the onus cast upon him of negativing any intent to defraud or to defeat, hinder, or delay, and that the debtors had no such intent.

But before us the case was argued as governed by sub-sec. (4), which deals with the giving of an unjust preference. It is therefore necessary to consider the facts, apart from the finding alluded to, in order to ascertain their relation to the question of preference.

The position is a simple one. The respondent, a creditor for $574, the difference in a real estate transaction, took a note dated the 11th January, 1915, for the amount. He failed twice in securing payment, and the third time armed himself with a prepared chattel mortgage and a provincial constable, and went, on the 25th August, 1915, to the debtors' farm, determined, as he says, to get either money or security. He got the chattel-mortgage, now impeached, on that day. He had sold the debtors the farm at a trade value of $13,500, but, no doubt, knew its real value, said by Moore, a farmer, formerly tenant on it, to be $4,500 less than the debtors took it for in trade.

The respondent was met at first by a refusal, repeated more than once, based on the fact that there were other creditors. To my mind that statement meant, and plainly indicated to the respondent, that, if the debtors gave the security, the respondent would secure a preference which would be unjust to the other creditors—otherwise the insistence on it as a ground for refusing the security would have no meaning. The respondent made an inventory of everything on the place, and got the mortgage signed. He says he did not know whether there was danger or not, and that he wanted to make himself safe. He was well aware that the debtors had no money, for they had twice renewed the note, the last time, as he says, because the debtors could not pay until they got their crops in.

The chattel-mortgage in question is upon all the wheat, oats, hay, and buckwheat crops, the horses, cows, and all live stock, and all the farm and dairy implements. It allows immediate

seizure in case the respondent feels insecure or unsafe, or if the debtor attempts to dispose of anything covered thereby, or if he is sued for any money demand. It constituted an immediate and complete preference in favour of the respondent, and in no way prevented what the debtors feared, *i.e.*, that the respondent would sell them out.

If the evidence of the husband and wife is accepted as to the cause of their refusal, then the respondent was aware that they owed other debts. He knew also that they could not pay even his debt as it became due, or till the crops were gathered; that they had only about $2,000 of value in chattels, including those crops, and that the debtors had mortgaged the farm for $8,500, an amount which the respondent says he would not load himself up with, even if he got the farm for it. There is no finding by the learned trial Judge that the respondent was not told of the other debts; and, as there was a distinct difference on this point between the debtors on the one hand and the respondent on the other, the circumstance that Hill, who went down with the respondent and urged the giving of the mortgage, was not called, is of very considerable moment. The mention of other creditors was sworn to have been made to him twice, the last time in the presence of the respondent.

The learned trial Judge expresses the view that, under the circumstances, the respondent might well believe in the debtors' solvency; but the circumstances indicated by him seem to be more apparent than real, depending largely on the value of the farm, which Moore, the former tenant, Almas, the auctioneer and real estate agent, and the respondent himself, depreciate to the amount of the mortgage.

The question, however, is: has the respondent displaced the presumption that there was intent to prefer both in his mind and the debtors'? The situation gives no clear impression rebutting the statutory inference, and at most leaves in grave doubt whether the respondent was as blind and confiding as he indicates, having regard to his insistence on immediate action, and the knowledge he gained during his conversations with the debtors. He had planted the debtors on the farm; the claim represented the cash he was getting out of the "deal;" although he was hard up, he renewed the note twice, he discounted it twice, and wanted, ac-

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cording to Hill, a security for it to shew to his bank. He shews intimate acquaintance with the placing of the heavy mortgage on the farm by the debtors; and nothing would be more natural than that, before renewing the note at all, he would have satisfied himself and his friend Schell as to what the debtors' position really was.

If I am right as to the debtors' reason for refusing at first to give the security, namely, that their other creditors would be prejudiced, their final concurrence in yielding to the respondent's wish is consistent either with a change in that belief or with an acceptance of the demand notwithstanding that it placed their other creditors at a disadvantage. Both admit that their fear that the respondent would sell them out induced them to sign; and, as pressure is unimportant, that shews that they intended to prefer him in order to save themselves. That they were insolvent there is no possible manner of doubt; and there is nothing, but rather the contrary, to warrant the conclusion that, if they had been able to harvest their crops, they could have paid the interest on the farm mortgage and the $4,209.92 which they owed outside.

On the whole, therefore, the result must be that the onus remains undischarged by the respondent. The appeal should be allowed and the action dismissed. *Appeal allowed.*

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Alberta Supreme Court, Beck, Stuart, Walsh and Ives, JJ. March 23, 1917.

1. LANDLORD AND TENANT (§ II B—10)—COVENANT AS TO SUITABILITY—BREACH—REMEDY—LIABILITY OF ASSIGNEE.

Notwithstanding the general rule that there is no implied covenant in a lease of an existing building that it is fit for the purpose it is intended to be used for, a lessor who agrees to construct for the lessees' occupancy a building on the leased land is bound to construct a building suitable for the purposes for which he knows the lessees intend to use it; if, however, the lessees have gone into occupancy, the remedy for a breach of the contract is in damages, not repudiation of the lease, even as against an assignee of the reversion.

2. DAMAGES (§ III A—64)—BREACH OF COVENANT BY LESSOR TO ERECT SUITABLE BUILDING.

The proper measure of damages for breach of covenant by a lessor to erect a building suitable for the lessees' purposes is the actual damage sustained as the consequence of defects arising before the time when the defects, if discovered, could have been remedied, and in addition, if any damage was sustained after that time, either what it would have cost the lessee to have repaired the defects, or the amount of his actual damages whichever is the least.

Statement.

APPEAL by plaintiffs, lessees, from a judgment of Harvey, C.J., dismissing their action for breach of contract by lessor. Reversed.

Frank Ford, K.C., and *J. R. Lavell*, for appellants.

C. C. McCaul, K.C., for defendants O'Brien & Smith.

C. H. Grant, for defendants Ferrings.

BECK, J.:—The defendants, the Ferrings (husband and wife) are lessors, and the Tarrabains (two brothers) are lessees under a lease which bears date November 15, 1913, made in pursuance of the Land Titles Act, of certain lots in St. Matheona (Edmonton), "and the *said building to be erected thereon*" for the term of 3 years from January 1, 1914, at a monthly rental. The lease contained a provision to the effect that "in the event of the building on the demised premises not being completed and fit for the occupancy of the lessees by January 1, 1914, the time for the payment of the first instalment of rent due should be postponed until February 1, 1914, and that in case there should be any dispute as to whether or not the building was properly completed a certificate of the architect as to the completion of the same should be binding upon both parties and conclusive evidence of the completion of the building;" and the lease concluded with a declaration that "this agreement and everything herein contained shall enure to the benefit of and be binding upon the parties hereto, their and each of their heirs, executors, administrators and assigns."

The Tarrabains moved into the building erected on the leased premises on or a few days before January 1, 1914. The defendants, O'Brien and Smith, took a transfer of the premises from the Ferrings quite early in January; perhaps, though it does not appear, the agreement for the sale was made some time before the transfer was actually made; and this I think probable.

Attached to the lease was a memorandum of agreement bearing date October 22, 1913, which refers to the lease as attached thereto, whereby the Ferrings agree to proceed to erect the contemplated building in accordance with the plan prepared by one Underwood, architect, to be leased to the Tarrabains on the terms of the "draft lease" annexed.

The statement of claim alleges certain representations as to the character of the proposed building, and alleges that the building was not properly erected, nor were proper materials supplied, nor was the work properly done, in consequence whereof

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the value of the building to the plaintiffs was greatly lessened and the plaintiffs greatly damaged. It also alleges that the plaintiffs, upon discovering the defects in the building, which were latent, notified the defendants O'Brien and Smith, who had acquired the premises from their co-defendants, of the defects, and that they assured the plaintiffs that they were such as could be easily remedied, and that they would remedy them, and that the plaintiffs afterwards, the defects not being remedied, nor capable of being remedied so as to make the building conform to the agreement or suitable for the plaintiffs' business, notified the defendants O'Brien and Smith that they repudiated the lease and would pay only for use and occupation.

The statement of claim also alleges in effect that, though the plaintiffs entered into possession of the premises, they discovered the defects only afterwards in the building. The defects they allege are as follows:—

(1) They could not use the windows for the display of goods owing to the frost forming on them. (2) Heating apparatus was of so insufficient capacity to heat the building, or was so defectively constructed that the plaintiffs and their employees and customers suffered from the cold. (3) With the opening of spring the basement was flooded and goods properly stored there were damaged. (4) The basement was damp, resulting in goods being damaged.

The defendants O'Brien and Smith distrained for rent.

The claims made by the plaintiffs are: a declaration that the building was not the building called for by the agreement and lease, and that the lease be delivered up to be cancelled; a declaration that the amount already paid is a sufficient compensation for the use and occupation of the premises; damages on the four grounds stated; damages for illegal distress.

I think that the lessors, being bound by their agreement to erect a building for the lessees, were, under the circumstances disclosed in the evidence, bound to make that building suitable for the purposes for which the lessees required it, notwithstanding that the general rule, to which, however, there are admitted exceptions, is that there is no implied covenant by a lessor of an existing building that it is fit for the purpose for which it is known to be intended to be used; though there are also restrictions upon as well as exceptions to the general rule. See generally, 24 Cyc. 1048, 1130, 1154 *et seq.*, tit. "Landlord and Tenant," where English and Canadian authorities are referred to. I think too

that, if there had been a substantial failure of performance by the lessors of the agreement, the lessees might have declined to go into occupation; and if substantial performance were not made within a reasonable time of the commencement of the lease the lessees might have repudiated the lease: *Tildesley* v. *Clarkson*, 31 L.J. Ch. 362.

The lessees, however, went into occupation, and I think the effect of their doing so was to take away their right of repudiation, and to leave what, if the non-performance were substantial, would have been (if possession were not taken) non-fulfilment of a condition precedent to the lease taking effect, on the plans of a mere contract, for default in performance of which they would still be entitled to recover damages. See Hudson on Building Contracts, 4th ed., pp. 333, 484.

These are the conclusions as to the law which I have arrived at after examining a number of decisions.

As to the liability of the defendants, O'Brien and Smith, I am of opinion that on the evidence the plaintiffs are entitled to look to them in place of the Ferrings for such damages that the plaintiffs can shew they suffered by reason of the non-fulfilment of the lessors' agreement as to the building.

In Foa, Landlord and Tenant, 4th ed., p. 434, it is said:—

> It is also to be observed that upon a purchase or assignment of the reversion, the possession of a tenant is notice to the assignee (as between himself and the tenant) of the *actual* interest, including any equities, the tenant may have in the premises. *Taylor* v. *Stibbert*, 2 Ves. 437; (30 E.R. 713); *Daniels* v. *Davidson*, 16 Ves. 249, (33 E.R. 978); and even, as it has been held, of rights which have accrued to the latter under a contract posterior to, and independent of, the contract under which he holds possession. (*Allen* v. *Anthony*, 1 Mer. 282, (35 E.R. 679).

This proposition is sustained by *Barnhart* v. *Greenshields*, 9 Moo. P.C. 18 (14 E.R. 204), and *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296, 78 L.T. 165.

O'Brien and Smith are not, in my opinion, entitled to say that they took a transfer and obtained a certificate of title thereon and so are free of any obligation of the Ferrings. They took expressly subject to the lease; the lease on its face shewed—and they no doubt were well aware of the fact quite apart from the lease—that the tenants were entitled to have the building on the premises complete in all respects; that obligation of the Ferrings, as lessors, ran with the land and bound O'Brien and Smith unless

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the tenants had estopped themselves; the fact of them taking possession was not an unequivocal statement that everything was complete. So though doubtless the Ferrings remain liable O'Brien and Smith are, in my opinion, also liable as assignees of the reversion, and I think too that they clearly undertook, and assumed towards the plaintiffs, the obligations of the Ferrings, and that the plaintiffs looked solely to O'Brien and Smith to remedy the defects they complained of. See *Cornish* v. *Stubbs* (1870), L.R. 5 C.P. 334; *Smith* v. *Eggington* (1874), L.R. 9 C.P. 145, and *Buckworth* v. *Simpson* (1835), 1 C.M. & R. 834, and the cases noted in the reprint of the last case, 149 E.R. 1317.

I think the plaintiffs have shewn that in some respects the building was not put in the condition in which the plaintiffs were entitled to have it put, and I think too they have shewn some damages under some at least of the 4 heads under which they place them, but the measure of damages which they seek to apply, is not, in my opinion, the correct one. One entitled to damages is bound as far as reasonably possible to minimise his loss. *Frost* v. *Knight*, L.R. 7 Ex. 111, at 112. *Nickoll* v. *Ashton*, [1909] 2 Q.B. 298, affirmed, [1901] 2 K.B. 126. Applying this principle, which is incontestible, the damages recoverable by the plaintiffs will necessarily be quite small at all events under some heads of claim. I think the proper measure of damages in the present case is this: any actual damage to goods or otherwise sustained as the consequence of defects arising before the time that the defects having been discovered, could have been remedied, and in addition, if any damage of that character was sustained after that time then either what it would have cost the plaintiffs to have repaired the defects or the amount of the plaintiffs' actual damage under that head whichever is the lesser.

The action was dismissed by the trial Judge at the conclusion of the plaintiffs' case on motion of counsel for defendants. It does not appear whether the defendants were prepared with evidence on their own behalf or not and no suggestion was made on behalf of any of the defendants upon the argument either by their factums or orally as to what ought to be done in the event of the plaintiffs' appeal succeeding, and the Court being of opinion that the plaintiffs had established a right to damages against any of the defendants on the evidence as it stands;

it was recognized, I think, that any damages recoverable would have to be ascertained by a reference.

Beck, J.

It seems at least doubtful whether a defendant who moves for and obtains a dismissal of the action at the close of the plaintiff's case where the case is tried without a jury is entitled as a matter of right to have a new trial to enable him to adduce evidence on his own behalf. At all events the usual and safer course is to call his own witnesses and thus enable the Court to decide upon the whole evidence and if a defendant has not done so he should bear the costs that have been thrown away by reason of his not having taken that course. See *Macdonald* v. *Worthington*, 7 A.R. (Ont.) 531; *Craig* v. *McKay*, 8 O.L.R. 651; *Merchants Bank* v. *Lucas*, 12 P.R. (Ont.), 526; *Baker* v. *G.T.P. R. Co.*, 11 A.R. (Ont.), 68, and English authorities therein cited.

If the case is to be decided upon the evidence as it now stands I would direct judgment against both the Ferrings and O'Brien and Smith for such amount of damages as shall be ascertained by a Judge upon the principle of the measure of damages above indicated; with the right, however, to Smith and O'Brien to apply in this action to the Judge for the purpose of enabling them, if they think they are entitled to do so, to claim against the Ferrings any portion of the damages recovered by the plaintiffs against them from the Ferrings; and I would order the defendants to pay the plaintiffs the costs of the action; I would give the plaintiffs the costs of the appeal, taxable under col. 2, as against all the defendants. I would, however, give the defendants or either set of them the right to elect to have a new trial, if they so elect within one month, they in any event to pay the costs of the first trial in any event taxable under the same column.

I would suggest that the Judge upon the reference should utilize r. 534 as to the employment of an expert as was done in *Faulkner* v. *Llewellyn*, 9 L.T. 251, 11 W.R. 1055, affirmed 9 L.T. 557, 12 W.R. 193.

Walsh, J.
Ives, J.

WALSH, and IVES, JJ., concurred with Beck, J.

Stuart, J

STUART, J.:—No doubt the general rule is that there is no implied covenant by the landlord that the demised premises are suitable and fit for the purpose for which the tenant intends to use them. But where there is an agreement by the owner of

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lots to build a building thereon which, in the agreement, another person agrees to take a lease of and the purpose for which the building is to be used is known to the owner I think there is necessarily not only an agreement (in this case express) to erect according to specifications but also an implied agreement that the work should be done in a proper and workmanlike manner, and produce a building reasonably fit for the purpose intended, at least within the limits of the specifications. Moreover, the lease when signed contained this clause:—

> And it is further understood and agreed that in case there should be any dispute as to whether or not the said buidling is *properly* completed, certificate of the architect as to completion of the same shall be binding upon both parties and conclusive evidence of the completion of the said building.

Surely this means that there was an implied agreement that the work should be *properly* done.

> Where it appears from the terms of a lease of a store in a building being erected by the lessor and from the subsequent acts of the parties that they understood the property rented was to be a finished store, a covenant will be implied that the store should be fit for use at the time of the commencement of the term. *Le Forge* v. *Mansfield*, 31 Barb. (N.Y.) 345.

Indeed, I think that it might well be argued that owing to the clause in the lease which I have quoted there was an implied agreement by the proposed landlord that he would employ an architect to supervise the erection of the building. So far as the evidence shews, though of course the defendants called no evidence owing to their success in securing a non-suit, there was really no superintendence of the work by an architect at all. Underwood, who was employed by the Ferrings to prepare the plans and specifications, said that he did not actually superintend the work and was not employed to do so. I think the Ferrings were probably at fault in not having an architect watch the work.

Underwood examined the building in May, 1915, some 16 or 17 months after its completion. He was very emphatic in his opinion that there was poor workmanship in the building and that it was in consequence of this that the damage suffered by the plaintiffs arose. I think the only reasonable inference from his evidence is that in consequence of this poor workmanship the building was not reasonably fit for the purpose for which it was, to the knowledge of the owner and landlord, intended to be used. But I think, by taking possession, the plaintiffs

accepted the lease, the tenancy began and they were liable to pay the rent. It was apparently open to them under the clause I quote from the lease, to have had Underwood, the architect, examine the building and say whether it was properly completed or not. They did not choose to do this but entered into occupation, and I think, therefore, they cannot escape from their liability under the lease. But I do not think that by entering into possession they should be held to have waived the right to have a building reasonably fit for the purpose intended. They were entitled to rely upon the landlord's implied covenant in that respect, particularly where the defects were not immediately apparent to a person who was not an architect.

I think, however, that again, owing to the clause in the lease, they were entitled still to have Underwood examine the building as soon as the trouble appeared in order to ascertain the cause of it. Not only were they entitled to do that but I think they were bound to do so in order to discover as soon as possible what needed to be done to stop the damage from continuing. The architect's fee for examination, I think, they were entitled to charge as part of their damage. If the result of the examination shewed, as the evidence seems to indicate that it would have shewn, that with respect to most of the defects a very slight expenditure would have put the matter right, I think the plaintiffs were certainly bound to make at least this expenditure, and would have been entitled to recover it as damages from the landlord. I, at first, had some doubt whether there should not be another rule in regard to defects which could only be remedied by some serious structural alteration on the ground of the position of the parties as tenant and landlord, the latter being the owner of the building. But I now rather incline to the view that, in such a case as this, the tenant should occupy a position more nearly approaching the position of an owner whose contractor has not fulfilled his contract. In a sense the landlord was a contractor and the tenant was the owner at least of an estate for 3 years, for whom the building was being built.

Where there is a covenant by the landlord to repair, the tenant is entitled, upon breach, to do the repairs, and though perhaps he cannot exactly deduct it from the rent so as to reduce the amount for which the landlord can distrain (Foa, 5th ed.,

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546; Woodfall, 19th ed., 711; *Taylor* v. *Beal*, Crok. Eliz. 222 (78 E.R. 478)), he can claim the cost of the repairs as damages. In Amer. & Eng. Encyc. of Law, vol. 18, p. 230, it is said:—

> If the covenant of the landlord is to put the premises in repair before the beginning of the tenancy, the making of such repairs is a condition precedent to the obligation of the tenant to accept possession and pay rent; but if the tenant enters into possession he becomes liable for the rent subject to a claim on his part for damages for the failure of the landlord to repair.

The present case is not, of course, one involving a covenant to repair, but in the circumstances I think the principle applicable should be the same with this modification, that as the landlord's covenant was to *construct*, I think the tenant's right was perhaps more extensive so far as structural alterations were concerned. While, on the other hand, his right was perhaps not so extensive as that of an absolute owner whose building contractor had failed to complete. Just where the line of his right should be drawn would perhaps be difficult to say, but I think that there was clearly nothing that needed to be done to the building in this case which the plaintiffs did not have a right to do if after notice the owner did not do it.

I think, therefore, the plaintiffs ought upon the evidence as it stands to be given judgment for damages, but that these should be limited to what they actually suffered up to the time that they might have reasonably been expected to have the corrections in the building made themselves, and the cost of such corrections, including an architect's fee, provided of course that the damage they actually did suffer subsequently to the time they should have made the repairs reached the latter amount. They are not the owners, and the measure of the subsequent damages suggested is merely an outside limit beyond which the subsequent actual damages suffered by them should not be allowed to go.

With regard to the question whether the Ferrings or O'Brien and Smith or both of them are liable, I have had considerable difficulty. The lease is under seal and assigns are mentioned, and the lease and agreement are to be read together as one document. Hence by the stat. 32 Hen. VIII. ch. 34, the assignee of the reversion is bound by the covenants which run with the land. The covenant here was to do something with relation to the land itself, *i.e.*, to erect a building thereon, and though it was therefore not *in esse* at the date of the lease, yet "assigns" being named, I

think the assignees of the reversion were bound. But were they liable?

It seems to me that the breach may have taken place before the assignment of the reversion, and I should therefore think that for a preceding breach, the assignee would not be liable (see Foa, 5th ed., pp. 425-6). The assignees may have found the tenant in possession and may have assumed and been entitled to assume owing to the terms of the lease that there was no dispute about the proper completion of the building. I think anything that Smith and O'Brien did afterwards was perhaps nothing more than any good-natured landlord might be expected to do, and did not amount to a recognition of liability for the covenant of the Ferrings in regard to the completion of the building. This is the view I should be inclined to take of the matter if it were clear that the assignment from the Ferrings to O'Brien and Smith took place after the plaintiffs had gone into possession. But this is not clear from the evidence, although the pleadings would seem to indicate that such was the case.

However, as the other members of the Court are of opinion that the defendants, Smith and O'Brien, are upon the evidence, as it stands, liable in any case even if they did acquire title subsequent to the plaintiffs taking possession I shall not expressly dissent from their view.

I think the Ferrings were not relieved by anything that the plaintiffs did. It seems to me there can be no question of election. The plaintiffs tried to get at the persons who were nearest them, their present landlord, and did not approach the Ferrings, but the mere omission to make a claim against them cannot, in my opinion, destroy the liability of the Ferrings for their breach of their covenant.

If, however, neither of the defendants desire a new trial and both are content to accept liability for the narrow measure of damages we suggest, then there may be a reference to the Master at Edmonton to ascertain the damages, and on such reference the Master ought, I think, under rule 534, to accept the certificate of Underwood as to the extent of the defects and the cost of remedying them.

If a new trial is not asked for, I think all the defendants should pay the costs of the appeal of the action and the amount of damages ascertained by the Referee.

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If either of the defendants ask for a new trial within one month, then the order should be that the appeal be allowed with costs as against both defendants, a new trial ordered, and that the costs of the first trial be paid by the defendants.

There is, as I gather from what was said at the opening of the case, a third party notice, which raised the question of liability as between the defendants themselves and which by agreement was left in abeyance. Proceedings to settle any matter arising between defendants may be taken thereunder, and that although, strictly speaking, a third party notice may not have been applicable to such a case. *Appeal allowed.*

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BOUTILIER v. LEWIS.

Nova Scotia Supreme Court, Russell, Longley, Harris and Chisholm, JJ. March 31, 1917.

PLEADING (§ II D—185)—NATURE OF CLAIM — NEGLIGENCE — EMPLOYER'S LIABILITY.

The essential function of pleadings is to give the parties notice of the case to be tried; where a statement of claim charges the defendant with negligence as the owner of a factory building, and he has shaped his defence accordingly, the plaintiff cannot, at the trial, offer to prove the defendant's liability as employer.

Statement.

APPEAL from the judgment of Sir Wallace Graham, C.J., in favour of plaintiff, for the amount of $500 damages assessed by the jury, in an action under the Fatal Injuries Act (Lord Campbell's Act) by the mother of a lad who died from injuries received in a factory in which he was employed. Reversed.

C. J. Burchell, K.C., for appellant; *J. Terrell*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The plaintiff is the mother of a boy under fourteen who was employed in a factory operated by an incorporated company. Such employment was contrary to the provisions of the Factories Act, and there is evidence that the boy was set to work in a dangerous position, and without the proper securities for his safety. The plaintiff stated her case in such terms as to lead the defendant to suppose that she was claiming damages from the defendant as the owner of the factory and responsible for the negligence in consequence of his ownership. It was not until the case was opened that plaintiff's counsel discovered that defendant was not the owner of the factory. Perhaps he did not even discover it then, but he had notice then that counsel for the defendant contended that the action was wrongly brought, and

should have been against the Lewis Hardwood Co., Ltd., a corporation.

The trial proceeded, defendant's counsel apparently assuming that plaintiff was seeking to prove that the defendant was liable as owner, and shaping his defence in that view; being unconcerned as to the particulars of the negligence charged and concerned only as to the proof bearing on the issue whether or not the defendant was the owner of the business. After the evidence was all in, he was surprised to learn that the plaintiff was about to claim that the defendant, whether owner of the factory or not, was liable for his personal misfeasance in and about the employment of the boy.

I think the statement of claim has had the effect of misleading the defendant as to the nature of the claim to be put forward. It was not intended to mislead. The plaintiff's counsel was himself taken by surprise when he discovered that the factory was not, as his statement of claim sets out, owned and operated by the defendant. I do not think it is sufficient that by discarding such statements as this as mere description, the statement of claim can be made to cover the facts proved. The essential function of pleadings is to give the parties notice of the case to be tried and I think the defendant has a fair grievance in that he was not informed by this statement of claim as to the nature of the case he had to meet.

If the interests of the child were in question, one might have feelings of sympathy which would tempt him to strain a point to sustain the verdict and assessment. So far as I am able to draw inferences from the evidence, the interests of the surviving children are more likely to be promoted by setting aside the verdict than by sustaining it. If the parents of infant children are permitted to combine with unscrupulous employers in submitting them to the risk of dangerous employments, and then when accidents happen, are fortunate enough to have heavy damages awarded to them, it is quite possible that many parents will be mercenary enough to take the chances of violating the statutes made for the protection of children. All this, however, has nothing to do with the merits of the appeal. I think that, without blame to the defendant, he has been prejudiced by the form of the action, that he has not had a fair hearing of his defence, and that the interests

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of justice will be promoted if the real issue be submitted to another jury.

LONGLEY, J., concurred.

Harris, J.

HARRIS, J.:—I have reached the conclusion—not without some doubt—that the defendant's counsel was misled by the pleadings, and did not prepare to meet a charge of personal negligence on the part of his client, and on this ground I agree that there should be a new trial. While I think counsel was misled, I am not clear that he should have been; and I think, if the defendant is given a new trial, it should be on payment of the costs of appeal, and of the abortive trial.

Chisholm, J.

CHISHOLM, J.:—I concur. The indulgence should be on the terms mentioned by Harris, J. *Appeal allowed.*

CAN.

Ex. C.

UNION STEAMSHIP Co. v. THE "WAKENA."

Exchequer Court of Canada, British Columbia Admiralty District, Martin, Adm. J. March 22, 1917.

COLLISION (§ I—3)—CROSSING CHANNEL—FOG.

Finding herself on the wrong side of a narrow channel during a fog, a vessel which cautiously endeavours to cross to the proper side of the channel, to get out of its dangerous position, is not liable for a collision with another ship which has misunderstood the former's movements.

Statement.

ACTION to recover damages resulting from a collision of ships. Dismissed.

Martin, J. Adm.

MARTIN, J. Adm.:—This is an action arising out of the collision which took place shortly after midnight on February 24, 1916, between the Steamship "Venture," 579 registered tons (John Park, master) and the gasoline barge "Wakena," 316 registered tons (John Anderson, master) near the entrance to Burrard Inlet, in the First Narrows, inside Prospect Bluff. The night was calm with a dense fog and the tide on the ebb (for nearly 2 hours) at about 1½ knots. The result of the collision was that considerable damage was done to the port bow of the "Venture" which was struck by the stem of the "Wakena," but the damage to the latter was of so slight a nature that it was not the subject of address to me by counsel during the argument, and, therefore, I am entitled to disregard it.

The only fault attributed to the "Wakena" is that she was out of her course and steering across the Narrows: the allegation that she had also violated art. 19 was withdrawn.

As against the "Venture" it is alleged that she did not enter

the Narrows with caution, or so navigate after entry thereof, and that she ran at an excessive speed, and did not take proper efforts to avoid collision after hearing the "Wakena's" fog-signals. It is conceded that neither ship is at fault as regards fog-signals, lights, or lookout, or for anything that occurred after they came in sight.

I shall first deal with the charge against the "Wakena" because if that is not sustained it will be unnecessary to consider those against the "Venture."

By some misadventure in the fog the "Wakena," after passing the light at Prospect Bluff, in endeavouring to pick up the fog-bell at Brockton Point on a supposed E. by S. course, found herself at midnight over on the north shore of the Narrows, near the water pipe line there, close to the dolphins, and touching the ground. It has been held by me and approved by their Lordships of the Privy Council that "the First Narrows from Prospect Point to Brockton Point (a distance of approximately one and a quarter sea miles) must be deemed to be a narrow channel within the meaning of said art. 25." *Bryce* v. *Canadian Pacific R. Co.* 13 B.C.R. 96, at 103; 15 B.C.R. 510, at 514. Consequently, the "Wakena" was on the wrong side of the channel and directly in the track of any outgoing vessels. Under these circumstances the master determined to get over to the right (south) side of mid-channel as quickly as possible and then proceed on her proper course towards Brockton Point, and after manœuvring about a few minutes, so as to get clear from her dangerous position on the beach, she proceeded cautiously to cross over to her proper side, and in so doing crawled, literally, through the fog at a dead slow speed—just sufficient to keep steerage way on her, having regard to the tide. (Vide *The Zadok* (1883), 9 P.D. 114.) I do not think that, from the time she started from the beach at a stand-still until she first heard the "Venture's" signal on her starboard bow, she was going more than a knot an hour, if so much. This first signal gave no intimation of immediate danger to her master, and the second one, which did indicate that the vessels were coming closer, was followed up so instantly by the sighting of the "Venture's" lights that he had only time to do what he did —viz: reverse his engines. The engineer of the "Wakena," who was a satisfactory witness, explained that with her flat bottom and

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UNION STEAMSHIP CO. v. THE "WAKENA."

Martin, J. Adm.

spoon shaped bow she is very easily affected by wind or tide when light and on that occasion she was down by the stern, and I have no doubt that "so far as the circumstances of the case admitted," art. 16, she was navigated with due caution. It was not, indeed, alleged against her that there was any lack of caution in the method of her navigation other than the fact that she should not have crossed the channel. This is recognised by the master of the "Venture" (which was undoubtedly proceeding at a much faster rate than the "Wakena") when he said in his examination:

We were going as slow as we could, and with the tide running out if we had stopped altogether we would have gone ashore with the tide running. We had to go slow, and keep our steering way on her in a proper position in the channel.

In this attempt to get back as soon as possible into her proper side of the fairway the "Wakena" within about 2 minutes from the time she left the beach (the engineer says 1½ minutes before he got the reverse signal) came into sudden collision with the "Venture," while both vessels were sounding the proper signals, at such a short distance that though the engines of both ships were reversed after their lights were seen, the impact could not be averted.

It is urged by the plaintiffs' counsel that the "Wakena" had no right to thus cross the Narrows back into her proper channel on the starboard side of the fairway (as to which see *The King* v. *The Despatch* (1916), 28 D.L.R. 42, 22 B.C.R. 496) and that she should have taken a diagonal inbound course, approximately E.S.E., from where she grounded, to Brockton Point. But this would also involve her crossing the channel, at a long angle, and in the attempt to do so she would be proceeding for at least half a nautical mile on the wrong side of the channel before she could get into her proper water, and for this long distance she would not only be in a position of danger herself but to other vessels, whereas by crossing at once to the south side she would get into her proper water very quickly because the width of the fairway at the water pipe line is only about a cable and a quarter and she would only have half that distance to go in a direct line to be in her proper position. As the Privy Council said in the *Bryce* case (p. 514 supra) speaking of a collision in the same channel, which has frequently been before this Court (*cf.* also "*The Charmer*" v. "*The Bermuda*," 15 B.C.R. 506) "the configuration of the locality

and the circumstances with regard to tide, etc., have to be considered," and I have come to the conclusion that "the course taken by the ('Wakena') was justified by the circumstances." She was in a dangerous position and it was her duty to extricate herself from it in a manner which would cause as little danger to other vessels as was possible and I feel myself quite unable to say, after very careful reflection, that in so doing her master did not conduct himself as a prudent navigator. The position taken by the plaintiffs' counsel is that judging by the signals the "Venture" was entitled to assume that the approaching vessel on her port bow was an outbound one on the north side of the fairway, and reliance was placed upon the case of "*The Saragossa*" (1892), 7 Asp. M.C. 289, but that collision took place in the North Sea when the weather was "fine and clear and moonlight," and the principal point of the case at bar is that events were happening in a tideway in a narrow channel in a dense fog, and in such circumstances those in charge of a vessel are not entitled to make and act upon assumptions which would be otherwise justifiable. The point was precisely dealt with by Mr. Justice Gorell Barnes in the "*Germanic*" (1896), Smith's Leading Collision Cases, 104, wherein he laid it down as follows:—

> It was argued by counsel for the "Germanic" that taking the precautions which were adopted with regard to lookout and with a speed of 7 knots through the water and only 5 over the ground, she was not going too fast under the circumstances, and that those on board of her were entitled to expect to meet nothing if they were on the right side of the channel. But I must observe that the speed through the water is that which has to be considered with regard to vessels in motion, and that the argument as to not expecting to meet anything, if pressed to its extreme, would justify the vessel in going at full speed. Moreover, it is fallacious, for in addition to vessels which may possibly be on the wrong side of the channel, owing to the difficulty of keeping on the right side in thick weather, there may be sailing-vessels working up and crossing the channel, and vessels at anchor, or being overtaken, any of which might be in the way of the vessel.

In the case of "*The Tartar*" v. "*The Charmer*" (1907), reported in Mayers Adm. Law, 536, 538, I have cited some leading authorities upon the uncertainty of sounds in a fog, and in my opinion the unfounded assumption by the "Venture" of the course of the "Wakena" is the real cause of the collision. In this view of the case it becomes unnecessary to consider the charges brought against the "Venture" because in the special circumstances of the case I hold the "Wakena" is not to blame and, therefore, the action should be dismissed with costs. *Action dismissed.*

QUE.

C. R.

BERNIER v. CHOUINARD.

Quebec Court of Review, Fortin, Greenshields, and Lamothe, JJ. March 2, 1917.

INFANTS (§ I E—25)—PURCHASE OF LAND—PREJUDICE—FORFEITURE—VOID CONTRACT.

A lease of a farm with a right to purchase, entered into by an infant unassisted by his guardian, subject to a forfeiture of the land and payments in case of default, under which the infant apparently has derived no benefit, is prejudicial to his interests, and if not ratified by him after attaining majority it will be annulled by the Court.

[See also *Phillips* v. *Greater Ottawa Dev. Co.*, 33 D.L.R. 259, 38 O.L.R. 315.]

Statement.

APPEAL by defendant from a judgment of the Superior Court, in favour of plaintiff, in an action to enforce an agreement entered into by an infant. Reversed.

Under a 22 years' lease defendant, on May 25, 1915, took over plaintiff's farm and lands on account of which he paid $1,000 in cash and agreed to pay $50 in 2 years, and $200 annually, until $5,500 (including the $1,000 cash payment) had been paid. Then a deed of sale of the property would be made to defendant, who meanwhile was to pay, in addition to the annual instalments, 6% interest on the balance outstanding from the $5,500. It was further stipulated that if defendant failed in any of his payments for a period of 3 months, plaintiff could enter upon and take possession of the premises and defendant would forfeit all payments made thereon and be entitled to no reimbursement for any improvement he might have on the property.

On August 26, 1916, the present action was taken against defendant for $240, being instalments due under the aforesaid lease, with accrued interest up to that date. At the same time the plaintiff asked to have the deed of lease set aside and the property given back to him.

Defendant was under 21 when the contract was made and working as a tinsmith. He met with an accident whereby he lost one hand and received $1,000 compensation. This sum was the cash paid on the contract. The farm was occupied by the defendant's father, and the defendant never had any benefit from the same.

Defendant pleaded minority when he made the contract and alleged lesion, plaintiff replying that defendant had ratified the deed after majority. By judgment of the Superior Court the plaintiff's action was maintained, defendant was condemned to pay $240 to plaintiff and the deed was annulled. It was this judgment that defendant inscribed in review.

F. Campbell, for plaintiff; *C. C. Cabana*, for defendant.

GREENSHIELDS, J.:—The fact is incontestable, that when defendant signed the deed he was a minor. He had a tutor at that time and he refused to assist defendant in the deed. It is submitted by plaintiff that when minority and lesion are put forth as a defence, both must be proved. That is perfectly sound. But it should be stated that lesion may be established in different ways. The very contract, on its face, that a minor enters into may establish lesion, and all the surrounding circumstances should be taken into consideration by a Court in ascertaining whether or not a minor was really wronged (lésé) by a given contract.

In this case defendant was a young man, apparently without any education, and is described as a tinsmith. Some time previous to entering into the contract or lease with the plaintiff he met with an accident by which he lost one of his hands. He received as an indemnity for his loss $1,000. The record justifies the statement that this was all the capital or assets he possessed. He was handicapped in his future operations in making money to meet his obligations under this deed. He parted with the whole of his capital and he incurred a liability of $4,500. And there was held over him the threat that if he failed to meet any of his obligation he would be dispossessed of all his property and his entire capital confiscated. He bound himself to pay $200 for 22 years. He could not sell the property because he had no title to it. The land was partly wooded and he was forbidden to cut more wood on it than was necessary for heating purposes and for repairs to fences or buildings. Neither could he sublet the farm without the consent of the plaintiff.

Here then, was a young boy, partly permanently incapacitated, parting with his sole asset, namely, $1,000, and burdening himself with obligations, the fulfilment of which by him, if not impossible, was extremely hazardous and doubtful, and the failure of fulfilment entailing serious consequences. I would not hesitate to say that such a contract, even for a man of mature years, in the condition in which this young man was, would be most imprudent and dangerous.

If any contract entered into by a minor, coupled with all the surrounding circumstances, could ever irresistibly force a Court to the conclusion that there was lesion, this is one. No tutor

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with a residuum of common sense would ever have consented or should ever consent to such a contract, and I am of opinion that lesion has been abundantly established.

But, the plaintiff says, the young man ratified the contract when of age. The statement is easy to make, but justification for the statement is difficult to find in the record. It would appear from the proof that the young man's father, some time previous to the contract, had been in possession of the farm—under what title it does not appear. After the contract he remained in possession. Defendant never took possession of the property and, so far as the record shews, never benefitted one cent by the contract. It is said that not until the production of the plea in the present action did he complain of the contract. That may be; but a failure to become the actor as against the contract is not in itself a ratification of the contract. There is no proof in the record that either in writing or by word of mouth did defendant ever ratify the contract. It is urged by plaintiff that a creditor of defendant's father seized some of the property in execution of a judgment, and that an opposition was filed in the name of defendant's father, but at the instigation of defendant, and that the latter signed an affidavit in support of the opposition wherein it was asserted that defendant was owner of the property. That is true. This affidavit, like the deed of lease, was signed while defendant was still a minor, and it cannot be seriously pretended that this is a ratification after he had reached majority. Upon the whole we are forced to the conclusion that there was lesion; that there was no ratification; and that the action of the plaintiff must be dismissed, with costs. The judgment of the Court below is reversed. *Appeal allowed.*

B. C.
C. A.

ROYAL BANK v. B.C. ACCIDENT.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 30, 1917.

COMPANIES (§ IV D—79)—POWER TO BORROW—ULTRA VIRES—SUBROGATION.

An insurance company is a commercial corporation, and therefore has implied power to borrow, and to pledge and mortgage its securities to secure the sum borrowed, though for the purpose of meeting the statutory security to the government authorities to enable it to carry on the business; even if *ultra vires*, if moneys were used for the payment of a just debt, the lender is entitled to be subrogated to the rights of those whose debts were paid therewith.

Statement.

APPEAL by plaintiff from the judgment of Gregory, J., in an action to recover money lent to a corporation. Reversed.

Sir Charles Hibbert Tupper, K.C., for appellant.

A. H. MacNeill, K.C., for respondent.

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

MARTIN, J.A.:—In my opinion the defendant company had power to borrow the money in question from the plaintiff bank. The difference between the wide language used in sec. 87 of the English Companies (consolidation) Act, 1908 ("shall not commence any business or exercise any borrowing power") and that in sec. 26 (*a*) of the defendants incorporating Act is very marked and I think that the prohibition in the latter section extends only to entering into contracts of insurance under sec. 17.

Martin, J.A.

The appeal, therefore, should be allowed.

GALLIHER, J.A.:—The defendant company was incorporated by private Act of the Legislature of British Columbia, being ch. 62 of 1911. The objects for which the company was incorporated are set out in sec. 17 of the Act and were for the purpose of effecting contracts of insurance against accident or casualty and contracts of indemnity with any person against claims and demands of workmen and employees of such person, and generally for carrying on the business of accident and sick insurance in all its branches, and for the guaranteeing of the fidelity of persons filling or about to fill situations of trust, and the due performance and discharge by such persons of the duties and obligations imposed on them by contract or otherwise, and for guaranteeing the performance and discharge by liquidators, committees, etc., of their respective duties and obligations; and also guaranteeing persons filling or about to fill situations of trust or confidence against liabilities in connection therewith.

Galliher, J.A.

By sub-sec. (*a*) of sec. 26, it was enacted that the company shall before carrying out any of the objects mentioned in sec. 17 give to, or deposit with, the provincial government, from time to time such security as the Lieutenant-Governor in Council may by order in Council direct and approve, and shall not commence or carry on such business until such security shall have been given. The amount fixed by order in Council under this sub-section was $25,000.

Of this amount the company borrowed from the plaintiff bank the sum of $20,000 and a further sum of $8,000 was subsequently borrowed, but in respect of this latter sum, no question arises here.

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Galliher, J.A.

The whole point is as to borrowing this $20,000. The borrowing of this $20,000 was admittedly for the purpose of meeting the requirements of sub-sec. (*a*) of sec. 26, and it is contended that the company had no power to borrow at all, and this contention was upheld by the trial Judge. No borrowing powers are given by the Act of incorporation, but if the company can be considered a trading or commercial company, it has an implied power to borrow, and also to pledge or mortgage any of its securities to secure the money so borrowed: see Halsbury's Laws of England, vol. 5, p. 337, par 552:—

> A trading or commercial company has an implied power to borrow and to mortgage and charge all or any part of its property to secure the money so borrowed, although no express power to borrow or mortgage is given to it, provided that such borrowing or giving security is not expressly prohibited.

And among the cases cited in the notes to this paragraph is that of *Gibbs and West's* case (1870), L.R. 10 Eq. 312. This was a case of a life insurance company which in the judgment of Malins, V.C., was treated as a commercial company.

The present company I think may also be classed under that heading.

It is to be noted in the Act that the words used are "shall before carrying out any of the objects mentioned in sec. 17" and "shall not commence or carry on such business until such security shall have been given."

There is nowhere in the Act a prohibition as to borrowing money for the very purpose for which this was borrowed, namely, to provide for the deposit required by the Government, nor is there any suggestion in the Act how this deposit shall be secured.

This money, when deposited, was placed to the credit of the Minister of Finance in the plaintiff bank for the purpose of meeting liabilities that might from time to time be incurred in the insurance business to be carried on, the practice being that the Minister of Finance would send the deposit receipt in his possession to the bank, together with a request to issue cheques for such claims as were properly payable, and to return a new deposit receipt to the Minister of Finance for the balance after such cheques were issued.

Having then, as I am of the opinion, implied borrowing powers for the purpose of their business, and no restrictions having been placed upon them as to how this amount to be deposited was to be raised, it cannot be said that the borrowing from the bank for this

purpose is *ultra vires*; but should this view be wrong, I will assume that it is an *ultra vires* borrowing and proceed to discuss the case on that ground.

It is admitted that this sum of $20,000 which was borrowed has been used in payment of the just debts of the company, and Sir Charles Tupper urges that in such case even of an *ultra vires* borrowing where the bank might not be in a position to compel repayment of the money, yet after these moneys have been used in payment of the just debts of the company, the bank are to that extent subrogated to the rights of the original creditors, and cites *Blackburn Bldg. Soc.* v. *Cunliffe Brooks & Co.* (1882), 22 Ch.D. 61, affirmed in (1884), 9 App. Cas. 857. It was urged here that this was a borrowing before the company were in a position to do business, and hence there were not at the time any debts or liabilities incurred to which this money could be applied, but in the case of *Baroness Wenlock* v. *River Dee Co.* (1887), 19 Q.B.D. 155, where the *Blackburn* case is discussed, it was held that the rule there laid down applied not only to debts incurred at the time of the borrowing, but to debts subsequently incurred as well. These cases were considered in *Sinclair* v. *Brougham*, [1914] A.C. 398; Lord Parker of Waddington, at p. 440, has this to say:—

> Accepting the principle that no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow, the question remains whether the lender has any other remedies. On this point the result of the authorities may be stated as follows: First, it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred before or after the money was borrowed) the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied.
>
> There appears to be some doubt as to whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground that to this extent there is no increase in the indebtedness of the company or association, in which case, if the contract of loan involves a security for the money borrowed, the security would be validated to a like extent; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off. . .
>
> It is still open to your Lordships' House to adopt either view should the question come up for determination.

Under these authorities, I think Sir Charles Tupper's contention is correct, and in that view any moneys collected by the bank from securities held by them and applied by the bank in liquidation of the $20,000 borrowed, in the absence of any direction as to what

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particular account it should be applied, must be held to be properly applied.

On appropriation of payments see *Seymour* v. *Pickett*, [1905] 1 K.B. 715, 721.

The appeal, in my opinion, should be allowed.

McPHILLIPS, J.A.:—The respondent borrowed $20,000 from the appellant to make the deposit with the provincial government required by sec. 26 (*a*) of the British Columbia Accident and Employers' Liability Insurance Company Limited Act, 1911.

The main question for determination and if answered in the affirmative, *i.e.*, that the borrowing was *intra vires*, is the question as submitted in the amended case which reads as follows:—

1. Had the company power to borrow such sum of $20,000, and does such power form a binding contract for the return of such sum and is the company now liable for the return of such sum or any part thereof and interest whether such borrowing was *ultra vires* or not?

The appeal is from the decision of Gregory, J., who held that the respondent had no authority to borrow the money from the appellant.

The respondent is a company incorporated by a private Act of the legislature of British Columbia, the "British Columbia Accident and Employers' Liability Insurance Company Limited Act, 1911"—to carry on the business set forth in sec. 17 and sub-sections of the Act. Sec. 7 of the Act reads as follows:—

So soon as $100,000 of the capital stock of the company have been subscribed, and ten per centum of that amount has been paid into some chartered bank in Canada, the provisional directors shall call a general meeting of the shareholders at some place to be named in the said City of Vancouver, at which meeting the shareholders present or represented by proxy who have paid not less than ten per centum on the amount of shares subscribed for by them shall elect a Board of not less than 5 or more than 20 directors, of whom 4, or such greater number as may be prescribed by any by-law of the company, shall form a quorum.

The ten per cent. being paid up would only give $10,000 and apparently $25,000 was required to be paid to the provincial government under sec. 26 (*a*) which reads as follows:—

(*a*) The company shall, before carrying out any of the objects mentioned in sec. 17, give to or deposit with the provincial government, from time to time, such security as the Lieutenant-Governor in Council may by order in Council direct and approve, and shall not commence or carry on such business until such security shall have been given.

The Companies Clauses Act, 1897, except secs. 102, 118, 119 and 121, applies to the respondent—sec. 21 reading as follows:—

The Companies Clauses Act, 1897, shall apply to and be incorporated with this Act, save so far as the provisions thereof are expressly varied or excepted by this Act, or as any of the provisions thereof are inconsistent with or repugnant to the provisions of this Act, in which case the provisions of this Act shall, to the extent of such repugnancy or inconsistency, govern. The following clauses of the said Companies Clauses Act, 1897, shall not apply to this company, namely: secs. 102, 118, 119, and 121;

Provided that no increase of capital shall take effect until the Company shall have paid to the Minister of Finance a sum equal to the additional amount the Company would have had to pay on incorporation if it had increased its capitalization then by the amount of said increase.

No express power to borrow money would appear to have been conferred by statute. Sec. 17 sets forth the business that may be done and we find the words "and generally may do, or perform, all other necessary matters and things connected with and proper to promote such objects."

That the respondent is a trading corporation admits of no doubt in my opinion, and as such there is the implied power of borrowing: *Bank of Australasia* v. *Breillat* (1847), 6 Moore P.C. 152, at 193, 201, [13 E.R. 642]; *Re International Life Assur. Co., Gibbs and West's* case (1870), 39 L.J. Ch. 667, at 669, L.R. 10 Eq. 312; *Mansel* v. *Cobham* (*Viscount*) (1905), 74 L.J. Ch. 327, at 330, [1905] 1 Ch. 568; *Bryon* v. *Metropolitan, etc., Omnibus Co.*, 3 DeG. & J. 123; *Re Marine Mansions Co.* (1867), 4 Eq. 601; *Ex parte City Bank*, L. R., 3 Ch. 758; *General Auction, etc., Co.* v. *Smith*, [1891] 3 Ch. 432; *Patent File Co.*, L.R. 6 Ch. 83.

Now it was a matter of necessity to commence business to make the deposit; therefore in my opinion it was a matter of necessity to obtain the required moneys. And how can it be said that a trading company could not go to its bankers and borrow the money, absolutely necessary, under the terms of its Act of incorporation, to be deposited with the provincial government, before business could be commenced? It is contended that the money should have been obtained, and could only be obtained under the statutory powers of the company by the sale of stock. It is to be seen, though, that the whole of the ten per cent. that would be available, pursuing sec. 7 of the Act, would not amount to one-half of the sum required to be deposited with the provincial government.

If it were necessary to look for any express language which would lend support for the borrowing, although in my opinion that is wholly unnecessary under the particular facts of this case, language of general authority may be found, being the words

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before quoted from sec. 17 of the Act, "and generally may do or perform all other necessary matters and things connected with, and proper to promote such objects."

In dealing with trading, mercantile and commercial corporations, there must be accorded to them such implied powers as will admit of the business authorized being carried on; and unless it be doing violence to the language as contained in the statute creating the corporations and setting forth their powers all reasonable and necessary powers should be exercisable and be deemed to be *intra vires*. For a trading company to go to its bankers and borrow money for such a reasonable and necessary purpose as the making of this deposit, to admit of its embarking upon its business career, seems only proper and right, the required subscription of stock being first accomplished, and the ten per cent. paid up, which evidently was that which parliament deemed requisite, before permanent organization should take place: (*Peruvian Rly. Co.* v. *Thames Co.* (1867), L.R. 2 Ch. 617; *Baglan Hall Co.* (1870), L.R. 5 Ch. 346; *Simpson* v. *Westminster Palace Hotel Co.*, 8 H.L. Cas. 712; *Taunton* v. *Royal Ins. Co.*, 2 H. & M. 135; *Joint Stock Discount Co.* v. *Brown* (1866), L.R. 3 Eq. 139 at 150; 8 Eq. 381).

In the present case it was certainly "reasonably necessary" to borrow the money and *Re Kingsbury Collieries and Moore's Contract*, [1907] 2 Ch. 259, 76 L.J. Ch. 469, the L.J. headnote reads:—

A colliery company, without express power of sale in its memorandum of association, may sell land from time to time and in a proper manner where it is reasonably necessary and has the effect of making the rest of the company's property more useful: *Johns* v. *Balfour* (1 Meg. 191), applied.

I am not of the opinion that *Ashbury Ry. Co.* v. *Riche*, L.R. 7 H.L. 653; *Att'y. Gen'l.* v. *G.E. Ry. Co.*, 5 App. Cas. 473; *Baroness Wenlock* v. *River Dee Co.*, 36 Ch.D. 674; 10 App. Cas. 354; 19 Q.B.D. 155; *London County Council* v. *Attorney-General*, [1902] A.C. 165; *Sinclair* v. *Brougham*, [1914] A.C. 398, 83 L.J. Ch. 465—upon the facts of the present case are in any way applicable, and the borrowing cannot be considered to have been *ultra vires* borrowing.

Therefore in my opinion the borrowing was *intra vires* borrowing and the respondent is liable to the appellant upon the securities given for the same, and liable for the return of the total sum borrowed together with the accrued interest thereon.

The appeal should be allowed. *Appeal allowed.*

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Manitoba King's Bench, Curran, J. March 9, 1917.

ELECTIONS (§ III—80)—NOMINATION PAPER—SUFFICIENCY—ELIGIBILITY—RESIDENCE.

A nomination paper which fails to indicate the ward for which a municipal councillor has been nominated is defective, and may be rejected by the returning officer. Non-residence of the candidate either in the ward or municipality is not a disqualification. Residence of the candidate in the ward is the sole requirement under sec. 52 (*c*) of the Municipal Act (R.S.M. 1913, ch. 133); but under sec. 16 of the statutes 1913 (Man.), ch. 20, this restriction may be avoided by the candidate, not so resident, agreeing to serve if elected. The omission of sec. 16 from the revision of the Municipal Act did not thereby repeal it.

Statement.

APPLICATION by one Edwin Smart for leave to exhibit an information by way of *quo warranto* against Frank Edward Sprague, councillor elect for ward 3 in the Rur. Mun. of Fort Garry, to unseat the said Frank Edward Sprague on certain grounds.

H. N. Baker, for applicant; *A. E. Hoskin*, K.C., for returning officer; *P. C. Locke*, for Sprague.

Curran, J.

CURRAN, J.:—The facts are not in dispute, and are briefly as follows: Nominations for councillor were called for according to law on Tuesday, December 5, 1916. There are three wards in this municipality, in each of which a councillor was required to be elected for 1916. Henri Dieudonne Demoissac was the returning officer, and received the nominations on above date for reeve and councillors. Frank Edward Sprague was nominated as a councillor for ward 3, and a nomination was also made of one Pierre Dumas, for the office of councillor for the municipality, but without specifying for which ward of said municipality he was so nominated. No other nominations were made for ward 3, and at the expiration of the time fixed by statute for the receiving of nominations, the returning officer rejected the nomination of Pierre Dumas for this ward and declared Frank Edwin Sprague duly elected.

The Municipal Act contains no form of nomination paper. Section 79 simply requires that the nominations shall be made in writing by a proposer and seconder, who shall be duly qualified electors of the municipality and one of whom, in the case of a nomination of councillor, where the municipality is divided into wards, shall be an elector of the ward for which such nomination is made. A written acceptance of the nomination by the proposed candidate must accompany such nomination. I understand from an affidavit filed by the returning officer, that the question as to

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the sufficiency of the nomination papers of Pierre Dumas has already been passed upon by Metcalfe, J., upon a motion for a mandamus to compel the returning officer to hold an election for councillor for said ward 3, between the two candidates alleged to have been nominated, to wit, Sprague and Dumas, which motion was dismissed, the learned Judge holding that the nomination of the said Dumas for ward 3 was improper, and did not comply with the Municipal Act.

I may say that I have carefully considered the copy of the nomination paper of Pierre Dumas, filed on this application, together with the copy of his acceptance, and of the declaration as candidate made by him, all dated December 5, 1916. In no one of these papers is it stated directly or indirectly, nor is there even a hint or indication as to which ward Dumas was being proposed for. His nomination was for a councillor at large for the whole municipality, which of course could not be, as the municipality is divided into wards. I fully concur in the opinion that such nomination paper was defective and that the returning officer was right in refusing to act upon it, and to declare a poll.

I therefore hold that the first of the applicant's grounds of objection as stated in his notice of motion, namely, the refusal of the returning officer to accept and act on Dumas' nomination, fails.

The other ground of objection to Mr. Sprague argued was that he was disqualified by reason of non-residence, either in ward 3 or in the municipality. It is a fact that Sprague is not a resident of the municipality, but of the City of Winnipeg.

If I had to determine the question by reference solely to sec. 52 of The Municipal Act, ch. 133, R.S.M. 1913, I should have no difficulty in deciding that the application is well-founded upon this ground, and that Sprague was not qualified to be elected as a candidate by reason of non-residence. See sec. 52 (*c*).

But this sub-section must be read in conjunction with, and subject to, sec. 16 of ch. 20, statutes of 1913, which are applicable only to the Rur. Mun. of Fort Garry. This section provides that it shall not be necessary for a councillor in this municipality to reside in the ward in which he may be a candidate for election, if such candidate, not being so resident, shall have expressed in writing to the returning officer on or before nomination day,

willingness to accept office if elected. Mr. Sprague has complied with the requisite condition as to acceptance in writing and is therefore elegible for nomination and election as a councillor, notwithstanding the general law as laid down in sec. 52.

Counsel for the applicant, however, contends that sec. 52 of the Municipal Act in effect repeals sec. 16 of ch. 20 aforesaid. I cannot agree with this contention. On the contrary, I am clearly of the opinion that it does not repeal this section. What at first sight appears to be an enigma, owing to the deliberate omission of this clause, sec. 16, which had been added as subsection (*e*) to the re-enactment of sec. 52 in 1912, by ch. 42 of the statutes of that year, from the revision of 1913 of the Municipal Act, is made quite clear by a reference to the Act authorizing the revision of the statutes, ch. 72 of 2 Geo. V. (1912), secs. 3 and 5.

By sec. 3 the commissioners are empowered to prepare and arrange for publication a new edition of the laws of Manitoba, to omit all such Acts and parts thereof which have expired, been repealed, or had their effect, all repealing Acts, to alter the numbers of Acts in force, the arrangement of the different sections thereof where necessary or advisable, to revise and alter the language where necessary or desirable, so as to give better expression of the spirit or meaning of the law, but not so as to change the sense of any enactment, and to frame new provisions and suggestions for the improvement of the laws.

Sec. 5. The said commissioners, in consolidating the said statutes, may make such alteration in their language as are requisite in order to preserve a uniform mode of expression, and may make such minor amendments as are necessary to bring out more clearly what they deem to have been the intention of the legislature, or to reconcile seemingly inconsistent enactments, or to correct clerical or typographical errors, and they *may omit* from said revision any Acts or parts of Acts which, although printed among the Public General Acts, have reference only to a particular place or municipality, and have no *general application* throughout the province.

It is clear the commissioners had no power of substantive repeal of any Act. The consideration of these somewhat limited powers of the commissioners makes it clear why this Act, sub-sec. (*e*) of which related only to the municipality of Fort Garry, and had no general application throughout the province, was omitted in the revision of sec. 52, which is definitive of the general law only and is still subject to those particular modifications or restrictions

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contained in Acts previously passed which had reference only to particular places or municipalities.

This also explains the express repeal in 1916, by ch. 43, of the particular enactment of 1913, relating to the Rur. Mun. of Fort Garry, and indicates, if such indication were necessary, that in the opinion of the legislature this particular section had not been repealed by the revision of the Municipal Act of 1913.

It is clear, then, to my mind that the provision in 1913, found in sec. 16 of ch. 20 of 3 Geo. V., was still in force when the election in question was held, and its provisions governed the residential qualifications of all candidates for councillor in the Rur. Mun. of Fort Garry.

Mr. Baker, moreover, contends that even if the 1913 provision is still law, yet Sprague was debarred because he was not a resident of the municipality. In effect, I understand him to argue that although residence in a ward may be dispensed with under the conditions imposed, it is still necessary that the proposed candidate should be a resident of the municipality. To give effect to this contention, it would be necessary, I think, to read into the law something that is not there. I take it the legislature, in framing sec. 52, meant what it said in defining the residential qualifications of reeves and councillors. As to the latter, residence in the ward is the sole requirement; but in the particular case of the Rur. Mun. of Fort Garry, this restriction may be avoided in favour of a candidate who does not reside in the ward by agreeing in writing to serve if elected. By what authority, then, is the further restriction of being a resident in the municipality imposed? I can find none, nor have I been referred to any.

I think, therefore, that Sprague was eligible as a candidate for councillor for the ward in this municipality in which he has offered himself for election. His nomination papers seem to be in order, and I am of the opinion that the returning officer had no option under the circumstances but to reject the clearly defective nomination papers of Dumas, and there being no other candidate nominated but Sprague, to declare Sprague duly elected.

I therefore refuse the application with costs.

Application refused.

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Quebec King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. January 12, 1917.

1. HIGHWAYS (§ IV A—142)—DUTY AS TO SAFETY—AUTOMOBILE TRAFFIC.
The charter of the City of Quebec, which places all the roads in the city under the care of its council, does not require the council to keep them in repair; if the council open a street it must do so with care. A municipal corporation is not obliged to take extraordinary precautions for automobile traffic; it is sufficient if the streets are maintained with reasonable care for ordinary traffic.

2. MUNICIPAL CORPORATIONS (§ II G—222)—LIABILITY FOR ACTS OF OFFICERS —HIGHWAYS—NEGLIGENCE.
A municipal corporation is responsible to third persons for a *delit* or *quasi-delit* of one of its officials; neglect to maintain a road which the corporation has opened is a *quasi-delit*.

Statement.

APPEAL from the judgment of the Superior Court of the District of Quebec, Dorion, J., 50 Que. S.C. 226. Affirmed.

Gelly & Dion, for appellant; *Chapleau & Morin*, for respondent.

Carroll, J.

CARROLL, J.:—This case is not exempt from difficulties and it is not without some anxiety that I have come to the conclusion to confirm the judgment of first instance. It is an appeal from a judgment dismissing the action of the appellant for damages and costs against the City of Quebec.

On August 29, 1914, at about 8 o'clock at night, the appellant was going down a hill in the City of Quebec, called Cote de la Negresse, in an automobile owned by one Dion. The latter was at the wheel. He had no chauffeur's license, but an owner's license. He was an apprentice in the trade.

The Cote de la Negresse is very abrupt and at the place where the accident occurred, it makes a complete turn in a very limited radius. It had rained all day and the road paved with stone blocks was very slippery. Dion directed his car to the right and coming to the curve could not turn it. This would have been impossible even if he had had the control of his machine. But if he had directed his automobile to the left he would have been able to turn without difficulty, as he would have had the control of his machine. Being aware at the first half of the hill that the wheels were skidding, the driver of the automobile cut off the gasoline supply and put on the brakes but the wheels were still skidding. At the turn, the car weighing about 3,000 lbs., instead of turning, struck a fence and fell from a height of 20 feet into a yard.

The negligence of the driver is evident and is not seriously contested.

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The appellant makes two charges against the respondent. 1. Of having built that hill without following the rules of art; 2, of not having constructed sufficient protection against the precipice which is at the foot of the hill.

It is proved that on railways, on Government roads, the outside ground of a curve is raised, and this has for effect to reduce the centrifugal force which as a direct cause of the speed forces vehicles to take the tangent. This precaution is not necessary on a hill where from its formation speed is impossible and where it would render ascent of the hill more difficult. Mr. Verreault, superintendent of roads for the City of Quebec, explains why the hill was not built with a higher level on the outside. It was to render the climbing of the hill less abrupt. But even in assuming that the city would have committed a slight negligence in the tracing and execution of its plan, account must be taken of the fact that it had erected an obstacle to the centrifugal force by erecting on the outside of the hill a sidewalk with a stone fence, and the automobile, according to the evidence of the chauffeur, was going down the hill very slowly; this stone fence compensated, as declared by the Court of first instance, for the slight inclination which existed towards the outside.

On the first point I think the appellant has no legal recourse against the respondent.

On the second point, the honourable Judge who rendered the judgment admits that a stone wall would have prevented the automobile from falling into the yard, and I think he is right. Then the question to be determined is this: was the city obliged to build a stone or cement wall at that place?

There was no document produced to show how the city became possessor of that hill. One Loiselle has told us that he was the owner of that ground 27 years ago, and that he had sold it to the city. This hill, which up to then had only been used by pedestrians, was widened by the city for the use of vehicles. A retaining wall was built to the level of the street, then a fence of square wood put crosswise on posts, which fence was replaced by one of boards two years ago.

All the roads of the City of Quebec are under its control, by virtue of arts. 349 and 365 of its charter (Chouinard edition); but, a peculiar thing to note, this charter does not require that they

be kept in good state of repair. The municipal council has every authority to regulate the opening and repairing of the roads, but it has only enacted laws with regard to the maintenance of the roads in winter.

According to my view, it is clear that a corporation on which has been conferred the control of its streets cannot be sued for damages if its council does not provide, for example, for the opening of a street, and if this omission causes damage to a person. In such a case, the legislature has conferred absolute discretion on a municipal body, as regards the opening of a street, and this discretion cannot be questioned by the Courts. But if a city or town corporation has the power to open a street and it exercises that power, it must exercise it with reasonable care, as has been decided in the Privy Council, in the case of *Sanitary Com. of Gibraltar* v. *Orfila*, 15 App. Cas. 400.

It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care. In the absence of a contrary intention, its duties and liabilities are the same as those imposed by the general law on a private person doing the same things.

For a long time in the United States and in England, municipal corporations could not be held liable for the negligence of their officers, on the principle that these corporations administer the public property as agents of the State, without making any distinction with regard to the duties which are prescribed for them as corporations and those which they do as agents of the State.

There are obligations imposed upon municipal corporations which do not hold these corporations liable, because they are imposed upon them as guardians of part of the sovereign authority. In the exercise of these public obligations, corporations cannot be held responsible any more than the State could be.

Thus, constables, in the exercise of their duties for the maintenance of peace and order, do not especially represent the corporation by which they are appointed, but the State.

It is then necessary to distinguish between political and civil corporations.

In many instances city corporations have been condemned for acts of their constables.

Art. 356 C.C. says: Political corporations are governed by the public law, and only fall within the control of the civil law in their relations, in certain respects, to individual members of society.

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In principle, recourse must be had to civil law to determine the rights and obligations of municipal corporations which are political bodies.

It is very difficult to state precisely the meaning of these words "in certain respects" which are found in art. 356. This meaning is quite vague and codifiers do not indicate its meaning, but I think that the general principles as expressed by Tiedeman on Municipal Corporations (1897 ed., No. 324) clear up the situation.

> Municipal duties may be divided into two classes: First, governmental duties, which have been delegated to the city or town by the people acting through the legislature, and which, though performed within circumscribed territorial limits, serve to benefit the people of the State, and in the carrying out of which the municipal corporation is only an agent of the State. Secondly, quasi-private duties, to be exercised for the peculiar advantage of the municipal locality and its inhabitants, and exclusive of any benefit to be conferred upon persons outside of the corporate jurisdiction.
>
> The first class of duties are the duties of sovereignty, delegated though they be, and for their violation the municipality is no more liable, unless made so by express statute, than is the State whence they are derived.
>
> The second class of duties are not imposed as a burden, but conferred on the municipal corporation and its inhabitants as a benefit, to be accepted and exercised to the advantage of the municipality alone, which the city receives somewhat as a private proprietor.

The French doctrine was resorted to, but according to my view it has no application, as our municipal laws are derived from the English laws. However, even in France, they do not go as far as it is thought. Saleilles, cited by the reporter Languedoc ((1913), 43 Que. S.C. 436), says:—

> Not only is the State (as well as the bodies exercising powers delegated to them, such as the communes) are held responsible for administrative jurisdiction, but their responsibility is not, as that of private individuals, derived from art. 1382 and following. We must distinguish between police measures, on the one part, and the acts of administration of public services, on the other part—acts of negligence committed by public services only being able to give rise to an action for damages.

Baudry-Lacantinerie (Obligations, No. 2917) says that the State Council and the Tribunal des Conflict rejects the application of art. 1384 as regards damages resulting from acts of public authority, or acts done for the public service. They only permit it in respect to damages arising from things done by the State in

regard to the common right, that is to say as a civil person would do.

The Cour de Cassation, which had first been of a contrary opinion, has for many years come back to the theory of administrative jurisdiction. But we have nothing to do with the French doctrine, because art. 356 of our C.C. declares that politic corporations are governed by the common law.

As I said a moment ago, the responsibility of corporations towards the citizens individually is hard to define. The expression "In certain respects" of art. 356 means, I presume, that the corporation is responsible towards third parties, in its contractual relations, or when its officials accomplishing a quasi-private duty of the corporation, commit a *delit* or a *quasi-delit*. And the maintenance of the roads is a quasi-private obligation of a municipality.

Its obligations towards the public in general being decided according to the common law, our guide must be the English law and the American law, from which we derive our municipal institutions. However, the English and American law differ on one point. Thus in England the corporations are held responsible if the officials commit a misfeasance, whilst they are not responsible if the accident results from a non-feasance. This distinction does not exist in the United States where the cities are responsible in both cases.

At all events, in the present case, such a distinction has no *raison d'être*, because if the city is responsible it would be through the acts of its road superintendent who would have been guilty of a misfeasance. To widen this hill and not protect the passers-by would be an act of misfeasance, just as certainly as if the official had dug a hole in the middle of the street, which would have been the cause of an accident.

We must then determine if the city, in erecting a wooden fence supported by beams, has taken the necessary precautions to be exempt from all responsibility.

It is true that municipal corporations are not obliged to take extraordinary means for the protection of automobiles, a mode of locomotion which is rather dangerous. The laws were only made for the vehicles existing when they were adopted, and if the streets are maintained with a reasonable care for the ordinary traffic, the city has no additional obligation towards the owners of automobiles.

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Carroll, J.

The Cote de la Négresse has existed for 27 years. It was proved that since that time repairs were made to the fence 10 to 12 times, that boards had been broken and that traces of rigs or sleighs can be seen on certain parts of the fence, which would indicate a danger, but the origin of these marks was not established, and they could very well have been done by children sliding in sleighs in winter. Only one accident was proved: a horse ran away from the top and went through.

It seems that the fence was a sufficient protection for the ordinary traffic. If walls had to be constructed on all the hills of Quebec, the expense would be rather onerous. Account must be taken of the nature of the ground and of natural dangers, which are inherent to them.

In the present case I would condemn the city if it had been negligent in the exercise of its obligations, but this negligence is not proved.

Pelletier, J.

PELLETIER, J. (dissenting):—It is clearly proved and admitted by both parties that this hill is dangerous, even very dangerous. It is one of the reasons invoked by the defendant, who insists before us upon the fact that the driver of the automobile, in which the defendant was, knew well the dangers of the hill and that he should not have ventured there especially on a rainy night.

Not only is the hill dangerous, because it turns suddenly at a spot where the slope is steep, but it is dangerous also because it runs along a precipice on the edge of the promontory between the upper and the lower parts of the city, there being no protection wall, and lastly because the street paved with blocks instead of inclining towards the promontory bends towards the precipice.

It is undeniable that a municipal corporation, who must give to the public, roads and hills in good shape, should not allow traffic on a hill like the present one, especially to automobiles.

Taking all this into consideration, the defendant incurs legal responsibility which results from all this.

On the other hand, it is clearly proved that the chauffeur of the automobile, who had for a long time been a carter, knew for a long time also the state of the hill and its dangers; it cannot be forgiven him that he went down that hill with an automobile on a rainy night, especially when there are so many other roads

between Saint Jean ward and the lower part of the city, where he was going. It would only have taken a few more minutes to have gone down by another hill less dangerous. However, this chauffeur, with very little experience, commits the gross imprudence of going down by that way.

In my humble opinion, both parties have contributed to the accident, and it results that the judgment which dismissed the action entirely is erroneous.

In what proportion shall the responsibility be shared?

The imprudence of the driver could be called by a much stronger word; it is close to foolishness, stupidity and want of sense.

The respondent, which cannot get away here from its share of responsibility, has for excuse that the hill has existed for a long time, that accidents have been relatively few, because of its dangers. It is evident that those who know the hill must use it with great care; otherwise accidents would be frequent.

And the city was to a certain extent justified in thinking after all that things were not going too badly; but we cannot leave her under the impression that she does not owe more protection than she is giving to the public in the Cote de la Negresse.

The amount of $2,500 which is claimed would not be too large if the city was alone responsible, but the driver is to be more severely blamed.

I would grant $500 but with costs of the action taken in the Superior Court and in appeal.

[Appealed to the Supreme Court of Canada.]

JONES v. THOMPSON.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley, Harris and Chisholm, JJ. March 31, 1917.

JUSTICE OF THE PEACE (§ III—10)—JURISDICTION OF STIPENDIARY MAGISTRATE.

Under the Nova Scotia Statutes, as amended in 1905, ch. 11, sec. 3, a stipendiary magistrate for any of the municipalities within a county has jurisdiction anywhere within the limits of the county in all civil matters as to which two justices of the peace have jurisdiction, and in causes of action arising wholly outside his special municipality but within the county.

Statement.

APPEAL from the judgment of Forbes, Co.J., in an action before the stipendiary magistrate in and for the county of Lunenburg and the municipality of Lunenburg, on appeal from the judg-

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ment of the stipendiary magistrate in favour of plaintiff, allowing defendant's appeal and dismissing the action on the ground that the stipendiary magistrate had no jurisdiction to hear the case. Reversed.

S. A. Chesley, K.C., for appellant; *D. F. Matheson*, K.C., for respondent.

The judgment of the Court was delivered by

Chisholm, J.

CHISHOLM, J.:—The plaintiff sued the defendant for $73 before one P. McGuire, a stipendiary magistrate for the municipality of the district of Lunenburg, in the county of Lunenburg. In addition to being stipendiary magistrate for the said district, Mr. McGuire, as I gather from the case on appeal, was also a justice of the peace for the county of Lunenburg and signed the papers in the action both as stipendiary magistrate and as justice of the peace. The cause of action arose wholly within the town of Lunenburg and Mr. McGuire tried the action within the town.

The defendant objected to his jurisdiction to try the action in either capacity—as justice, because the claim was over $20 and should therefore be tried by two justices; and as stipendiary magistrate, because, while having the powers of two justices (R.S.N.S. 1900, ch. 33, sec. 5, and ch. 160, sec. 3), he had no jurisdiction in a case where the cause of action arose within the town. The plaintiff recovered judgment for the amount of his claim and the defendant appealed to the County Court for District No. 2. The County Court Judge gave effect to the contention of the defendant, allowed the appeal, and dismissed the plaintiff's action. From this decision the present appeal is asserted.

The town of Lunenburg was before its incorporation a part of the municipality of the district of Lunenburg.

The only point which arises for determination in this appeal is whether a stipendiary magistrate for a municipal district has authority to exercise his functions as such within an incorporated town in the said district in respect to a claim or cause of action arising wholly within the town.

Sec. 14 of ch. 33 of R.S.N.S. 1900, enables a stipendiary magistrate for a district to sit or hold his Court at any office or place in any city or incorporated town within the limits of the county in which is situated the municipality for which he is appointed, and to perform all judicial and ministerial acts at such

office or place. These functions he may perform in relation to causes of action arising outside of the town, in towns where the town Courts have exclusive jurisdiction within the limits of the town, R.S.N.S. 1900, ch. 159, sec. 65. The stipendiary magistrate had authority, therefore, to hold his Court as he did within the town of Lunenburg.

Turning to the cause of action a later statute was passed, which, in my view, puts the question raised in this case entirely at rest, namely, ch. 11 of the Acts of the Legislature of Nova Scotia for the year 1905. By sec. 3 of that statute it was enacted:—

> Subject to the provisions of sec. 65 of ch. 159 of the R.S. 1900, the Municipal Courts Act, every stipendiary magistrate shall have and exercise throughout the county in which is situated the city, incorporated town or municipal district for which he is appointed, all the powers, jurisdiction and authority conferred upon stipendiary magistrates by ch. 160 of the R.S. 1900, "Of civil procedure in justices' courts."

Sec. 65 of ch. 159, R.S.N.S. 1900, to the provisions of which the section above quoted is subject, gives the stipendiary magistrates of the towns therein named, of which the town of Lunenburg is not one, exclusive jurisdiction as to causes of action arising within the town. The stipendiary magistrate, before the passing of the amending section in 1905, had already the right to hold his Court in the town and to try claims arising anywhere in his district and outside the towns situated within that district. What then could have been the object of the amendment of the statute unless it were to enlarge the jurisdiction of the stipendiary magistrates so as to include claims arising in the towns? It must, I think, mean that or nothing. Two justices of the peace could have tried the action. They can try any action of debt not exceeding $80, providing the defendant resides in the county or the cause of action arose in the county. By the amendment it must have been intended to authorize stipendiary magistrates to do what two justices can do.

I am of opinion, both from the state of the law on the subject before ch. 11 of 1905 was passed, and from the express words of sec. 3 of that chapter, that a stipendiary magistrate appointed for any of the municipalities within the county, whether such municipality be a city, town or municipal district, can exercise all the powers of two justices of the peace throughout the whole county; or, as applies to the county of Lunenburg, that through-

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out all the municipalities which combined constitute the geographical area known as the county of Lunenburg, a stipendiary magistrate for any one of the municipal bodies can exercise his functions anywhere within the limits of the county in all civil matters as to which two justices of the peace have jurisdiction.

Mr. McGuire was therefore, in my opinion, fully authorized to adjudicate upon the claim of the plaintiff.

The appeal of the plaintiff must be allowed and the plaintiff will have judgment for his claim with costs in all the Courts.

Appeal allowed.

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LAKE CHAMPLAIN AND ST. LAWRENCE SHIP CANAL Co. v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. December 30, 1916.

CROWN (§ II—20)—APPROVAL OF PLANS—REFUSAL—LIABILITY.

Where the Act incorporating a company, for the purpose of constructing and operating a canal, provided that before the work of construction commenced, the plans, etc., were to be approved by the Governor-in-Council, the refusal of the Governor-in-Council to approve plans submitted does not give the company a claim for damages which could be enforced against the Crown.

Statement.

APPEAL from a judgment of the Exchequer Court of Canada, 16 Can. Ex. 125, dismissing the suppliant's petition of right. Affirmed.

By the petition of right the appellant company claimed damages for failure of the enterprise authorized by the Act of Parliament, 61 Vict., ch. 107, owing to the refusal or omission of the Governor-in-Council to approve the plans submitted. The only question dealt with by the Exchequer Court was whether or not such refusal entitled the company to claim damages and, holding that it did not, the Court dismissed the petition.

Brosseau, K.C., and *R. V. Sinclair*, K.C., for appellants.

Newcombe, K.C., Deputy Minister of Justice, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:— (dissenting).— From the reasons for judgment of Cassels, J., it appears that counsel for the suppliant and for the Crown came to an understanding that "the question of law" should be first argued. If there was any written consent to this course it is not in the record and I suppose the learned Judge was therefore right in saying that the question was as to whether or not on the allegations in the petition the suppliant was entitled to succeed. It is a demurrer to the petition of right.

Now I entertain no doubt that the statute 61 Vict., ch. 107, made a good and valid grant to the suppliant of the rights in respect of which the claim is advanced. The condition that the approval of the plans by the Governor-in-Council should be obtained before the works were commenced was a purely administrative matter. By this I mean that there was committed to the Governor-in-Council no power to consider the policy or advisability of the grant, that being a question which parliament had undertaken to decide for itself. Parliament did not, as it often does, authorize the Governor-in-Council to take such action as he might think fit, leaving it to him to consider the matter and decide whether to make the grant or not. He has therefore no power to nullify the grant or in effect repeal the statute by an arbitrary refusal to exercise the power of approving the plans which for the proper carrying out of the works parliament in the public interest has vested in him. It is said in the statement of defence that His Majesty did not refuse to approve the plans

and if His Majesty did refuse such approval, the refusal proceeded upon high political grounds of public policy which were committed to the consideration of the responsible advisers of His Majesty.

I do not think the statute committed anything of the sort to His Majesty's advisers.

I cannot doubt that the grant made by the statute is in the nature of a contract and it is one of the highest order, His Majesty, in the words of the statute, granting by and with the advice and consent of the Senate and House of Commons.

The provision for approval of the plans is a common one in such cases; it has reference only to the way in which the rights granted are exercised; the works proposed to be carried out must be reasonably suitable and proper and not opposed to public interests.

It is scarcely necessary to refer to cases in which such a provision as this is to be found. The approval is sometimes confided to the Governor-in-Council and at others to the heads of government departments especially concerned or others. The general Railway Act is an instance. By secs. 157-159 the company have first to submit to the Minister of Railways and Canals a map and information as therein mentioned for his approval, and after that has been obtained to deposit with the Board of Railway Commissioners a plan, profile and book of reference for their sanction;

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in sec. 168 there is the like provision that the company shall not commence the construction of the railway until such sanction has been obtained as in the statute with which we are here concerned.

The Minister of Railways or the Board may be of opinion that the railway is not wanted, is even objectionable, it may parallel another railway so as to render it impossible for either to be successfully operated, but they cannot by refusing their approval of the plans prevent the construction of the railway which parliament has authorized.

We may usefully compare the provision in this case with sec. 7 of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, which provides that

> the local authority, company or person proposing to construct any work in navigable waters, for which no sufficient sanction otherwise exists, may deposit plans thereof . . . and may apply to the Governor-in-Council for approval thereof.

Under this section the Governor-in-Council might be in a different position with regard to giving or withholding his approval of the plans according as he might think the proposed work desirable or not.

Counsel for the respondent has urged that the Crown is not mentioned in the statute and therefore by sec. 16 of the Interpretation Act is not bound. I do not think this section of the Interpretation Act has any application in such case; the section deals solely with the *rights* of His Majesty which, it provides, shall not be affected by any Act unless it is expressly stated therein that His Majesty shall be bound thereby. In the respondent's factum the Governor-in-Council is spoken of as the responsible adviser of His Majesty's Government for the Dominion of Canada, but I think this is rather absurd. The Governor-in-Council is the Governor-General acting with the advice of the Privy Council for Canada. This is the only Government of Canada I know of and it would therefore seem that the Governor-in-Council must be his own responsible adviser, I do not know who else he can be said to advise. I certainly think that the Governor-in-Council must here be considered as meaning the same thing as the Crown. The Governor-General carries on the Government of Canada on behalf of and in the name of the Sovereign (the Interpretation Act, sec. 34, pars. (6) and (7)). If this were an English statute, we should have a grant by the King in Parliament subject to the approval of the plans by the King in Council.

Then I think that the King in Parliament having made this contract was bound to carry it out and to act with reference to the condition in accordance with the purpose thereof which certainly was not to destroy the grant; the advisers of the Governor-in-Council should rather in good faith have facilitated than opposed the undertaking.

This Court could not undertake to review any decision at which the Governor-in-Council in the exercise of his discretion might arrive or weigh the reasons for the same. It is, however, another thing, that he should neglect or refuse to exercise the power of control reserved to him.

In the statement of defence the Attorney-General has pleaded a number of inconsistent defences as of course he was entitled to do, but in par. 9 he alleges that

> The suppliant did not submit to the Governor-in-Council for approval any plans, locations, dimensions or necessary particulars of the canals and works described or authorized to be constructed by the said statute, ch. 107 of 1898, nor were any such plans, locations, dimensions or particulars submitted for the approval of the Governor-in-Council.

Now this, assuming the facts alleged in the petition, is quite incompatible with there having been any exercise by the Governor-in-Council of the discretionary power reserved to him by parliament.

For the purposes of the present proceedings, however, we can only look for the facts to the allegations in the petition of right and it is in par. 14 alleged that the Crown without any reason has refused approval. It may be as the Judge of the Exchequer Court says that this may mean without any reasons furnished to the suppliant, but I do not think this makes any difference. It may be that any defect in or objection to the plans could easily have been remedied or overcome and the suppliants were certainly entitled to have an opportunity of making such alterations.

If it was not to the mode of carrying out the works but to the undertaking being proceeded with at all, that there was objection, that, as I have said, was not a matter within the power of the Governor-in-Council at all. The Judge of the Exchequer Court says:—

> The Crown certainly would not be liable for the tort or wrong of the Governor-in-Council. It is too clear for argument that the Crown is not liable for damages in tort.

Whilst there is no question that in England the Crown is not liable,

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I am not sure that the doctrine is applicable so strictly in this country. We have the authority of the Judicial Committee in the case of *Farnell* v. *Bowman*, 12 App. Cas. 643, for saying that if the maxim "The King can do no wrong" were always applied to colonial governments, it would work much greater hardship than it does in England. It was said in the judgment:—

> Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown.

Fitzpatrick, C.J.

In such a case as the present I think the Courts may well be disposed to lean in favour of affording relief to the suppliant.

That the claim is a meritorious one, seems clear. It would surely be an injustice if the suppliants after incurring large expenditures on the faith of a parliamentary grant were to be deprived of all their rights not through any defect in their plans but because the government did not approve of the undertaking and dissenting from the decision of parliament could by withholding approval of the plans prevent altogether the carrying out of the works.

If necessary, I should be prepared to hold that the suppliant is entitled to claim under sec. 20, par. (*d*), of the Exchequer Court Act which gives to the Court jurisdiction over

> every claim against the Crown arising under any law of Canada or any regulation made by the Governor-in-Council.

I am of opinion that the allegations in the petition disclose a good ground of action and the appeal should be allowed.

Idington, J.

IDINGTON, J.:—The appellant was incorporated by parliament, but, so far from giving its creature any right to complain, it only gave a right to prosecute its proposed undertaking as the Governor-in-Council might, as a matter of public policy, see fit to approve of either as to location or dimensions or plans of construction.

Sec. 22 of the Incorporation Act, which is clear and explicit in these regards, is as follows:—

> Before the company shall break ground or commence the construction of any of the canals or works hereby authorized, the plans, locations, dimensions, and all necessary particulars of such canals and works shall be submitted to and approved by the Governor-in-Council.

It seems idle to contend that such a conditional proposal as parliament has sanctioned thereby constitutes a contract. And it seems equally absurd to contend that the Governor-in-Council

entrusted by parliament with such a duty can be said to have committed a tort of any kind, much less a tort for or in respect of which a petition of right would lie, in discharging the duty thus assigned by withholding the approval sought by appellant.

The case thus presented falls very far short of coming within the scope of any of the decisions relied upon by appellant or the principles upon which any of them proceeded.

The appeal should be dismissed with costs.

DUFF, J.:—The suppliant company was incorporated in 1898 (61 Vict. ch. 107) with authority to construct a ship canal between the St. Lawrence and the Richelieu Rivers and by sec. 22 of its special Act it was enacted:—

Before the company shall break ground or commence the construction of any of the canals or works hereby authorized, the plans, locations, dimensions and all necessary particulars of all such canals and works shall be submitted to and approved by the Governor-in-Council.

The relevant allegations of the petition are those numbered 10 to 14 inclusively; they are as follows:—

10. That on or about the 30th of May, 1911, the plans, locations, dimensions and all necessary particulars of such canals and works were submitted to be approved by the Governor-in-Council, and duplicates of the same were deposited with the Department of Railways and Canals and the Department of Public Works in Ottawa.

11. That since the 30th of May, 1911, your suppliant has repeatedly requested the approval of the plans by the Governor-in-Council.

12. That all informations requested by the Department of Railways and Canals and the Department of Public Works in Ottawa have been duly furnished.

13. That in granting a charter to your suppliant for the construction of said canal, the Crown took the engagement and obligation to approve the plans made in conformity with the charter.

14. That the plans, locations, dimension and all necessary particulars for such canals and works were made in conformity with the requirements of the Secretary of War of the United States, and, notwithstanding the repeated and incessant request of your suppliant for approval, the Crown, without any reason, has refused to do so.

By the statement of the defence in par. 12 an objection was taken that the alleged refusal of the Governor-in-Council to approve the suppliant's plans

does not constitute a cause of action for which a petition of right will lie against His Majesty.

The point of law raised by this objection was argued on the first day of the trial and being decided adversely to the suppliant by the learned Judge of the Exchequer Court, no evidence was given.

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The allegations of the petition are ambiguous; and, strictly in accordance with the settled rule for the construction of pleadings, they should be construed against the suppliant. The suppliant's case must be taken on the pleadings so construed to rest upon an allegation that the Governor-in-Council has refused to approve plans submitted which ought to have been approved because they were sufficient and satisfactory. It requires no argument to shew that such an allegation if well founded would afford no ground of action against either His Majesty or the Governor-in-Council; it could not be argued that a decision of the Governor-in-Council not to approve plans submitted under sec. 22 is open to review in the Courts.

The decision in the Privy Council in *McLean* v. *The King*, July 10, 1908, is a sufficient authority for holding that the question of the sufficiency of the allegations in a petition of right to disclose a cause of action, ought not to be disposed of as a preliminary question of law on a narrowly technical construction of a badly framed pleading but that for the purpose of such a question the suppliant should be held to be entitled to prove any cause of action disclosed upon any reasonable construction of the pleading. This appeal ought, I think, to be decided on the assumption that the pleading contains an allegation that the suppliant duly submitted its plans for the approval of the Governor-in-Council, but that the Governor-in-Council refused and refuses to exercise its authority under sec. 22 to consider such plans. The question to be determined therefore is whether such allegation is sufficient to support the suppliant's claim by petition of right against His Majesty.

The question of substance argued before us was whether it can be affirmed that the enactment under consideration gives rise to a duty to the suppliant which (in the language of Cockburn, C.J., in *The Queen* v. *The Lords Commissioners of the Treasury*, L.R. 7 Q.B. 388): "has to be performed by the Crown;" but assuming such a duty to be created the first point which naturally occurs to one is, does a petition of right lie against His Majesty for the recovery of unliquidated damages arising from the non-performance of that duty? I do not intend to decide the point because I do not understand the objection to be taken by counsel for the Crown who with fairness and candour, when the difficulty was

mentioned, referred to sec. 20 (*d*) of the Exchequer Court Act; I do not think it is within the province of the Court to insist in such proceedings upon technical objections which counsel representing the Crown does not (and quite properly) consider it to be his duty to raise. (*Dyson* v. *Attorney-General*, [1911] 1 K.B. 410.)

Does sec. 22 then give rise to a duty that "has to be performed by the Crown," which is a duty to the suppliant of such a nature as to be capable of vindication in His Majesty's Courts? The suppliant's argument might in outline be stated in this way. The special Act is a contract between parliament (the King in Parliament) and the promoters; sec. 22 imposes a condition with which the appellant is bound to comply in order to avail itself effectively of the rights assured to it by this legislative contract and the performance of that condition (getting its plans approved by the Governor-in-Council) being impossible without concurrent action by the Crown represented by the Governor-in-Council in considering the plans submitted for approval, the obligation is, on a familiar principle (*Mackay* v. *Dick*, 6 App. Cas. 251, at 263), undertaken by the Crown to do that which is necessary to be done in order to enable the suppliant to fulfil the condition upon which its rights depend.

It should be observed that His Majesty is not mentioned *eo nomine* in sec. 22, the provision upon which this argument rests; and it is sometimes not easy to ascertain where powers are by statute vested in a minister of the Crown whether the depositary of the powers is thereby constituted the "agent" of the legislature (see the argument of Sir George Jessel, L.R. 7 Q.B., at p. 389) to exercise those powers, an instance of that being *Re Massey Manufacturing Co.*, 13 A.R. Ont. 446; see also *Irwin* v. *Gray*, 3 F. & F. 635, and *Fulton* v. *Norton*, [1908] A.C. 451; or whether the powers are vested in the Crown to be exercised through the instrumentality of the minister, in other words, whether or not the legislature has named the donee of the power in his capacity of servant of the Crown. (See an interesting discussion in Maitland's Constitutional History, p. 415 *et seq.*, and Lowell Government of England, vol. 1, pp. 48 and 49.) So here there might no doubt be room for an entertaining argument upon the point whether the authority to examine and approve under sec. 22 is an authority vested in His

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Majesty to be exercised by the Governor-in-Council, or an authority vested in the Governor-in-Council as "agent" of parliament. The reasons which have led me to a conclusion adverse to the appellant's contention would apply with equal force in either view; and I shall assume in favour of the appellant that the authority given by sec. 22 is given to His Majesty, the Governor-General being the representative of His Majesty for exercising the powers conferred on the advice of His Majesty's Privy Council for Canada.

Now, I am far from saying (where a contract between the Crown and a subject conditionally confers upon the subject rights which become absolute only upon the performance of some act on the part of the Crown) that the principle of *Mackay* v. *Dick*, 6 App. Cas. 251, and *Pordage* v. *Cole*, 1 Wms. Saun. 548, may not in a proper case come into play; but in considering whether an implied obligation is laid upon the Crown under a written contract the constitutional relation between the Crown and parliament and the exigencies of the public service may be the determining elements of the controversy (see *Churchwood* v. *The Queen*, L.R. 1 Q.B. 173, at 199 and 200). Although it is a common practice for some purposes to read the provisions of Acts of Parliament such as that before us as if they were stipulations in a contract between the promoters on the one hand and parliament as representing the public and particular individuals who may be affected, on the other hand, it is necessary sometimes, nevertheless, for the sake of accuracy, to insist upon the fact that such statutes are not contracts. As Lord Watson said in *Davis* v. *Taff Vale R. Co.*, [1895] A.C. 542, at 552,

> Such statutes differ from private stipulations in this essential respect that they derive their existence and their force not from agreement of the parties, but from the will of the legislature.

Though speaking broadly the promoters may be deemed to undertake in effect that "they shall do and submit to whatever the legislature empowers and compels them to do;" Lord Eldon in *Blakemore* v. *Glamorganshire Canal Navigation*, 1 My. & K. 154, at 162; still "though commonly so spoken of Railway Acts are not contracts and ought not to be construed as such." (Court of Exchequer Chambers, *York and North Midland R. Co.* v. *The Queen*, 1 E. & B. 858, at 864); Parke and Creswell, JJ., were members of the Court of nine who delivered the judgment in which

this sentence occurs. The statute before us confers, conditionally of course, upon the suppliant company wide powers which in their exercise must necessarily in some instances affect the rights of all His Majesty's subjects, and in others the rights of particular individuals. The statute imposes upon the promoters no obligation to go on with the undertaking and no contract on their part to exercise the powers which are given to them in words that are permissive only, ought to be implied. *York and North Midland R. Co.* v. *The Queen*, 1 E. & B. 858. I think there is no authority which goes the length of requiring me to hold and I know of no principle that would justify me in holding in these circumstances that sec. 22 ought to be given exactly the same construction and effect as if it were a term of a contract between the Crown and the promoters.

Regarding, then, the relevant provisions of the statute as legislative enactments simply from the point of view of the Crown, is there anything in sec. 22, when read either alone or with the other provisions of the statute, that has the effect of creating a juridical obligation which inheres in the suppliant and the incidence of which rests upon either His Majesty or the Governor-in-Council? Sec. 22, as I have already said, involves no doubt a grant of power to examine and either to approve or to reject; but is a duty to the suppliant to exercise the power also created cognizable by His Majesty's Courts? In *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214, there was much discussion by the great lawyers who decided the appeal upon the subject of the indicia which may be considered to point to the conclusion that a grant of authority by the legislature is coupled with a duty to exercise that authority. We need not, for the purposes of this appeal, follow the discussion closely. At p. 235 Lord Selborne observes with regard to the question before the House—whether there was an enforceable duty to exercise a power admittedly conferred—that

> in general, it is to be solved from the context from the particular provisions, or from the general scope and objects, of the enactment conferring the power.

And he adds:—

> The present question is, whether it can be shewn, from any particular words or provisions of the Church Discipline Act, or from the general scope and objects of that statute

that such a duty had in fact been created. The observations of Lord Cairns at pages 225 and 227, and of Lord Penzance at pages 229, 230, 231 and 232, shew that the question of duty or no duty

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was considered to be governed and determined by the answer to the question thus put by Lord Selborne. So the question to be answered on this appeal is whether from the language, scope and objects of this enactment an intention to create a duty in the sense above indicated can properly be inferred.

It may be noted that legislation investing the Governor-in-Council with special powers ought to be considered with reference to the well-known practice in this country, that is to say, that the council by whose advice in the passing of orders in council the Governor-General acts invariably, is composed exclusively of members of the government for the time being, the Governor-in-Council being therefore *de facto* the responsible executive.

My conclusion is, that the body in whom the power is reposed being the executive directly responsible to parliament, and there being such remedy for grievances of persons alleging non-execution of powers by the executive as the existence of this responsibility entails, one cannot from the fact itself of the power being given legitimately infer that a legal obligation is imposed on the Governor-in-Council (either as representing His Majesty or otherwise) in favour of the persons interested in having the powers exercised. I am unable to convince myself, apart altogether from anything to be found in the Interpretation Act, that such an inference could be said to be necessary, and it appears to me that such an obligation ought not to be held to be imposed upon either His Majesty or the Governor-in-Council unless either one finds express words creating it, or the intention to do so is necessarily implied in the provisions of the enactment to be construed.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The facts of this case and the grounds of the suppliant's claim sufficiently appear in the judgment of the learned Judge of the Exchequer Court. With him I am unable to find in the appellant company's Act of Incorporation (61 Vict., ch. 107) a contract by the Crown, for breach of which it would be liable in damages, that the Governor-in-Council would approve of plans of its projected works prepared in conformity with the powers conferred on it. The company's privilege or franchise is granted subject to the condition that before exercising its power it shall obtain the approval of the plans for its works by the Governor-in-Council. With that condition it has been unable to comply—by

reason, as it alleges, of the refusal of the Governor-in-Council to approve plans submitted by it. It complains that the powers conferred by its "charter" have consequently lapsed entailing a loss of $5,000,000 which it seeks to recover from the Crown by a petition of right.

If there was such a refusal of approval, according to the statement of defence of the Attorney-General, it was based not upon a consideration of the plans disclosing that the projected works were not within the authorization of the statute or that the method of construction proposed was either defective or otherwise objectionable, but "upon high political grounds of public policy which were committed to the consideration of the responsible advisers of His Majesty."

The Attorney-General submits that the Exchequer Court

> has no jurisdiction to adjudicate upon the quality of the decision of the Governor-in-Council in the execution of a statutory power conferred in the public interest.

If the statement that any refusal of approval of plans that there may have been "proceeded upon high political grounds of public policy" means that in so refusing approval the Governor-in-Council assumed to exercise a discretionary power to determine that it was not in the public interest that the appellants' undertaking, authorized by parliament, should be proceeded with, I can only say that I have failed to find in the statute anything which confers such a discretion upon the Governor-in-Council or which warrants withholding on such a ground approval of plans duly submitted. Sec. 22, invoked by the respondent, in my opinion does not bear the construction which counsel representing the Attorney-General sought to give to it. The company's right to exercise certain special powers conferred on it, such as improving, widening, deepening and straightening the Richelieu River and the Chambly Canal (sec. 20), and the taking of the Chambly Canal, or any lock, dam, slide, boom, bridge or other works, the property of the Government of Canada (sec. 22), is expressly made subject to the consent of the Governor-in-Council, and, in the case of an appropriation of any such public works, to terms to be agreed upon between the company and the Government. It is alleged in par. 16 of the statement of defence that the company's plans as submitted involved the exercise of these special powers. But this is denied in the suppliant's reply and in dealing with the question of

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law now before us the truth of that denial must be assumed. If it were not abundantly clear from the terms in which sec. 22 itself is couched, as I think it is, that it was not meant thereby to vest in the Governor-in-Council a discretionary power entirely to prevent the prosecution of the suppliant's undertaking by refusing on grounds of public policy to approve of plans duly submitted by them, which had been prepared in conformity with the statute and in compliance with all proper requirements, any possible doubt on that point would be removed by a comparison of those terms with the explicit provision made by parliament in secs. 20 and 21 in regard to matters as to which it was intended that the Governor-in-Council should exercise such control over the exercise of the company's powers.

But assuming that by sec. 22 parliament meant to impose on the Governor-in-Council the duty of approving plans submitted to it for works authorized by the statute, prepared in conformity with any pertinent regulations or requirements of the Department of Railways and Canals or of the Governor-in-Council and such that any public interest in regard to the location of the works and the mode of their construction would be fully protected, it does not at all follow that it was intended that, upon failure to discharge that duty, the Governor-in-Council should be amenable to process in the Exchequer Court, still less that the Crown should be answerable to the company in damages. Assuming both the duty and its breach, the Governor-in-Council is, in my opinion, answerable therefor only to parliament, which can afford an adequate and effective remedy to the suppliants should "the high grounds of public policy" upon which the Governor-in-Council may have proceeded not commend themselves to it and should it find that its will has been thwarted by the refusal or failure to approve of the suppliants' plans. It seems to me to be contrary to our conception of responsible government that the action of the executive department in such a matter as this should be subject directly or indirectly to the control of the Courts.

Brodeur, J.

BRODEUR, J. (dissenting):—I am of opinion that this appeal should be allowed for the reasons given by the Chief Justice.

Appeal dismissed.

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Quebec King's Bench, Trenholme, Lavergne, Cross, Carroll and Pelletier, JJ. November 6, 1916.

COPYRIGHT (§ I—8)—INFRINGEMENT—FOREIGN AUTHORS—CONFLICT OF LAWS—BERNE CONVENTION.

The Berne Convention (1886, 49-50 Vict., ch. 33) and the Imperial copyright statutes for the protection of the rights of foreign authors and playwrights are in force in Canada, and a foreign author has the right to sue here for the statutory penalties for any infringement of his rights and may bring the action in his own name though a member of a society of authors; an unauthorized representation of a play in a moving picture hall instead of a regular theatre constitutes an infringement.

Statement.

APPEAL from the judgment of Monet, J., Superior Court, dismissing an action to recover damages for the infringement of a copyright. Reversed.

C. Rodier, K.C., for appellant; *A. Papineau Mathieu*, for respondent.

Carroll, J.

CARROLL, J.:—The appellant, Joubert, is a publisher of music and of dramas in Paris. He is the proprietor, amongst others, of 14 one-act comedies, the titles of which are mentioned in his action.

He complains: (1) That the respondents did without authorisation represent those plays in Montreal at certain dates which he gives; (2) That those plays were not represented by them under the names of their authors; (3) That three of the said plays were represented under false titles.

On the first ground, Joubert claims 40 shillings or $10 for each representation, *i.e.*, $840. On the second ground, he claims $50 for each of the plays represented, *i.e.*, $700. On the third ground, he claims $100 for each of the plays the title of which was changed, *i.e.* $300,—which amounts to a total of $1,840.

The respondents (defendants) have produced a plea of general denial.

The main allegations of the action were proved but the demand of Joubert was dismissed in first instance (Monet, J.) on the main ground that, being a member of the "Société des auteurs, compositeurs et éditeurs de musique" of Paris he had no status to bring a suit and that the Society alone could enforce his rights.

Two additional grounds support the judgment of first instance: (1) There are no rights of authors that can be infringed in a moving-picture hall, such not being a theatre in the true sense of the word: (2) The respondents acted in good faith. None of those grounds seem to me to be well founded.

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First, on the question of procedure, I believe that Joubert, although a member of the "Société des auteurs, compositeurs et éditeurs de musique," could bring a suit in his own name for the violation of rights of which he is the only incumbent. When the present case has been finally decided on the merits, there will be "chose jugée" with regard to the Society as well as between Joubert and Géracimo.

There are in France three associations organized for the purpose of looking after the interests of the authors: they are the "Société des gens de lettres," the "Société des auteurs et compositeurs dramatiques" and the "Société des auteurs, compositeurs et éditeurs de musique."

Those societies are not the assignees of the copyrights of their members. Each one only exercises, in its special sphere of action, a mandatory function. They are collection agencies for copyrights and for the subsequent distribution of those rights in accordance with conditions fixed by their respective by-laws.

It is in that light that those three societies were looked at by the French tribunals which were called upon to study their statutes.

Considering (says the Court of Appeal of Paris), that the statutes of the Société des gens de lettres have for their sole object to constitute an agency the purpose of which is to look after the rights of the interested parties and have them respected in the many circumstances when individual vigilance would be impossible, or at least very difficult . . .

But considering that it in no way ensues that the adherents to the statutes of the society have abandoned their rights in their works to vest them in the association. *Société des gens de lettres* v. *Rousse*, Sirey, 72, 2, 167.

The affiliation of a writer with the Société des auteurs dramatiques (says the Court of Appeal at Rouen) does not deprive him of the ownership of the plays which he writes, nor of the right to conclude with the directors of shows treaties relating to the representation of those plays, the purpose of that society being the collection of the rights of authors and the putting in common of part of those rights. *Briet* v. *Carre*, Sirey, 66, 2, 138.

One (says the tribunal at Caen) who becomes a member of the "Société des auteurs, compositeurs et éditeurs de musique," does not adbicate his direct right of action against the counterfeiters. De Choudens, Ann. prop. ind., 1889, p. 109.

There is very little uncertainty in the jurisprudence when, in the special case of conflict between one of those societies and any of its members there has to be established a priority of powers in connection with the authorisation or interdiction of certain dramatic representations or certain reproductions of texts, but, in the present case, where the action is brought against a third party

from whom an indemnity is claimed for non-authorised representations, it does not seem to me to be doubtful that Joubert had the necessary legal capacity personally to become plaintiff. Moreover, had the action been brought through the "Société des auteurs, compositeurs et éditeurs de musique," Joubert would have been in it just the same as plaintiff. This is the purport of art. 19 of the by-laws, which reads as follows:—

Each of the members of the society, by his adhesion to the statutes, grants to the administration committee all necessary powers to bring in his own name, at his request, but at the costs of the society: 1. Any suit which he might personally have to sustain against third parties because of the public representation of his works and of the copyright in connection with those works.

It is true that by virtue of arts. 9, 10, and 11 of the same statutes an apportionment of the sums collected is provided for *pro rata* according to the rights of everybody. But how could those clauses take from an author or a publisher the right to claim in justice what is due to him? When the amount of the rights has been collected, it will be a matter for settlement of accounts between the plaintiff and the other associates. In a word, an author or a publisher gives a mandate to a society for the collection of his rights, but that mandate does not prevent the principal acting in lieu of his agent.

On the second ground, *i.e.* that the performances did not take place in a theatre proper, but in a moving picture hall, I do not believe that the recovery of the rights of an author can be refused because dramatic performances took place in a moving picture hall instead of in an ordinary theatre. It is the representation of the play that is forbidden. Whether the play is represented in a large theatre hall, in a music hall, or even in open air, if the representation is not authorised, there is an offence and at law the author or his legatee may claim damages.

The third ground of the judgment of first instance is the supposed good faith of the defendants. I do not find any trace of good faith in the evidence on record. In his evidence, F. Delville, stage manager for Geracimo, admits that the plays in question in this case have been represented after booklets having on their covers, with the name of the publisher Joubert, this note:—"All rights of translation, reproduction and representations reserved for all countries."

Not only no attention was paid to such formal reservation of all rights, but on the posters, all names of authors have been

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systematically suppressed and the titles of some plays have also been changed. Moreover, supposing that there was good faith on the part of the respondents, that would not constitute, in a case like this, a bar to the action. The responsibility of the respondents comes from the law.

Those three preliminary grounds of defence being set aside, let us examine the case on the merits.

The proprietary titles of the plaintiff are on record. They were brought at great cost. Joubert is a French subject, under the jurisdiction therefore of one of the countries which formed what is called the International Union for the protection of literary and artistic works. The plenipotentiaries of those different countries, on September 9, 1886, signed a treaty known as the Berne Convention. England's signature affixed to that international treaty for itself and its colonies binds Canada. On this point there is a decision of this Court rendered about 10 years ago: *Hubert* v. *Mary*, 15 Que. K.B. 381.

We must therefore consider as settled law that French authors are entitled to collect duties in Canada. But the means provided somewhat resemble a labyrinth. The British Parliament, instead of ratifying by a simple declaration, as had been done by the other countries, the draft of the treaty prepared at Berne in 1885, passed a statute reproducing the main clauses of that draft, modified at the same time the law of copyright as far as colonies were concerned, then in such an already complicated legislation inserted the statute of an international character of 1852, and a statute of the same kind of 1844 which refers to a national law of 1842 which has itself its complement in a law of 1833. And it is through all this confusion of diffuse legislative texts that one has to go to get at the solution of the legal problem set forth by Joubert's attorney when he tells us in his action:—The plaintiff is entitled to claim $10 for each non-authorised representation of his plays.

The Judges of this Court are all agreed on two points: the right of Joubert to appear himself in Court to recover the copyright of which he is the legatee and the validity of the Berne Convention in Canada.

There is dissension only on the interpretation of part of the law of 1886, *i.e.*, whether under such British legislation Joubert is entitled to the minimum statutory indemnity (40 shillings) which

he claims for each non-authorised representation of his plays or whether the damage resulting to him from that score must be entirely left to our personal appreciation.

Our colleague, Pelletier, J., thinks that the Canadian Courts have a sovereign power to weigh the damages and fix them on the 3 grounds at the base of Joubert's claim: violation of the right of representation, suppression of the names of the authors and changing the titles of some plays.

The majority of the Court, on the contrary, is of opinion that our discretionary power as to the amount of damages that can be granted is limited to the two last mentioned grievances of the plaintiff: suppression of the names of the authors and changing the titles and that as to the violation of the right of representation we must not grant less than 40 shillings for each non-authorised representation, though we could, if there were any reason for it, grant more.

> The offender shall be liable for each and every such representation to the payment of an amount not less than 40 shillings, or to the full amount of the benefit or advantage arising from such representation.

That law of 1833 is the last ring of a chain which we now have to unroll to make intelligible the conclusion we arrived at.

First let us say that the coming into force of the law ratifying the Berne Convention was dependent upon the adoption of an Imperial order-in-council. That order-in-council was signed on November 28, 1887.

Art. 1 of the statute of 1886 says, par. 3:—

> This Act and the International Copyright Act shall be construed together, and may be cited together as the International Copyright Acts, 1844 to 1886.

Art. 9 enacts that in the absence of an order-in-council to the contrary—and it is a known fact that such order-in-council was never passed in England—"The International Copyright Acts and this Act shall apply to every British possession as if it were part of the United Kingdom."

After beginning to lay the foundation of his right on that law of 1886 as the main basis, Joubert, ignoring the law of 1852 (15-16 Vict. ch. 12) which concerns only translations, goes directly to the law of 1844 (7-8 Vict. ch. 12) which says:—

> It shall be lawful for Her Majesty to direct that the authors of dramatic pieces and musical compositions which shall be first publicly represented or performed in any foreign country shall have the sole liberty of representing or performing in any part of the British Dominions such dramatic pieces and musical compositions, and the enactments of the Dramatic Literary

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Property Act and of the Copyright Amendment Act shall apply to and be in force, in respect of the said dramatic pieces and musical compositions, in such and the same manner as if such dramatic pieces and musical compositions had been first publicly represented and performed in the British Dominions.

Then from that law of 1844 we are referred to the Copyright Amendment Act of 1842 (5-6 Vict. ch. 45) which tells us that playwrights and compositors of music, whose rights are protected in England and its colonies

shall have and enjoy the remedies given and provided in the Act of 3-4 Wm. IV. as fully as if the same were re-enacted in this Act.

Finally we get at the law of 1833, called Dramatic Literary Property Act, containing the promised sanction in the following terms:—

The offender (*i.e.*, the one representing or causing to be represented a play without the written consent of the authors or his legatees) shall be liable for each and every representation to the payment of an amount not less than 40 shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered by such authors or other proprietors, in any Court having jurisdiction in such cases in that part of the said Kingdom United or of the British Dominions in which the offence shall be committed.

Such is the nature of the legislation under which Joubert brings before us his claim. England having adhered to the Berne Convention in rather complicated and, we may say, "far reaching" terms, the juridical situation had to be looked at as it emerges from a mass of statutes in connection with copyright covering a period of more than half a century.

Our conclusion is that Joubert's claim is well founded at law.

Now, as to the ground of dissension I referred to:—In opposition to the opinion of the majority of the Court on the granting of 40 shillings for each non-authorised representation, it is said: Joubert being a foreigner, he cannot escape the laws having an international character and he is not entitled to a minimum indemnity of 40 shillings because the international laws of 1886 and of 1844 do not mention those 40 shillings.

The objection would be a serious one if there had not been a co-ordination, first between the law of 1886 and the law of 1844, then between the law of 1844 and those passed in 1842 and 1833. The law of 1844, referring to provisions printed in the statutes of 1842 and 1833, enacts that such provisions (up to that time applicable only to British subjects) shall in the future apply to foreign authors:—

The enactment of the Copyright Amendment Act (1842) and of the Dramatic Literary Property Act (1833) shall apply in such and the same manner as if the dramatic pieces and musical compositions had been first publicly represented and performed in the British Dominions.

By so connecting the international law of 1844 with the national laws of 1842 and 1833, the benefit of British legislation is assured to the foreigners. And all codes contain such references used to avoid repetitions in the texts. In that there is nothing contrary to the ordinary economy of legislation. It would be useless to answer: But the benefit of the English law assured to foreign playwrights by the enactments of 1842 and 1833 does not exist any more: the law concerning copyright adopted by the English parliament in 1911 abrogated the statutes of 1842 and 1833.

The claim that a foreign playwright wronged in Canada cannot go to the English statutes of 1842 and 1833 for the precise formula of the remedy provided by the International law of 1844, that claim, I say, will be of some value only when those statutes of 1842 and 1833 have ceased to be in force here. Then, to-day, they are still in force in Canada, both by virtue of their own respective text and by virtue of the Imperial Copyright Act of 1911, which, after abrogating them, in so far as England is concerned, proceeds to declare that they shall continue to apply to autonomous colonies as long as the latter have not renounced them by adopting, with or without modification as to procedure and sanctions, that new Imperial enactment. Then, it is a well-known fact, that Canada did not accept as law the text of the Copyright Act of 1911 which came into force in England on July 1, 1912.

But it is added: Supposing the English laws of 1842 and of 1833 are still in force in Canada, they can be invoked here only by an English author, for, as a consequence of a classification of statutes appearing in the Act ratifying the Berne Convention, the laws of 1842 and 1833 have lost every international bearing: schedule 2 of the law of 1886 puts them under the heading: "Copyright Acts," which do not apply to foreigners, so that Joubert cannot have the benefit of them.

I do not see how schedules 1 and 2 of the statute of 1866 can affect the basis of anterior legislation and deprive the laws of 1842 and 1833 of the international character conferred upon them by the law of 1844. Those two schedules are a mere nomencla-

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ture, for the purpose, according to the very text establishing it (sec. 1 (2)), of facilitating references by grouping in two categories and under the respective titles of International Copyright Acts and of Copyright Acts several previous statutes concerning copyright.

It is also claimed that, according to art. 8 of the law of 1886, the Copyright Acts are in force in the colonies only in specified cases differing from the one we are now considering.

The fact that the cases foreseen by art. 8 of the law of 1886 differ from Joubert's case is of no importance in the present action, because Joubert does not prosecute under art. 8. He proceeds under art. 9, and art. 8 cannot prevent him from proceeding under art. 9. As I said above, one must not lose sight of the complex character of the law of 1886 entitled: An Act to amend the Law respecting International and Colonial Copyright. Then the clause has in view the case of a colonial author and grants him the enjoyment, in England, of privileges which he did not have before—exemption, as an example, from registration and deposit. Clause 8 widens the rights of colonial authors, without, because of that, narrowing those of foreign authors.

But, we are told as a last objection: Conceding that the laws of 1886, 1844, 1842 and 1833 can be invoked in the present case by Joubert, those laws are only attributive of the law of copyright and the enforcement of them must be restricted to such measures as may prevent violation of copyright. So, Joubert might have obtained a writ of injunction to prevent the representation of his plays, but as soon as his right has been violated, the sanction in connection with such violation depends solely upon Canadian law both under the B.N.A. Act, which gives to the Federal Parliament the right to exclusively enact laws relating to copyright, and under the Berne Convention, which left with every signatory country the task of punishing the offenders.

In the case of *Hubert* v. *Mary* (15 Que. K.B. 381), this Court pronounced on the range of sec. 91 (23) of the B.N.A. Act: it then decided that the power of the federal parliament to legislate in connection with copyright is exclusive only in relation to the provinces of the Canadian Confederation and such interpretation of sub-sec. 23 of sec. 91 must have been given in the bright light of another law passed 20 years after the B.N.A. Act, I mean the

law ratifying the Berne Convention. The latter law, in fact, explicitly declares that colonies can escape its enactments only with regard to the works originally published in those colonies (sec. 8 (4)). That means we can make laws applying to Canadian authors, but as to foreign authors we are bound by the British law.

Even if the Berne Treaty had left with each signatory country the task of repressing any offence against the rights of foreign authors, the enforcement of this clause cannot be declared to be imperative in the face of a statute which is part of this very Berne Treaty as ratified by England and enacting precise sanctions.

Under those conditions, the most that could be said is that in the matter of sanctions for violation in this country of the rights of foreign authors, the Canadian parliament has a concurrent legislative jurisdiction with the British parliament and the foreigner who is wronged has the option. So that if to-day Joubert finds in the English law a better remedy than the one provided by the Canadian law we cannot refuse him the English remedy which he demands and give him the Canadian remedy which he does not demand and which, moreover, would, in the present case, be rather commonplace, since we have here no civil laws specially protecting playwrights.

In short, here is how I look at the situation:

The validity in Canada of the Berne Convention being admitted—and we are agreed on that point—it seems logical to me to apply it, in its entirety, to those who are praying for such entire application, above all when a special jurisdiction is given the Courts of the colonies in the case of damages for non-authorised representations of protected plays:—"damages to be recovered in any Court having jurisdiction in such cases in that part of the United Kingdom or of the British Dominions in which the offence shall be committed," 3-4 Wm. IV. ch. 15, sec. 2.

That territorial jurisdiction, created by the law of 1833 was never abolished, in so far as Canada is concerned, no more after than before the Confederation Act: it was even implicitly affirmed by the British law of 1866 and it will subsist as long as the Canadian parliament, taking advantage of the powers conferred upon it by the British law of 1911, does not put an end to it.

Let us say one word, in passing, about the character of that

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minimum indemnity of 40 shillings a representation. Before us, the attorney for the appellant called it a "penalty." The declaration does not contain that word. And, in fact, there is no question here of a penalty in the strict sense of the term. See on this subject: Copinger On Copyright (4th ed.), p. 328.

The action is not for the payment of a fine, it is simply a civil recourse for damages liquidated by law to a minimum of 40 shillings and the maximum of which may vary according to evidence.

The question of law having been examined in its several aspects, it remains only to fix the total figure of indemnity which must be given to Joubert. The three offences charged against the respondents, non-authorised representations, suppression of the names of the authors and changing of the titles of three plays were clearly proved.

The majority of the Court is of opinion that, in the present case, real and punitive damages may properly be granted.

We were asked to believe in the good faith of the respondents. That request seems to us rather bold, the evidence proving that those people not only represented without any permission 14 of Joubert's plays, but in a series of 84 representations regularly suppressed, on the posters of their theatre, all the names of the authors and changed the titles of three of the plays. And later on, after the institution of the present action, in the face of the demand for payment formulated by Joubert with authentic titles of property to support it, the respondents did not think proper to offer one cent of indemnity. The suppression of the names of the authors and the changes in the titles constitutes far-reaching frauds. It can be imagined to what annoyance and also to what expenses might be submitted a playwright—specially a foreign playwright—who, to find out to what extent he is robbed and then be in a position to take to Court evidence of the theft, would have to organize a close watch in the theatres, hire stenographers to note the words of the actors, or get, as had to be done in the present case, photographs of the posters of the theatres where there is no printed programme. Under such circumstances, the writ of injunction to prevent a representation would become an illusory remedy. A judiciary interdiction cannot be got on mere suspicions: both the titles of the plays and the names of the authors have to be produced before the Judges. A playwright cannot guess that some-

one intends to represent one of his plays when his name is suppressed from the poster and the title of his work is changed. What is the use of saying to an author that he is entitled to a writ of injunction if, in fact, those who, through their fraud, prevent him from exercising that recourse are allowed to go unpunished?

In the case of *Hanftangl Art Publishing Co.* v. *Holloway*, where the defendant had to pay $500 for illicitly reproducing a picture, an English magistrate, Charles, J., said:—

> The purpose of this legislation (the Imperial law of 1886) seems clear to me. It is not destined to create disabilities, but rather to remove them if they exist. (Le droit d'auteur, juillet 1893, p. 87.)

In England, the Courts have interpreted the Berne Convention in a rather wide sense, so as to give an efficacious protection to foreign authors. When applying in this country the English law, I am of opinion that we must do likewise. Copyright is a regular property. It is even, in the eyes of civilized nations, a property of a superior character which was placed under the protection of national and also of international laws. The Courts must insure respect for this property even more than of other properties, and it is time, we think, to shew to those who, in any way, operate theatres, that it is not always safe to present other people's works.

In France, all the receipts of a non-authorised representation are confiscated for the benefit of the author and when his coffers have so been emptied the theatre manager has, besides, to face a fine which is paid over to the treasury and may vary from 50 to 500 francs. Here, the protection of the law in favour of the authors does not go that far: therefore, they must be given the full measure of protection that our Courts may grant.

The respondents are in consequence condemned to pay to the plaintiff 40 shillings for each of the 84 illicit representations they gave,—which, at the present rate of change, amounts to $817.75. By granting only this amount of damages we take into account the law and the ensemble of the facts: we combine the rigorous application of the law on one part of the claim with the exercise of our discretion on the other and we make a whole of the damages arising from the three offences of the respondents, although, technically, there is a condemnation only for the lack of authorisation of the 84 illicit representations.

The plays represented being all of them short comedies and

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the receipts on that score not being likely to have proved considerable, owing to the low fee of admission at the Liberty Theatre, we would not have fixed, in an action at common law, the damages at 40 shillings for each of the non-authorised representations. On the other hand, we would have been inclined to grant an appreciable amount of damages, both real and punitive, but mainly punitive, for the suppression of the names of the authors and the change in the titles of some plays. Such methods are more than disloyal, they constitute intolerable frauds.

An author is entitled to the credit of his work, to respect for his productions and also to the material benefit which may be derived from the prestige of his name or from the popularity of his works.

Joubert's attorney asks for double costs. The original text of the law of 1833 authorised him to do so, but that text has been modified. Double and treble costs granted in former days in England, in certain special cases, were suppressed in 1842 (5-6 Vict., ch. 97, art. 2).

The appeal is maintained with ordinary costs, costs of exhibits included.

Cross, J.

CROSS, J.:—The appellant is owner of the performing right of certain dramatic pieces composed in France.

The respondent has given representations here of these pieces, and I consider that he has failed to prove that the appellant consented to such representations being given. The consent, to avail under the Act, must be in writing.

I further consider that it makes no difference that the representations were given in a moving-picture hall as accessory to the moving pictures, instead of having been given in a theatre. *Russell* v. *Smith* (1848), 12 Q.B. 217, 116 E.R. 849, *Wall* v. *Taylor* (1882), 9 Q.B.D. 727. But the appellant claims to recover the statutory penalty of 40 shillings for each representation, as being a recourse afforded by the Act 3-4 Wm. IV., ch. 15, and the question arises whether or not that recourse is available in an action taken in Canada.

By the Berne Convention, it became a treaty obligation of Great Britain to give to the subjects of the other parties to the Convention the same remedies for violation of copyright and right of dramatic representation as were available to her own subjects

(clauses 2 and 9). Such convention is to be treated by the Courts as statutory law: *United States* v. *The Schooner Peggy*, 1 Cranch, 103; Wheaton, Elements of International Law, ed. 1855, p. 329.

The redress for such violations has, however, to be provided by legislation in the State where the violation is committed. *Baschet* v. *London Ill. Standard Co.*, [1900] 1 Ch. 73.

I take it that a legal effect of the proclamation of the order of adhesion by Great Britain to the Berne Convention made on November 28, 1887, would be to afford to a French author, whose treaty right had been violated in Great Britain, the remedies (including right to such statutory money penalties as might be available) which would have been open if the work had been of British origin instead of French, saving such local requirements respecting deposit of copies, etc., as may have been dispensed with by the Convention itself.

It happens in the state of the law with which we are concerned, that by the Imperial Act of 1886, 49-50 Vict., ch. 33, upon the subject of copyright, certain Acts are classified as International Copyright Acts and others simply as Copyright Acts, but it makes no difference, as to the matter now in hand, whether the respondent is charged under an Act of one or the other of these classes, so long as he is charged under an Act which is in force in Canada.

The Act, 3 Wm. IV. ch. 15 (Bulwer Lytton's Act), respecting dramatic reproduction, decrees the penalty of 40 shillings for any representation given without the prior written consent of the author or owner, such penalty being recoverable

in any Court having jurisdiction in such cases in that part of the said United Kingdom or of the British Dominions in which the offence shall be committed.

That enactment was made more definite and its substance adopted by secs. 20 and 21 of 5-6 Vict., ch. 45, which Act is declared in sec. 29 to extend to the Dominions.

The Act 7-8 Vict., ch. 12, provides for the putting into effect of the Dramatic and Literary Property Act above referred to by proclamation. It required the author to have his work registered and by sec. 19 denied right of action other than under the Act.

These enactments extended to Canada as it was when they were passed, and I do not find that they have been repealed or displaced, as regards Canada, by later legislation. Provision was in fact made by Great Britain in the *procès verbal* of signing the Berne Convention that Canada and certain other of the self-

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governing dominions might withdraw from the Convention. Canada has not done so.

The Canadian Copyright Act, ch. 70, R.S.C. (1906), after its enactment, was given effect to by the Imperial Act, 38-39 Vict. ch. 53. It grants copyright only upon registration or re-registration in Canada.

It is unnecessary to decide whether the appellant has any copyright in the pieces here in question or not, since it is the performing right or right of representation which is in question. Copyright of a drama may belong to one person and the performing right to another. I do not find that the Parliament of Canada has legislated on the subject of the right of dramatic representation or performing right.

If this had been an action for infringement of copyright, we might have had to consider the question left open in *Imperial Book Co.* v. *Black*, 35 Can. S.C.R. 488, where it was said at p. 499:

> It is still open for discussion as to whether the Parliament of Canada, having been given exclusive jurisdiction to legislate upon the subject of copyright, may not, by virtue of that jurisdiction, be able to override Imperial legislation antecedent to the B.N.A. Act, 1867.

In that case, the Supreme Court expressly reserved what had been decided by the Ontario Court of Appeal in *Smiles* v. *Belford* (1877), 1 A.R. (Ont.) 436, as an open question. I notice that the case of *Smiles* v. *Belford* has been cited later in Hals. Laws of England, vol. 8, sec. 340 (s); cf. *R.* v. *Marais*, [1902] A.C. 51, at 54.

I take it to be clear that the sections of the Imperial Copyright Acts which relate to dramatic representation are in force in Canada. They were applied by the Territorial Court of Appeals in *Carte* v. *Dennis*, 5 Terr. L.R. 30 at 50. In matters of copyright, Canadian Courts, in several cases which have arisen since 1867, have had regard to the Imperial Acts: *Morang* v. *Publishers' Syndicate*, 32 O.R. 393; *Black* v. *Imperial Book Co.*, *supra*; *Smiles* v. *Belford*, *supra*.

Having regard to the terms of the Berne Convention, registration or deposit of copies in the country where the right is infringed is unnecessary: Copinger, Copyright (4th ed.), p. 477.

The requirement, in that regard, of 7-8 Vict. ch 12, is consequently inapplicable, as would also be the case with the requirement of registration in the Canadian Copyright Act if this were a copyright case.

It may be noted that, by the effect of sec. 8(*a*) of the Imperial Act, 49-50 Vict., ch. 33, it is only in respect of works first produced in a British possession, that the enactments of the legislature of such possession respecting registration are to be complied with. Canada is not a nation. She has no international relations, except in a few matters of trading interests provided for by special Imperial enactments, a requirement in a Canadian Act that a literary or artistic work should be registered in Canada would be without effect as against a foreign plaintiff claiming redress under the Berne Convention.

I conclude that the appellant should have judgment for $817.65, there having been 84 representations and the penalty being $9.73 for each.

I would regard the other claims asserted in the plaintiff's declaration as not existing independently of the forty shillings penalty. The enactment is that every offender

> shall be liable for each and every such representation to the payment of an amount not less than forty shillings or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages.

The statute gives the right to one of three measures of damages. The proof does not afford us means of measuring them in the second or third mode indicated.

I would maintain the appeal accordingly.

PELLETIER, J., dissented. Pelletier, J.

Judgment: Whereas the appellant claims from the respondents a sum of $1,800 as penalty and damages incurred because of the representation, without any right, by the respondents, of theatre plays in the City of Montreal, and of the suppression, without any right, of the titles of the authors of said plays: Judgment.

Whereas the Superior Court dismissed the action of the appellant against the respondent:

Considering that the Berne Convention has force of law in this country and that the Imperial statutes applicable to colonies were never repealed in so far as Canada was concerned:

Considering that the minimum damage granted for each non-authorised representation is 40 shillings:

Considering that in the present case, it is reasonable to grant the minimum of damages incurred by the respondents towards the appellant:

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Quashes and annuls the judgment of the Superior Court: maintains the appeal with costs and condemns the respondents to pay to the appellant the sum of $817 and interest with costs of the Superior Court and of this Court. *Appeal allowed.*

[Appeal to the Supreme Court of Canada rejected for want of jurisdiction, March 27, 1917.]

ONT.

S. C.

MORGAN v. BANK OF TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 3, 1917.

1. BANKS (§ IV C—110)—SECURITY TO—AGREEMENT—CONSTRUCTION. An agreement between bank and depositor, entitling the bank to hold the depositor's securities as security for the payment of all his present and future liability, covers an indebtedness on a promissory note given by him to a third person of which the bank became the holder in due course.

2. BILLS AND NOTES (§ VA—105)—TRANSFEREES—REMEDY—RIGHT TO SUE. Under sec. 61 of the Bills of Exchange Act (R.S.C. 1906, ch. 119), the transferee of a bill or note, before indorsement, is in the position of an equitable assignee of a chose in action, and may sue in the name of the transferrer, and also enforce by action his right to have the instrument indorsed to him.

Statement.

APPEAL by the plaintiff from the judgment dated the 5th December, 1916, which was directed to be entered by Lennox, J., after the trial of the action before him sitting without a jury at Sarnia, on that day.

The appellant alleges in his statement of claim that in the year 1911 he opened an account with the Sarnia branch of the respondent bank, and deposited as security for an advance "in the vicinity of seventeen hundred dollars worth of notes or customers' paper;" that he was asked by the manager of the branch to sign a printed document; that he never read it nor was it read to him, but he signed it on the representation that it was only an agreement that the respondent should hold "the collateral notes so deposited until the advances made to him from time to time were duly paid off and discharged;" that the agreement was obtained by fraud and misrepresentation; and that he finds that the respondent was "at liberty to purchase other paper on which" he "might be liable and use it to his detriment and disadvantage;" that during the month of November, 1915, he paid off in full his indebtedness to the respondent, and demanded the return of his notes and securities and the money that the respondent had collected on them, and that the respondent refused to do this, and continues to hold them, to the great detriment and loss of the appellant; and that, by reason of the wrongful detention of the money and securities, the appellant has suffered enormous financial reverses

and became seriously embarrassed for want of the use "of the money and securities," and was utterly unable to carry on his business without a serious loss, and his business, through the acts of the respondent, "became paralysed and ruined," and the claim is for the rectification of the instrument signed by the appellant, the return of the money and securities which it is alleged are wrongfully detained, and damages for the wrongful acts of which the appellant complains.

The action was dismissed by the trial Judge.

C. M. Garvey, for the appellant; *G. H. Sedgewick*, for the defendant bank, respondent.

MEREDITH, C.J.O. (after setting out the facts as above):— Meredith, C.J.O.
The appellant's attack upon the agreement, as having been obtained by misrepresentation and fraud, entirely failed; and the only substantial question in dispute is as to the right of the respondent to hold the securities deposited with it by the appellant, not only for indebtedness incurred by him directly, but also for his indebtedness on promissory notes made by him to other persons, of which the respondent had in the course of business become the holder; and, if that was the right of the respondent, whether, in the circumstances which I am about to mention, the respondent was entitled to hold the securities for the indebtedness of the appellant on a promissory note which he had made to Thomas H. Cook on the 1st May, 1915, for $968.99, payable six months after date, and which was in the possession of the respondent when it refused to hand over the securities to the appellant, and which had come into the respondent's hands in the circumstances I shall afterwards mention.

I do not find among the exhibits any agreement dated in November, 1911, but there were four agreements proved, dated respectively the 26th May, 1913, the 9th August, 1913, the 22nd June, 1914, and the 20th July, 1914. According to the terms of the latter two, the respondent was to be entitled to hold the securities "as security for the payment of all my present and all my future liability to your bank, whether direct or indirect, and all costs, charges, and expenses in connection therewith, and for all bills of exchange, promissory notes, or other instruments, now or hereafter representing same or any part or parts thereof." The two earlier agreements are different in form, but there is probably no difference in the legal effect of them.

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It does not, I think, admit of serious doubt that the indebtedness on a promissory note given by the appellant to another of the respondent's customers, of which the respondent became in the ordinary course of business the holder, would come within the terms of these agreements, and be an indebtedness for which the respondent would be entitled to hold the securities in question.

Cook, the payee of the note in question, was a customer of the respondent, and in the ordinary course of business gave it to the respondent to be held as security for his indebtedness to the respondent; and, but for the fact that, though payable to order, the note was not endorsed by Cook, there could be no doubt that the respondent would have been entitled to hold the securities until it should be paid.

It appeared in evidence that the practice of the respondent was to receive promissory notes from Cook without their being endorsed, and that the manager of the Sarnia branch held a power of attorney from Cook authorising him to "endorse promissory notes," and this with the possession of the notes seems to have been thought sufficient, and the respondent could, no doubt, at any time, have completed its legal title to the notes by obtaining the endorsation of them in Cook's name by its manager acting under the authority of the power of attorney.

It was suggested upon the argument that the test of the right of the respondent to retain the securities until the Cook note should be paid was, whether or not, at the time the demand for the securities was made, the respondent could have maintained an action on the note—but I am of opinion that that is not the true test. The respondent had then the possession of the note, though unendorsed, but was in a position at any moment to complete its legal title to the note and to maintain an action upon it by the exercise of the power which the manager of the Sarnia branch possessed under the power of attorney which he held, and held for the benefit of the respondent; and the appellant was, in my opinion, then indebted to the respondent, within the meaning of the agreements, in the amount of the Cook note.

In addition to this, sec. 61 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, provides that: "Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferrer had in the bill, and

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the transferee in addition acquires the right to have the endorsement of the transferrer."

The effect of this is, that the transferee, before endorsement, is in the position of equitable assignee of a chose in action, and may sue in the name of the transferrer, and may also enforce by action his right to have the instrument endorsed to him. Halsbury's Laws of England, vol. 2, p. 503, para. 853, and cases there cited, make it clear that the appellant was indebted to the respondent in the amount of the note in question, within the meaning of the agreements.

In my opinion, the action was properly dismissed, and the appeal must share the same fate, and be dismissed with costs.

Maclaren, J.A. Hodgins, J.A. Ferguson, J.A.

MACLAREN, HODGINS, and FERGUSON, JJ.A., concurred.

Magee, J.A.

MAGEE, J.A., agreed in the result. *Appeal dismissed.*

LANDRY v. BATHURST LUMBER CO.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., Grimmer and Barry, JJ. February 18, 1916.

1. MALICIOUS PROSECUTION (§ II A—10)—ARREST—PROBABLE CAUSE.
A cashier of a company who procures the arrest of an employee of the company in the honest belief, because of his failure to return to work, that he was the one to whom a missing sum of money was overpaid, acts under reasonable and probable cause, and the employer is not liable for malicious prosecution or false arrest.
[See annotations, 1 D.L.R. 56, 14 D.L.R. 817.]

2. PRINCIPAL AND AGENT (§ II D—25)—AUTHORITY AS TO ARREST—RATIFICATION—ESTOPPEL.
An employer who permits his name to be used for the purpose of a criminal prosecution thereby ratifies the act and is estopped from setting up want of authority.

Statement.

APPLICATION on behalf of the plaintiff to set aside a verdict for the defendant company and for an order to enter a verdict for the plaintiff for the damages assessed in an action for false arrest and malicious prosecution tried before McKeown, J., and a jury, at the Gloucester circuit in September, 1915, failing that for a new trial.

J. P. Byrne supported the application.

M. G. Teed, K.C., *contra*.

Grimmer, J.

GRIMMER, J.:—This is an action for the recovery of damages for alleged false arrest and imprisonment, and malicious prosecution. The case was tried before McKeown, J., and a jury, at the Gloucester Circuit in September last, and a verdict entered for the defendant, which the plaintiff now moves to set aside and have a verdict entered for himself, or for a new trial.

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The facts briefly are that the defendant is a corporation which carries on large lumbering operations in the county of Gloucester, in this province. The plaintiff was employed by the company during the winter of 1912-13, earning a little over the sum of $100 in wages. In March, 1913, he came out of the woods and went to the company's office at Bathurst for his pay. At this time one Mersereau, the cashier, was away, and one Cox acted as cashier that day, and, in paying the men, overpaid the sum of $100. The money was done up in bundles of $50 and $100 each, and Cox paid two men, the plaintiff and one McMann, without counting the money, and by mistake overpaid one of them $100 too much. In balancing his books Cox discovered the shortage, and endeavoured to find out how it had happened. The books had been balanced at 4 o'clock in the afternoon and found all right. Plaintiff and McMann were paid after that hour. McMann was overpaid by error a sum of about $30, which, when told of, he came back and worked it out. Cox made inquiries about the $100 overpaid, which had been charged up to him by order of the company. He was told the plaintiff had stated he was not going to drive for the company, because they would be after him for the $100. This the plaintiff stated to James McMann, as appears from his evidence on cross-examination, and he also told a number of people who were going on the drive that one Radcliffe had told him someone from the camp had been overpaid $100, which had not been returned. The plaintiff did not return to work for the company that year, but went to the United States, and did not return until the spring of 1914. Thereupon Cox, from his inquiries, believing the plaintiff was the man who had been paid the money, caused a writ of *capias* to issue against him at the suit of the defendant, upon which he was arrested and confined in gaol until he obtained bail. The case was tried at the Gloucester County Court and resulted in a verdict for the plaintiff herein, then the defendant. This action was then commenced. A good deal of evidence was given at the trial, and the Judge left six questions to the jury, which, with answers, are as follows:—

1. Did Cox, at the time he made the affidavit to hold Mr. Landry to bail, honestly believe that he had overpaid Landry the sum of $100? Yes. 2. If so, did he have reasonable grounds for such belief? No. 3. Was Cox actuated by malice in causing Mr. Landry's arrest? No. 4. Did Cox take reasonable care to inform himself of all the available facts of the case before

causing Landry's arrest? No. 5. Did Lousen authorize Cox to cause Landry's arrest? We cannot answer. 6. What amount do you estimate as fair and reasonable damages, caused plaintiff by arrest and imprisonment? $250.

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Upon these findings the Judge found there was reasonable and probable cause, and ordered the verdict entered for the defendant. In this I think he was right. There is ample evidence to support the finding as to the first question, and, in my opinion, there is also sufficient evidence to fully authorize affirmative answers to the second and fourth questions, and I find it difficult to conceive how the jury, as reasonable men, arrived at the conclusions they did as to these, particularly as they found there was no malice in the arrest. Reasonable and probable cause is not for the jury, but is a question of law for the Judge, as it arises on the facts disclosed. It is a mixed question of law and fact. Whether the circumstances alleged to shew that the cause was probable or not probable, are true and existed, is a matter of fact, but, whether, supposing them true, they amount to a probable cause, is a question of law: *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521.

In a Crown case it is the duty of a Judge to tell the jury that, if certain facts are proved to their satisfaction, they constitute the crime charged. In a malicious prosecution the question is similar but subjective, viz., what materials had the prosecutor before him upon which to ground his prosecution?

If the statements of others, or his own observation, assuming their accuracy, would prove the commission of the offence or create a presumption, or amount to *primâ facie* evidence, of its commission, the Judge there, as in a criminal trial, rules that reasonable and probable cause exists.

In *Willans* v. *Taylor* (1829), 6 Bing. 183, 130 E.R. 1250, Tindal, C.J., says:—

> Who is to decide what shall be esteemed probable cause? That is a question of law for the Judge, as it arises from the facts disclosed; and if there be any discrepancy in the testimony, or imputations on the credit of the witnesses, those are matters for the decision of the jury; so that, as in questions touching reasonable notice and the like, the Judge must pronounce his opinion on the facts when found by the jury.

In *Lister* v. *Perryman*, cited above, and also cited by the appellant on the argument, Lord Chelmsford says:—

> There can be no doubt, since the case of *Panton* v. *Williams* (1841), 2 Q.B. 169 (114 E.R. 66), reasonable and probable cause in an action for

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malicious prosecution or for false imprisonment is to be determined by the Judge.

Also in *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167, also cited by the appellant, it was held, p. 175:—

Want of reasonable cause is for the Judge alone to determine upon the facts found; for the jury, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will or any other motive or desire than to do what he *bonâ fide* believed to be right in the interest of justice.

This decision appeals to me as being most applicable to this case, under the circumstances revealed and the evidence, and seems very accurately to express what was in the jury's mind in rendering their findings. Here the jury found the defendant, or at least its agent, Mr. Cox, honestly believed in the case which he brought before the County Court, and also that he was not actuated by any malice in causing the plaintiff's arrest. For this last-mentioned reason the action could not be maintained. In *Purcell* v. *Macnamara* (1808), 9 East 361, 103 E.R. 610, referred to in *Willans* v. *Taylor*, it was held that

An action for a malicious prosecution cannot, from the very nature of it, be maintained without proof of malice, either expressed or implied; and malice may be implied from the want of probable cause; but that must be shown by the plaintiff.

And Parke, J., in the same case, remarks, "And, according to all the Judges, that is the law of the land." This statement is as true now as when it was uttered.

On the argument leave was given to amend the statement of defence, by adding as a further defence to par. 10 of the statement of claim,

that the assault and imprisonment therein alleged was the arrest and imprisonment of the plaintiff by the sheriff of the county of Gloucester, under the writ of *capias* mentioned and set out in par. 5 of the statement of claim, and not otherwise, and which said writ of *capias* has been issued and caused to be issued by one Howard Cox in the name of the now defendant, but without the authority of the said defendant.

As to this I am of opinion it does not avail to help the defendant, as there was a ratification of the action taken by their agent Cox against the plaintiff, and it is too late to set up an absence of such authority. In my opinion the appeal must be dismissed with costs.

Barry, J.

BARRY, J. (dissenting):—Because the question of reasonable and probable cause is involved in it, an action of this nature often occasions no little embarrassment in the conduct of a trial. This

embarrassment arises not so much from the inherent difficulty of the question itself, as from the manner in which it presents itself; since, first of all, it involves the proof of a negative; and, secondly, in dealing with it, the Judge has to take on himself a duty of an exceptional nature. The question of reasonable and probable cause is for the Judge to determine, but if the facts are in dispute they must be found by the jury, and the question is not whether the plaintiff was guilty of the offence of which he was charged, but whether there existed such a state of facts as might lead a reasonable man to believe that he was: *Cox* v. *English, Scottish and Australian Bank*, [1905] A.C. 168; *Dugay* v. *Myles*, 15 D.L.R. 388, 42 N.B.R. 265. The question of malice is one, also, which cannot be said to be free from difficulty. The malice which, in an action for malicious prosecution, a plaintiff has to prove is not malice in its legal sense, that is, such as may be assumed from a wrongful act done intentionally without just cause or excuse, but malice in fact, indicating that the defendant was actuated either by spite or ill-will against the plaintiff, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling against anybody. In order to enable them to arrive at a conclusion on the question, the jury have to be told to take into consideration all the circumstances of the case and to form their own opinion upon them uninfluenced by any opinion of the Judge, unless that opinion accords with their own view. If, among the circumstances, it appears to the jury that there was no reasonable ground for the prosecution, they may well think, though by no means bound to do so, that it must have been dictated by some sinister motive on the part of the person who instituted it: *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167.

The duty of illustrating to the jury the difference between malice in law and malice in fact, a matter, as I have said, in itself difficult, becomes more difficult because of the danger that, by extreme accuracy, one may succeed only in puzzling inaccurate minds. In a case to which, later on, I shall have occasion to refer, so eminent a Judge as Brett, M.R., admitted that in an action for malicious prosecution he found great difficulty in expressing himself clearly; and in the same case Bowen, L.J., said that to conduct a complicated case of the kind to a general verdict would require both a very clear head and a very clear tongue. Since

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it is probably more true to-day than it was 100 years ago, when Mansfield, C.J., said that it was utterly impossible for any Judge, whatever his learning or ability might be, to decide at once rightly upon every point which comes before him at *nisi prius*, it is not at all surprising that so many actions of the kind either result in mistrials or end in a reference to a Court of Appeal for the rectification of errors committed at the trial.

One of the circumstances which Cox assigns as a reason for thinking that the plaintiff had probably received $100 too much, was the fact that he had heard that the plaintiff had said that he did not intend to work for the company because they would want to keep out of his wages the $100. As to this statement, the only evidence of what the plaintiff really did say is what he himself told the sheriff at the time of his arrest. He said to one person, James McMann, and to him only,

that he wouldn't go to work for the company because he didn't want to be bothered by them for the reason that they had accused him of having received $100 more than was coming to him. Mr. Radcliffe had come to Tracadie and told that some of us (the company's woodsmen) had got $100 over what was coming to him, and the reason that he did not go back to work for the company was, that they would be seeking to get this money back from him, although he knew he had not received it. This was in September, 1913. He was not afraid at all, but had said this without reflection.

From this evidence it seems to me that the plaintiff's decision not to work for the company while some of their clerical staff harboured the idea that he had been overpaid in the spring of 1913, was prompted by the belief that the company would be likely to bother him about the money irrespective of the fact that he himself knew he had not received it, a conjecture in which the sequel shews the plaintiff to have been correct; and in that view of the case, what the plaintiff had said would be just as consistent with innocence as it would be with guilt. All the plaintiff wanted to secure himself against was the trouble which would be likely to follow on the company's suspicions; and, concluding that his strongest security would lie in not having anything more to do with them, he did not work for the company in the season of 1913-14, but, being a labouring man and having to earn a living somewhere, he secured employment in the United States. And the securing of employment in the United States, under the circumstances which I have mentioned, seems to have been accepted by Cox as some further evidence of the correctness of his suspicions.

It seems to me that a prudent man would have been less precipitate than Cox appears to have been in issuing, against a person whom he did not know, a bailable process for a claim which, to say the most of it, was founded entirely upon suspicions. For reasons which, as I have already remarked, have not been disclosed, Cox dismissed Brown from amongst those whom he suspected. Apparently he accepted McMann's bare statement that he had not received the missing money. Here the question naturally suggests itself why did not Cox pursue towards Landry a course similar to the one which he had pursued in respect of Brown and McMann, and ask Landry, or ask his mother, to whom he had turned over his wages, whether he had in fact received from the office of the company a sum greater than the amount of his wages? While I do not want to do Cox even a seeming injustice, I feel constrained to say that to me the action bears the ear-marks of one which was inspired by a desire to coerce into the payment of a sum of money, one who had never admitted his indebtedness, and one whom Cox himself was by no means sure had received the money. Upon a survey of the whole evidence, I think the jury were amply justified in coming to the conclusion that Cox had no reasonable ground for his belief that Landry was the man whom he had overpaid.

One of the chief reasons urged by the defendants at the trial and here against the plaintiff's claim, although it has been stated by counsel that that reason was not urged at the trial in the County Court, is that Cox had no authority to initiate proceedings in the name of the company; they deny that Cox was their agent; they deny that they sued out the writ. It is admitted that without special instructions Cox would have no authority to cause the arrest of the plaintiff at the suit of the defendants. Such an act would not be within the scope of his general authority or the course of his employment. In his evidence Cox says that he thought he had the authority of Albert E. Lousen, the treasuer and (in the absence of Angus McLean, the manager) acting manager of the company, to make the arrest, but at p. 84 of the report of the evidence he admits that he did not state to Lousen the nature of the action he was about to bring, and that he did not himself really know anything about it. McLean, the manager, and Lousen, both state positively and emphatically that Cox had

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no authority whatever to cause the arrest of the plaintiff in the company's name or on their behalf; that he had no authority even to bring an action. The manager says he knew nothing about it until after the action had been taken, and when he was told that action had been taken in the company's name he seriously objected to it; he questioned the matter very seriously and said it should not have been taken. Lousen says that when Cox asked him if it would be all right for him to take action against Landry, he told him he could do it on his own authority if he wanted to, but not in the name of the company; that it was purely a matter between Cox and Landry.

The strength of this evidence, when contrasted with the weakness of Cox's own evidence upon the question of authority, should, I think, have left it reasonably clear to anyone, although the jury seem to have been either unable or unwilling to answer the question submitted to them upon the point, that Cox had really no authority to arrest the plaintiff or even to bring a civil action without arrest. If that be so, then, obviously, the proper course for the company to have pursued when they first became aware that the plaintiff had been arrested in their name on the initiative of one of their employees, for at that point their responsibility commences, was to have stopped the suit, paid the costs and tendered to the plaintiff some suitable reparation for the inconvenience to which he had been subjected. But they did not do that nor anything of the kind. What they did was to employ counsel, enter the cause for trial and prosecute to judgment a suit which they now claim was improperly and unauthoritatively brought by one of their employees against the plaintiff. I entirely agree with the remarks of the learned trial Judge when, during the course of the trial, he said that it was a little late at that time of the day to raise the question of the absence of authority in Cox.

While there may be circumstances in which there may be good cause for the continuance of a prosecution the initiative of which was wrongful: *Weston* v. *Beeman* (1858), 27 L.J. Ex. 57; *Moon* v. *Towers* (1860), 8 C.B.N.S. 611, 141 E.R. 1306; it is clear that a malicious prosecution may consist in the wrongful continuance of proceedings already set on foot by another person. The defendants, considered apart from Cox, whom they now

repudiate, never regarded the plaintiff as their debtor. They do not say and never have said that he owed them $100. It was to Cox they looked for the money. The manager told the head bookkeeper to charge the discrepancy in the cash to Cox, and told the bookkeeper and told Cox himself that the latter would have to pay it. It was charged accordingly, and, for aught we know to the contrary, the debt for which Landry was arrested may, at the time of the initiation of the proceedings, have been actually paid by Cox to the company. Whatever may have been Cox's rights in regard to the recovery of the $100 which inadvertently he had paid to someone, it is clear from the defendants' own evidence that, so far as they were concerned, their continuance of the proceedings initiated by Cox must be considered wrongful, and for the wrongful perseverance in the suit they must shoulder the responsibility. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur;* and it is a general rule that ratification relates back to the time when the act ratified was done. With a full knowledge that an action had been commenced, and the arrest of the plaintiff effected, for and in the name of the defendant company, there was such an unqualified adoption of those *a priori* unauthorized acts of Mr. Cox by the defendants' continuance of and persistence in the action, that the inference may properly be drawn that they intended to take upon themselves the responsibility for Cox's acts: *Marsh* v. *Joseph*, [1897] 1 Ch. 213, *per* Lord Russell, C.J., at 246. All the conditions laid down by Wright, J., in *Firth* v. *Staines*, [1897] 2 Q.B. 70, necessary to constitute a valid ratification appear to have been present here.

It was contended by counsel for the appellant that on the count for false arrest and imprisonment, notwithstanding the finding of the jury on the question of malice, the plaintiff is entitled to a verdict, because, it is argued, in an action for false arrest and imprisonment it is not necessary either to allege or prove malice. While, as a general proposition, that may be true enough, the rule has been too long settled in this Court now to break away from it, that where an arrest is made through the process of a Court having jurisdiction, as here, the plaintiff or prosecutor is liable only if he maliciously and without reasonable and probable cause puts the law in motion. It is otherwise where he interferes in the execution of the process: *Byram* v. *Johnston*, 29 N.B.R. 572; *McDonough* v. *Telegraph Publishing Co.* (1910),

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39 N.B.R. 515. Whether there was reasonable and probable cause for a prosecution or not, is a mixed question of law and fact, the province of the jury being to find the facts, unless admitted: *Hilliar* v. *Dade* (1898), 14 T.L.R. 534, including the inferences therefrom: *Panton* v. *Williams* (1841), 2 Q.B. 169, 114 E.R. 66; *Taylor* v. *Willans* (1831), 2 B. & Ad. 845, 109 E.R. 1357; and that of the Judge to say whether such facts amount to reasonable and probable cause: *Peck* v. *Peck*, 35 N.B.R. 484. Reasonable cause has been said to be such as would operate upon the mind of a discreet man, and probable cause such as would operate upon the mind of a reasonable man: *Broad* v. *Ham* (1839), 5 Bing. N.C. 722, 132 E.R. 1278. When all the evidence is before the Court, every disputed fact and every disputed inference of fact is for the jury to decide upon, with this exception, that the final inference as to the presence or absence of reasonable and probable cause is to be drawn by the Judge alone: *Archibald* v. *McLaren* (1892), 21 Can. S.C.R. 588. He must accordingly make the jury find the facts and draw the subordinate inferences specially, or he must leave the whole case to them with a hypothetical direction that if they take such and such a view of the case, there is reasonable and probable cause, otherwise not. However numerous and complicated the facts may be, one or other of these courses has to be adopted: *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521. Because it is impossible to reduce to any definite rule the circumstances which will constitute it, reasonable and probable cause has usually been regarded as a mixed question of fact and law: *Johnstone* v. *Sutton* (1786), 1 T.R. 510, 99 E.R. 1225; *Taylor* v. *Willans, supra;* although in *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167, the Court says that the question of reasonable and probable cause is an inference of fact, and not of law as is sometimes erroneously supposed, and in *Olsen* v. *Lantalum*, 32 N.B.R. 526, where neither the trial Judge nor the jury found specifically upon the question of reasonable and probable cause, the Court themselves determined that question.

In practically withdrawing from the jury the evidence of Mersereau, which was in direct contradiction to that of Cox in regard to the manner in which the loss of the money had occurred, and the manner in which the loss had been discovered, I think the Judge's course open to serious exception. He told the jury:—

I am inclined to take in its entirety and its completeness Cox's state-

ment in reference to that shortage against any contradiction made by any other witness, because it seems to me the books bear out what he has said. It is true that in a general way the Judge told the jury that the facts were for them, and for them alone, notwithstanding any opinion he himself might have formed in regard to them, but I can scarcely think any general expression such as that would have the effect of neutralizing the result which the words which I have quoted in reference to the unimpeachability and conclusiveness of Cox's evidence must have produced in the minds of the jury. In deciding upon questions 1, 2 and 4, the jury would have the right to look at the evidence of Mersereau, and attach to it such importance as they might think it merited; they would have the right to discard it if they wished, but that was their business and theirs alone: *Milissich* v. *Lloyds* (1877), 36 L.T.N.S. 423.

While the jury have found as a fact that at the time he made the affidavit to hold the plaintiff to bail, Cox honestly believed that he had overpaid Landry $100, in answer to the second question they say that he had no reasonable grounds for such belief. The effect of this, it seems to me, is to leave both questions answered in favour of the plaintiff, for it has been settled by numerous authorities that in an action of this kind honest belief in a state of facts without reasonable grounds for such belief avails a defendant nothing. That this is the view of the law entertained by the trial Judge is obvious enough, for in his charge he told the jury, and more than once during the course of the trial told both counsel and jury, that the question was not whether the plaintiff had the money, but whether Cox honestly believed he had it, and had reasonable grounds for so believing: *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167, per Hawkins J., p. 171; *Shrosberg* v. *Osmaston* (1877), 37 L.T.N.S. 792, at p. 793; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q.B.D. 674, per Brett, M.R., at p. 686; *McGill* v. *Walton*, 15 O.R. 389; *Hopper* v. *Clark*, 40 N.B.R. 568, at p. 588; it is only right to say that the last named case was decided under the peculiar wording of a provincial statute.

In regard to the answer of the jury to question 4, there is this to be said. If Cox did not take reasonable care to inform himself of the true state of the case by a reasonable inquiry into and examination of all the available facts before causing the plaintiff's arrest, then clearly there must be a want of reasonable and probable cause: *Abrath* v. *North Eastern R. Co.* (1883), 11 Q.B.D. 440, per

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Brett, M. R., at 451. In order to enable himself to determine the issue of reasonable and probable cause the Judge left certain subsidiary questions of fact to the jury. The jury, having answered those questions, he could not on principle override their findings upon the very questions which he had expressly so left to them, but on the contrary would be bound by their findings: *Shrosberg* v. *Osmaston* (1877), 37 L.J.N.S. 792; *Baker* v. *Kilpatrick*, 7 B.C.R. 127 and 150. And the jury, having found that although Cox honestly believed that he had overpaid the plaintiff $100, yet, that he had no reasonable grounds for such belief, and further, having found that he had not taken reasonable care to inform himself of all the available facts of the case before causing the arrest of the plaintiff, it seems to me to be impossible to say that Cox had reasonable and probable cause for arresting the plaintiff. I think upon the findings of the jury, the issue of reasonable and probable cause must be determined in favour of the plaintiff: O. 40, r. 4.

In the modern reported judgments the older definitions of the term "malice" appear to be adhered to. "The term malice in this sort of action is not to be considered in the sense of spite or hatred against an indivudual, but of *malus animus* and as denoting that the party is actuated by improper and indirect motives," per Parke, B., in *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588, 595, 110 E.R. 908; and Bailey, J., defined malice as "a wrongful act done intentionally without just cause or excuse": *Bromage* v. *Prosser* (1825) 4 B. & C. 247, 107 E.R. 1051. If the plaintiff can satisfy a jury either negatively, that the securing of the ends of justice was not the true motive of the defendants, or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause. The jury are not bound, however, to infer malice from unreasonableness: *Haddrick* v. *Heslop* (1848), 12 Q.B. 267, 116 E.R. 869; and in considering what is reasonable they are not bound to take the ruling of the Judge. And since in the present action the jury had to pass upon the question of malice before the issue of reasonable and probable cause had been determined by the Judge, if the solution of the question of malice depended solely upon the absence of reasonable and probable cause, it would be within their province to determine for themselves in the first instance whether there was a want of

reasonable and probable cause. It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause—one by the jury and another by the Judge, but such at present is the law. *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167.

Objection has been taken to the Judge's charge upon the question of malice, and the following passage of the charge is pointed to as containing an insufficient definition of the term:—"Was he (Cox) actuated by malice? By that I mean was the arrest caused by ill-feeling between him and Landry? Had he any bad feeling against him, and did he simply make use of this legal machinery because of all that? That is what I mean by asking you if he was actuated by malice." Had the Judge stopped there, the charge doubtless would have been open to very serious objection, because by confining his definition of malice to ill-feeling or bad feeling proceeding from Cox to the plaintiff, he would have excluded that malice which would be deducible from any indirect, improper, foreign or collateral motive, though these might be wholly unconnected with any malevolent or uncharitable feeling against any one. For under the authorities it appears to be clear that without any ill-feeling, bad feeling or grudge proceeding from a defendant to a plaintiff, there may still exist the malice necessary to support an action of this kind. But later on, the Judge said:—

> If his state of mind is such that he has made up his mind that he is, without care, going to start this machinery in motion for any other reason than an honest desire to get back the money, if he is going right straight ahead with what I have defined as ill-feeling, a grudge against Landry, or any bad feeling against him, then he is liable.

It was said by Brett, M. R., in *Abrath* v. *North Eastern R. Co.*, *supra*, p. 453, that

> It is no misdirection not to tell the jury everything which might have been told them; there is no misdirection unless the Judge has told them something wrong, or unless what he has told them would make wrong that which he has left them to understand.

And in *Prudential Assurance Co.* v. *Edmonds* (1877), 2 App. Cas. 487, at 507, it is said by Blackburn, J.:—

> When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the Judge to give a guide, we cannot enquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but, there having been an improper direction, there must be a *venire de novo*.

Possibly by confining his definition of malice to ill-feeling,

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bad feeling, or a grudge, in the earlier passage of the charge, and to "any other reason than an honest desire to get back the money," in the later, the charge has been left open to the objection that by what the Judge told the jury he has left them to infer that he has covered the whole field of malice, outside of which they could not travel in order to discover whether or not the action had been brought maliciously. It is possible that by what he has told the jury, the Judge has made wrong that which he left them to understand. It seems to me, and I say it with all respect, that the Judge might quite properly have gone very much farther than he has gone and explained the doctrine of malice more fully and illustrated it by some of the examples of malice, of which this case appears to me to possess several, and in regard to which the charge is silent.

If the determination of the appeal depended solely upon the objection to the Judge's charge, we might perforce be obliged to subject it to a more minute analysis; but since, in my opinion, the appeal does not so depend, and that there does not exist any necessity for sending the case back for a new trial, but that on the contrary we have before us all the materials necessary for finally determining the question in dispute, no useful purpose can be served by a prolongation of this branch of the discussion.

It is almost impossible to imagine a jury finding that the defendant believed in his case, that he had not taken reasonable means to discover the truth, and that he had not been actuated by any "indirect motive." And yet, that is what the jury here have done. Whether the defendants in continuing the proceedings in the County Court were actuated, not by a desire to benefit themselves, but by an indirect motive, namely, the desire to assist Cox in getting back the $100, would be evidence to go to the jury upon the question of malice: *Quartz Hill Gold Mining Co* v. *Eyre* (1883), 11 Q.B.D. 674, *per* Brett, M.R., at 687. In my opinion, the continuance of the proceedings by the defendants, when they had in fact never looked upon the plaintiff as their debtor, would be evidence of malice. It was admitted by counsel for defendant at the trial that at the time of the issuance of the capias, Cox was the man who was out the money, and that he was the only person interested in bringing the action. Now it does seem to me that if, in order to further Cox's personal interests, the defendants permitted the use of their names in a proceeding involving the

arrest and imprisonment of the plaintiff, and one in which they were themselves in no wise directly interested, that of itself would be malice against the plaintiff, because here, clearly, was an "indirect motive."

Whether upon a proper charge, and by that I do not mean to say that the charge so far as it went was improper—but a charge so extended and amplified as to embrace that branch of malice which does not seem to me to have been sufficiently explained and illustrated to the jury, that is that malice which would be deducible from any one of the instances to which I have adverted, the jury would have found malice, no one, of course, can say. But that upon such a charge as I have suggested, they ought under the evidence to have found malice, I have not the least doubt.

Being satisfied that the findings of the Judge upon the issue of reasonable and probable cause cannot stand, and that that issue must be determined in favour of the plaintiff, and that the malice necessary to support the action was clearly shewn and proved—and I would go so far as to say admitted—at the trial, I would allow the application, set aside the verdict entered for the defendants at the trial, and enter a verdict and judgment in favour of the plaintiff for the sum of $250, with costs here and in the Court below: O. 58, r. 4.

McLEOD, C. J., agreed with Grimmer, J. McLeod, C.J.

Application refused.

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Quebec Court of Review, Archibald, A.C.J., McDougall and Tellier, JJ. October 28, 1916.

VENDOR AND PURCHASER (§ II—30)—VENDOR'S REMEDIES—FORFEITURE—WAIVER—SPECIFIC PERFORMANCE—PRÊTE-NOM.

A condition in an agreement of sale whereby the vendor is to become entitled to the property and payments thereon in case of the purchaser's default, and the agreement is thereupon to become null, is one for the benefit of the vendor, who may waive the condition, and sue upon the contract for the balance of the purchase price; the purchaser, having entered into the agreement in his own name, cannot, to escape personal liability, set up that he was merely a *prête-nom* or acting for another.

Statement.

APPEAL from the judgment of the Superior Court, Greensheilds, J. Affirmed.

On July 12, 1912, the plaintiff sold to the defendant Savignac a piece of land situated at Saint-Leonard-de-Port-Maurice for $34,000. The same day Savignac resold the land in question to

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the defendant Catton; and the latter on January 2, 1913, ceded to the defendant Dubord the half of the land. These two last purchasers assumed the conditions of the first sale.

The plaintiff prosecuted these three debtors jointly and severally, in proportion to their obligation for the sum of $5,944.20, in virtue of this deed of sale.

The defendants Catton and Dubord contested the action for the two following reasons: 1. To the end that, they have not made their payments mentioned in the deed of sale, and finally to give effect to the clause dealing with the rescission of the contract, and since the falling due of these payments, the act has become null, and the plaintiff re-entered *ipso facto* into the possession of the estate. 2. The plaintiff could not furnish good titles to the defendants.

The defendant Savignac has invoked the same grounds and has added that to the knowledge of the plaintiff he was only a *prête-nom* of the two other defendants, had no interest in this transaction, and claimed no profit from it.

The Superior Court has rejected the defence, and has condemned the defendants to pay the amount claimed on the following grounds:

Considering that the deed of sale of July 12, 1913, is a deed of sale direct to the defendant Savignac, and does not disclose that he is acting for any one other than himself, and the obligations to pay assumed under the deed were the personal obligations of the said defendant, Savignac, and he by said deed became the owner of the said property and proceeded to deal with it as his property;

Seeing art. 1541 and 1542, C.C.;

Considering that the unpaid vendor of an immoveable has the right to sue for the execution of a contract or for its cancellation, at his option, and that the demand for the enforcement of the contract does not exclude the action to cancel, but the action to cancel the contract excludes the action for specific performance;

Considering that the defendant, the purchaser of the said property, cannot by mere refusal or neglect to fulfil any of the obligations assumed by him under said deed, bring about the cancellation of the said deed, and thereby relieve himself from the obligations by him assumed;

Considering that the clause or stipulation in said deed invoked by the defendant is a stipulation in favour of the plaintiff, the seller, and not in favour of the defendant, the buyer;

Considering that there is due to the plaintiff by the defendant, in virtue of said deed, the sum of $5,944.20;

Doth dismiss the said plea;

Proceeding to adjudicate upon the issues between the plaintiff and the defendants, Catton and Dubord;

Considering the obligation of the defendants was to pay the purchase price of the said property;

Considering the defendants cannot designedly refuse and neglect to carry out their obligations under said deed, and thereby be relieved from such obligations;

Considering that although the plaintiff might avail himself of the clause invoked by the said defendants, he, the plaintiff, nevertheless, has the right to enforce the said contract in the manner and form he seeks its enforcement by the present action;

Considering that there is due by the defendant Catton the sum of $5,944.20, and by the defendant Dubord one-half said amount, to wit: the sum of $2,972.10;

Doth dismiss the said plea, etc.

Geoffrion, Geoffrion & Cusson, for plaintiff.

Maclennan, Howard & Aylmer, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—This is an action by which the plaintiff seeks to recover the sum of $5,944.20 as part of the price of sale of a certain property sold by the plaintiff to the defendant Savignac and by the latter to the other defendants.

Savignac pleads that he was only a *prête-nom*, to the knowledge of the plaintiff, and that he is not responsible. Savignac also pleads, and both of the others plead, that the deed contained a condition that in the event of non-payment of any instalment of price for a space of thirty days after it became due, the deed should be absolutely null and set aside and the property should immediately revert to the plaintiff; that that condition did arise and that, therefore, the deed had been null and the plaintiff could not proceed to collect further sums of money due under the deed.

The plaintiff replies that this clause was entirely for his benefit and he only could take advantage of it, and that he had the option to demand the fulfilment of their contracts on the part of the

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defendants and to renounce the benefit of the clause in question, which he did.

Although I had occasion immediately before the vacation this year to study thoroughly this point in the case of *Halcro* v. *Gray*, 33 D.L.R. 140, 50 Que. S.C. 350, I have again looked over the matter and I see no reason to depart from the decision then arrived at. It seems to me there are indications in the clause itself which point strongly towards the opinion that the clause was intended for the benefit of the plaintiff. The expression "without mise en demeure or sommation" would be of no application to the defendant. It is impossible to regard that expression as equivalent to a mere notice to be given by the defendant to the plaintiff of his intention not to proceed with his payments under the purchase.

I am, therefore, to confirm the judgment rendered in this case.

Tellier, J.

TELLIER, J.:—The main question, we might almost say the sole question, disputed in this case is whether the following stipulation of a deed of sale legally affects the terms of the contract, independent of the desire and even against the will of the seller, in the case where the purchaser failed to pay what he should have.

> The failure of payment by the present purchaser or his representatives of all payments in capital or interest after thirty days of their falling due shall have the effect of cancelling the present deed of sale without cost in arrears and the present vendor shall then recover the estate without being compelled to remit to the purchaser any payments previously made, which payments shall remain as liquidated damages.

This stipulation is in a deed of sale which the plaintiff has agreed to with the defendant, in the presence of Mr. Coderre, lawyer at Montreal, July 12, 1912, and which forms the basis of this action. By this contract the plaintiff sold to defendant Savignac a piece of land situated at Saint-Leonard-de-Port-Maurice for the price of $50,000, payable as follows. 1. $10,000 cash. 2. $6,000 to the delegates indicated in the contract. 3. $34,000 to the seller to be paid in the following manner: (a) $10,000 in one year: (b) $24,000 in equal annual payments, and consecutive payments of $4,000 each, the first payment to begin in the second year of the contract with interest at 5% payable annually. It is in consequence of these provisions that one finds in the contract the clause above quoted, the point of dispute between the parties.

Is Savignac a *prête-nom*? Is Savignac the defendant acting

as an intermediary or *prête-nom* in the deed of sale on which he is sued? Naturally he had to prove it, since the contract on its face gave evidence to the contrary. The parties and witnesses have been examined on the subject. After having examined the evidence and all the briefs, it is impossible for us to conclude that Savignac was acting as a *prête-nom* or mandatory.

This question moreover adds very little practical interest to the dispute since Savignac had acted for himself or for others, he ought in the second case to be held personally responsible in view of the fact that he had contracted in his own personal name. As a matter of fact the mandatory who negotiates in his own name is personally under obligation to a third party with whom he has contracted, according to art. 1716 of the Civil Code.

2. Is it true that the contract was closed and the sale legally fixed by the one action, that the purchaser has failed to pay the interest due on July 12, 1914, and the payment due on July 12, 1915? The Court of the first instance took the side of the negative, and we are of the opinion that it had reason to do so. The stipulation that the defendants are invoking in their favour is nothing less than the binding contract the rules of which we found in Civil Code (1536 *et seq.*). This stipulation gives an authority to the vendor, but not to the purchaser. The vendor alone can take advantage of it, because it is in his interest and for his safety that it is in the contract. He has the right to choose whether he will take back his property or demand the price for which it was sold. If he chooses to dissolve the contract, according to 1541, he loses his right to recover his selling price; but if he prosecutes for payment, art. 1542 still preserves for him the right of the dissolution of the contract, so long as it is not paid. The purchaser has not the power of choosing; nothing in the law allows him to make terms, or suppositions. His sole alternative is payment. Nothing is more natural than that, since he is absolutely and unconditionally obliged to pay. Art. 1538 allows him to pay so long as the decision of the dissolution has not been pronounced. That is our common law on this subject, that is to say, that which has taken place in the absence of a contrary agreement.

Doubtless it is always lawful to condescend to the common law by specific agreements, provided that they are not contrary to the public order, or to good morals (C. Civ. 13). Thus there

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should have been nothing illegal in the act of stipulation, except that the absolute power of choosing shall belong to the purchaser rather than to the vendor. All that depends on the will of the parties and it is simply this will with which the searching into the agreement is concerned. Every time this will is not expressed one must adhere to the common law and the authority of choosing between the agreement of the sale, and the price belonging to the vendor.

In spite of these agreements one may ask, however, if it is possible to conceive of a resolutive clause where the authority of the choosing of the covenant of sale and payment of the deed of sale should belong concurrently to the vendor and the purchaser. As a matter of fact, what would the power of a vendor become if the purchaser wished to choose himself, and *vice-versa* what would the purchaser's power be after the vendor had made his choice?

A law is not a law if it cannot be imposed, and recognized, that is to say if it has one correlative obligation. One could scarcely perceive of a clause in virtue of which a vendor should have a right to the price, and the purchaser to the agreement of sale. The right of one may necessarily be subordinated to the right of the other; they cannot exist simultaneously and concurrently.

Doubtless the deed of sale may very well depend on one condition either for its formation or agreement; but the condition it seems to us can never depend both on the free will of the vendor and purchaser; one or the other must, according to reason, be restricted, otherwise there would be no agreement, and a legal restriction would be found wanting. In every case the clause which we have at present before us does not detract from the common law, except in that which exempts the creditor from the formality of capital in arrears. Outside of this exception, it is subject to all the rules of binding peace such as are found in the Civil Code (arts. 1536 to 1544). Thus the dissolution of the contract has not taken place legally in virtue of our clause the parties not having been stipulated. It ought, then, to be legally demanded according to the rule of common law. But who ought to demand it? Obviously the vendor, since that is the course of common law.

Moreover, one glance at this clause suffices to convince us that it only gives authority to the vendor. Let us see for our-

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selves. The default of payment by the present purchaser or his representatives of all payments in capital or in interest in 30 days of their falling due shall have the effect of repealing the present agreement of sale without cost in arrears, and the present vendor shall then recover the immoveable. Is there anything therein which can lead one to understand or imagine that it is the purchaser that one is seeking to protect? Is power or authority conferred on him? Moreover, it would not be the least bit strange to find in a deed of sale a clause permitting a purchaser to acquire the right to liberate himself from his obligations by the sole action of default; that is to say by his fault. There is nothing conditional in the obligation except that the defendant Savignac had contracted with the appellant in the deed of sale of July 12, 1912; it is an obligation pure and simple, to pay the price agreed upon.

One thing is conditional in this contract: it is the right to ask for rescission of the sale if the purchaser defaults in the payment of the price. But as this authority belongs to him, he is free to use it or not as he may choose. So long as he does not choose to dissolve the sale his debtor Savignac shall remain absolutely and unconditionally bound towards him. The appellant had then the right to sue the defendant Savignac, which he did, and the Court in the first instance was right in maintaining his suit. *Halcro* v. *Gray*, 33 D.L.R. 140, 50 Que. S.C. 350.

The two other defendants from this point of view are in the same situation as the defendant Savignac and the suit is equally well justified against them. Consequently this Court is unanimously of opinion that the judgment appealed from ought to be affirmed with costs. *Appeal dismissed.*

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WODEHOUSE INVIGORATOR LIMITED v. IDEAL STOCK AND POULTRY FOOD Co.

Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 3, 1917.

1. TRADENAME (§ I—9)—PASSING OFF—INTENT.
Representing products to be "just as good as another's," "practically the same except one ingredient," or "better than" the other's, does not constitute a "passing off."

[See annotations, 2 D.L.R. 380, 31 D.L.R. 602.]

2. PRINCIPAL AND AGENT (§ II C—20)—LIABILITY FOR AGENT'S MISREPRESENTATIONS—TRAVELLING SALESMAN.
A false representation by a travelling salesman, that a certain company had gone out of business, and that his employer had taken it over, made in the course of his employment, thereby inducing a purchaser to buy his goods, the principal retaining the benefit, is an actionable wrong which entitles the company to damages occasioned thereby.

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3. PARTNERSHIP (§ VI—27)—RETIRING PARTNER IN SAME BUSINESS—TRADE SECRETS.

A partner who sells out his interest may engage in the same business as that of the firm and use the usual methods of doing that business, even though that involves the use of the knowledge acquired as a partner, providing he does not use the identical process or formula of the partnership.

Statement.

APPEAL by defendant from the judgment of Falconbridge, C.J.K.B., in an action for an injunction restraining the defendant from representing that the stock, food, and products of his manufacture were the manufacture of the plaintiff company, and from using the formulæ and secrets of the plaintiff company, and for damages. The real defendant was one J. J. Hobson, who carried on business under the name of Ideal Stock and Poultry Food Company. Varied.

The judgment appealed from is as follows:—

FALCONBRIDGE, C.J.K.B.:—The plaintiff company has, in my opinion, proved its case as to the allegations contained in both paragraphs 5 and 6 of the statement of claim.

Pringle, the person named in answer to the defendant's demand of particulars—salesman and agent of the defendant—was said to have been in court. The defendant did not call Pringle to contradict the statement of the plaintiff company's witnesses, nor to speak of the extent or limitations of his own agency.

There will be an injunction in terms of the prayer of the statement of claim, and a reference to the Master at Hamilton as to damages, with costs. Further directions and subsequent costs reserved until after the Master shall have made his report.

The plaintiff company will have leave to amend the statement of claim as to any matter covered by the evidence.

Lynch-Staunton, K.C., and *J. M. Telford*, for the appellant; *Washington*, K.C., and *Gauld*, K.C., for the plaintiff company, respondent.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—This was argued before us by the appellant as a passing-off case. Although no contention was made by the respondent at the trial in regard to passing-off, as appears by the argument appended to the transcript of evidence, nor before us, the appellant was justified in treating it as he did, as the judgment enjoins him from representing that his products are the respondent's manufacture. No case was made out, on the evidence, for this relief.

"The basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made:" *per* Lord Parker of Waddington in the House of Lords in *Spalding* v. *Gamage Limited* (1915), 32 R.P.C. 273, at p. 284. And in a former passage in the judgment he defines the false representation thus (p. 283): "Nobody has any right to represent his goods as the goods of somebody else."

In none of the three instances deposed to, was any one deceived by the "get-up;" and, when the articles are examined and those things common to all such articles in this trade are excluded, there remains a difference in the colour of the product, in the printed matter, and in the receptacle, leaving practically nothing to support any deception or to suggest intent in that direction. Nor was any damage proved. Of the three buyers approached, one gave an order, but with knowledge that he was not getting the respondent's goods, one declined to buy, and the last one cancelled his order immediately.

There was no "passing-off" in fact: the commendation was, that the goods were "just as good," "practically the same except one ingredient," or "better than" the respondent's—statements which do not transcend what is allowable under the authorities. See *White* v. *Mellin*, [1895] A.C. 154; *Hubbuck & Sons Limited* v. *Wilkinson Heywood & Clark Limited*, [1899] 1 Q.B. 86; *Cundy* v. *Lerwill and Pike* (1908), 99 L.T.R. 273.

Turning now to the two claims stated and argued by the respondent at the trial, these are, that the appellant should be restrained from representing that the respondent had gone out of business and that the appellant had taken it over, and from using the formulæ and trade secrets of the respondent.

The representation is proved to have been made by Pringle, the appellant's traveller, in this way: to Smith, that the respondent had sold out; to Parks, that the appellant had taken over the business of the respondent; and to Martin, that the respondent was out of business. The appellant's answer is, that these representations were not authorised by him, and were not within the scope of the traveller's authority, that they were promptly disavowed and the traveller dismissed, and that they caused no damage to the respondent. The only possible damage

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arises out of the Smith order, which, however, was given after an explanation that the appellant's feed was just as good as the respondent's, except for one ingredient. The loss to the respondent on this order would only be the 115 pounds which he gave Smith when the appellant's feed was returned, worth $5.75, and the profit on the remaining 85 pounds, say $2.25. If the respondent can recover, its damages should be limited to that amount.

The misrepresentation complained of is an actionable one, provided damage is proved: *White* v. *Mellin*, [1895] A.C. 154. It is similar in effect to that on which the plaintiff succeeded in *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524. As Smith said he was just out of chicken-feed, it is reasonable to infer that, had this representation not been made, he would have sent the respondent an order for it. Instead, the appellant got one for something "just as good." Part of the inducement for the contract was this statement that the respondent had sold out, producing the impression that no more goods could be got from it. This was false, and was material to the inducement which brought about the contract, within the cases of *Gordon* v. *Street*, [1899] 2 Q.B. 641, and *Page and Jacques* v. *Clark* (1914), 31 O.L.R. 94, 19 D.L.R. 530. It being judicially established that this representation was actually made, the traveller's antecedent denial, when questioned by the appellant, becomes immaterial. Nor was the traveller called to deny that he used this inducement. The extent of an agent's authority seems now to be determined by asking, as did Baron Martin in his dissenting judgment in *Udell* v. *Atherton* (1861), 7 H. & N. 172, 198, "Was his (the agent's) situation such as to bring the representation he made within the scope of his authority?" And the view of Mr. Justice Willes in *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259, was approved by the Judicial Committee in *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394, that, if the principal has put the agent in his place to do that class of acts, he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.

In this case, the misrepresentation complained of was made in the course of the agent's employment, in the situation in which he was placed by his employer, and was part of the inducement

which caused the contract to be made. It caused damage, though to only a small extent, and the principal retained the benefit he received under it. I think it affords a cause of action, and that the respondent should recover the damages it suffered thereby. See *Refuge Assurance Co. Limited* v. *Kettlewell*, [1909] A.C. 243.

The remaining complaint is that the appellant is using the formulæ and secrets of the respondent.

The word "formula" does not appear in the "Commercial Stuffs Act, 1909," 8 & 9 Edw. VII. ch. 15 (D.) It has been used in this case as describing a list of the different quantities of the "material of which the food is composed" (sec. 6 (*e*)), which, though required to be filed in the Department of Agriculture, is for its own information and not for publication.

It is not a secret to any one in a business manufacturing and putting up these feeds, because in mixing it is necessary for each employee, partner, or other person engaged therein, to know the proper proportions. What is here objected to is, that these particular formulæ were in use by the partnership in which the respondent's predecessor and the appellant were members, and that the latter, having sold out his interest therein, is disabled from using his knowledge as such partner.

The appellant admits that as a partner he knew the formulæ and had them in his head. But that he did not and does not use the identical formulæ is established by his evidence, in which 86 per cent. of the ingredients and their relative proportions are mentioned. And there is no other evidence upon the point. For instance, in one of the respondent's formulæ there is cotton-seed meal, 40 per cent., whereas the appellant uses only a small proportion; there is oil-cake seed and mustard-bran, which the appellant does not use, and so on. The difference between the formulæ used by the respondent and the appellant is, that in one case there are five ingredients used by the appellant which are not in the respondent's, and the proportions differ, while in the other the ingredients are the same except that the appellant omits black antimony. The proportions are not compared. There seems no escape from the position that if, under these circumstances, a former partner can be restrained from using the same ingredients or some of them, though differently compounded, he practically cannot use them at all; so that not only is he pre-

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vented from imitating the respondent, but must exclude from his business of manufacturing food-stuffs the compounding of such ordinary articles as corn-meal, flour, sulphur, flax-meal, etc. I do not understand that where, as here, it is conceded that the selling-out partner may embark in the same business as that of the former partnership, he is debarred from the use of the usual methods of doing that business, even though that involves the use of the knowledge acquired as a partner.

The respondent puts it in two ways: (1) that the appellant occupied a confidential position when he acquired knowledge of the formulæ; and (2) that he sold out whatever rights he had in them, and cannot derogate from his grant.

A partner having sold out is subject to defined disabilities only. These are, that he must not suggest that his connection with the other partner or partners still exists, or that they have ceased to carry on business and he is their successor, nor must he solicit old customers where he has sold the goodwill. He does not appear to be in the position of a servant or other person employed confidentially, as in *Lean* v. *Huston* (1885), 8 O.R. 521.

Indeed, when a secret process becomes the property of a partnership, knowledge of it may be rightly claimed by each partner, and the very fact that it may become an asset of the partnership which may be sold or assigned shews that each partner's interest in it is property, and that he acquires that interest not in confidence but as of right. The two positions contended for are inconsistent; for, if the outgoing partner grants his interest in the process, he parts with that which he owns and has a good title to, and any subsequent objection to his interference with it must rest on a property-right, and not upon betrayed confidence or breach of a fiduciary duty. What is stated by Turner, V.-C., in *Morison* v. *Moat* (1851), 9 Hare 241, at p. 262, and by Lord Justice Lord Cranworth in appeal (1852), 21 L.J.Ch. 248, at p. 294, while not necessary for the decision, which was founded on violation of confidential relationship and of contract, is valuable in this connection as shewing what the result would have been if the defendant's story had been accepted, namely, that he acquired his knowledge only when he was an actual partner in the business.

It may be noted that during the argument in *Amber Size and Chemical Co. Limited* v. *Menzel*, [1913] 2 Ch. 239, at p. 241, it

was pointed out that in Kerr on Injunctions the passage in the second edition, "Parties, however, in possession of a trade secret who take a man into partnership, or into their employment, without making any stipulation as to the trade secret, and permit him to acquire a full knowledge of the secret, will be considered to have waived their right to preserve the secret for their separate benefit," was modified in the later editions by omitting the words "or into their employment." This statement is based on *Morison* v. *Moat* (*ante*).

The argument that the appellant by his action is derogating from his grant depends for its basis on the fact that he is using in competition that which was the subject of the sale. I think this foundation of fact is lacking here; nor do I think that, if only the proportions are different, it can be argued that the substance of the respondent's combination, as that term is understood in patent cases, has been appropriated by the appellant. So to hold would result, as I have said, in excluding the appellant from any animal feed business altogether.

The result is, that the appeal should be allowed in part; the judgment set aside; and in place thereof there should be entered judgment for the respondent for damages $8, with costs on the Division Court scale. Rule 649* should operate, as the respondent began his action on the 25th April, 1916, six months after the event and after the appellant's disclaimer, and the dismissal of his offending traveller. The appellant practically took the course suggested as the proper one by Cozens-Hardy, M.R., in *Havana Cigar and Tobacco Factories Limited* v. *Tiffin Limited* (1905), 26 R.P.C. 473, at p. 478. There was ample opportunity to ascertain the exact extent of the salesman's representations, and therefore no excuse for opening the case as a passing-off case, as the respondent did according to the learned trial Judge, nor for charging that the appellant was doing wrong in the conduct of his business to the extent here put forward.

As, however, the appellant does not wholly succeed, there should be no costs of appeal.

Appeal allowed in part.

*Rule 649 allows the defendant certain costs where an action of the proper competence of a Division Court is brought in the Supreme Court.

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VICTORIA DOMINION THEATRE Co. v. DOMINION EXPRESS Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. December 18, 1916.

CARRIERS (§ III D—420)—LIABILITY FOR DELAY—MOVING PICTURE FILMS.

A carrier in the habit of receiving moving picture films, to be delivered for their exhibition on a certain date, is liable to the shipper for the loss occasioned by a delay in the delivery until after that date.

Statement.

APPEAL by defendant from the judgment of McInnes, Co. J., of September 28, 1916, in the plaintiff's favour for $194 damages, owing to delay in delivering films that were sent through the defendant company from Vancouver to Victoria. The films were delivered to the defendant company in Vancouver for shipment to Victoria on Saturday, June 7, 1916, it being the intention of the plaintiff company to use the films at the theatre in Victoria on following Monday. A mistake was made by the defendant's officials, and the films were sent east on the Canadian Pacific Railway. The parcel was stopped in transit and sent back, arriving in Victoria one day late.

Armour, for appellant; *Sir C. H. Tupper*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The question to be decided is, whether or not the contracting parties could reasonably be held to have had in contemplation the loss in question. Nothing was said by the shipper with respect to the matter of promptness of delivery, but when one looks at all the circumstances of the case, the business between the parties extending over three years, and the nature of the busniess conducted by the plaintiff here and in Victoria, I am unable to say the trial Judge drew an unreasonable inference from these facts and circumstances when he came to the conclusion that the defendant must have had in contemplation the fact that these films were to be used on Monday. For 3 years the plaintiff had been going to the Express Company with films after 11 o'clock on Wednesday and Saturday nights, after the theatre closed, and shipping them to a theatre in Victoria on the same circuit. I think any reasonable man would draw the inference from that that these films were required at the theatre in Victoria on Thursdays and Mondays. Why this very careful practice of sending the films on Wednesday night after 11 and Saturday night after 11, unless that was the purpose? I think the Judge was not wrong in drawing that inference, and we ought not to disturb the judgment.

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MARTIN, J.A.:—The case of *Jameson* v. *Midland R. Co.* (1884), 50 L.T. 426, in which it has been said by Mathew, J., with his usual clearness, if I may be allowed to say so, is in point:

> It is said that there was no evidence of knowledge on the part of the defendants that the goods were being sent . . . . to a particular destination for a particular purpose.

That is the crux of the matter, "to a particular destination for a particular purpose." I am of the opinion there was sufficient evidence before the trial Judge to come to the conclusion—as Mellor, J., says in *Simpson* v. *London and N. W. R. Co.* (1876), 1 Q.B.D. 274 at 278—to come to a conclusion on the facts of the case, as a juryman. Therefore, the fact they were needed at a particular place for a particular purpose has been sufficiently established.

As regards the general proposition advanced by Mr. Armour, companies cannot be held liable for damages for failure, under ordinary circumstances, to deliver a casual consignment, without particulars of the transaction being brought home, I agree with him. It cannot, I think, reasonably be said it is necessary for express companies to forward by the next train or boat every consignment or parcel that is handed to them. There are, for example, three boats sailing daily for Victoria from Vancouver in the summer months. Can it be said the Express Company has to make up its shipments three times a day to catch each boat? I do not think so. If they send them over once a day it would be reasonable despatch, as referred to in one of the cases. I am of the opinion, therefore, there was sufficient evidence to warrant the trial Judge in reaching the conclusion he did.

Galliher, J.A.

GALLIHER, J.A.:—I agree.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am of opinion the trial Judge in the Court below must be sustained. In so doing, I must say the evidence in itself is not very conclusive, yet I think there was sufficient evidence.

With respect to the contract: I think the contract can not be objected to upon the ground taken—that it was not established that it had the approval of the Railway Board; the plaintiff put in the contract. I am not satisfied that it is necessary to establish that the contract was approved by the Board. But with regard to clause 3 of the contract, I am of opinion that the liability provided against is the liability for the value of the article. If the

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company intends to cover damages, such as have been sued for here, special damages arising out of what may be said to be within contemplation of the parties—clause 3 does not include that liability, and that is the liability which has been sued for here, and for which judgment has been given for the plaintiff.

In respect to express companies, generally—and in regard to this company in particular—it is a matter of common knowledge that the Dominion Express Co. enjoys in Canada peculiar privileges, very extensive and very great. The public are, to a very large extent, in the hands of the company for express business. I think it can be said that the Dominion Express Co., as well as others, should exercise the very highest degree of expedition in carrying on their business. I would expect that the Courts would, at all times, hold them to expedition in the completest sense; that is, an express company must at once forward the article entrusted to it, that is to say, at the very first available moment of transportation. If it were not so, it seems to me all advantage of such carriage would be lost. Safety is one thing in dealing with express companies, but expedition is just as necessary. Suppose one were leaving the City of Vancouver, about to do important business in the City of Montreal, and expressed certain valuable documents which were absolutely essential to be gone into when arriving in Montreal. Would it be permitted to the express company to neglect to pursue their obvious duty of expedition and not send the parcel forward upon the first train passing out of Vancouver? If they failed to make the first connection, in my opinion, they failed in performing their contract. The question is, were the damages reasonably within the contemplation of the parties? No case has been made out for a reversal of the judgment.

Appeal dismissed.

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PARISH OF ST. LAZARE v. BILODEAU.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. November 13, 1916.

ELECTIONS (§ III—80)—DISQUALIFICATION OF CANDIDATE—TAXES—FILLING VACANCY.

One who owes for school or municipal taxes at the time of his election as a municipal councillor is thereby incapacitated (in Quebec) from holding that office, and the council may thereupon proceed to have the office declared vacant, and to fill the vacancy accordingly.

Statement.

APPEAL from the judgment of Dorion, J., Superior Court of the District of Quebec, 50 Que. S.C. 37. Reversed.

Gelly & Dion, for appellant; *Gagné & Gagné*, for respondent.

ARCHAMBEAULT, C.J.:—The action is one to set aside a resolution of a municipal council appointing a councillor to fill a vacancy. The respondent, plaintiff in the case, claims that the seat in question was not really vacant, and that consequently the council had no right to make the appointment.

On January 10, 1916, a municipal election was held at St. Lazare, and one Napoléon Turcotte was elected councillor. Turcotte was unable to be a member of the council because, at the time of his election, he owed municipal and school taxes, and for this reason, he was not a municipal elector. Art. 283 C.M. says that no one can be elected municipal councillor, if, at the time of his election, he is not a municipal elector, and art. 291 says that, in order to be a municipal elector, one must have paid his municipal and school taxes.

The fact that Turcotte owed municipal taxes at the time of his election is not contested; the respondent admits that in his factum, and Turcotte admitted that himself in council at a session of January 17, of which I will speak.

On January 17, Turcotte went to the council to take possession of his seat, and take the oath of office. But another member of the council asked him by writing to give a declaration of his qualification conformably to art. 283 of the M.C. This writing was putting Turcotte *en demeure* to declare on what date and at what hour he had paid his taxes, and, in his writing, Lacasse declared that he knew of the lack of qualification on the part of Turcotte at the time of his election. I do not claim that this document was absolutely regular in its form, and I simply mention it to expose the facts of the case.

Turcotte then produced his receipts, saying that the date of payment was shewn thereon, but he refused to take the oath, because he had not paid his taxes in time to be eligible for councillor.

Alphonse Audette, secretary of the municipality, was examined as a witness in the case, and this is what he says on this point.

He is asked if it is not true that he asked Turcotte if he was able to give his oath, that he had not paid his taxes within the hour before he was nominated, and he answers affirmatively to that question, adding that Turcotte answered to that question by

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producing his receipts and in saying: "Look at the date that I paid." Audette adds:—

I asked him: "At what hour did you pay?" He said: "I paid at about 4 o'clock in the afternoon."

Q. He refused to swear that he had paid his taxes within the hour after his nomination? A. Yes, sir.

We therefore have two facts absolutely true: 1. Turcotte had not paid his taxes during the required time to be eligible as municipal councillor at the time of his election; (2) Turcotte declared that to be so before the council.

I am of opinion that, under the circumstances, the council could itself nominate a municipal councillor to replace Turcotte. Art. 208 of the M.C. declares that when the disqualification of a person appointed to a municipal office is notorious or sufficiently established, the council may, by resolution, declare the office of such person vacant, and must thereafter fill that vacancy.

Surely a better proof of incapacity cannot be invoked than the statement of the person himself. As long as Turcotte admitted that he had paid his taxes too late, his incapacity was sufficiently proved and the council could declare the seat vacant, and proceed to the appointment of someone to replace Turcotte. That is what was done. The meeting of the council was adjourned to January 24, "to appoint a councillor to fill the vacancy," says the *procès-verbal*, and on January 24, one Joseph Goupil was appointed by the council.

Other points were raised in the cause. Thus, does the fact that a councillor newly appointed refuses to take the oath of office at the first meeting of the council, render the seat vacant? I must say that, in my own opinion, it does not. Art. 112 M.C. says that the omission during 15 days to take the oath constitutes a refusal to accept the office. Of course, the refusal of Turcotte to take the oath of office at the meeting of January 19, forbade him to act as councillor. The taking of the oath is essential to clothe a councillor of his functions; but the negligence or the refusal to fill that formality does not constitute a refusal to accept the office, and does not, by that, render the seat vacant, unless this negligence or refusal is kept on during 15 days. Turcotte was elected on January 10. His negligence or his refusal to take the oath of office could not constitute a refusal on his part to accept the office until January 26.

The municipality contends that, not only did Turcotte refuse to take the oath at its meeting of January 19, but that he formally declared before the council that he would not accept the office of councillor. The evidence on this point is conflicting. But, it is not necessary to decide this question, as long as we arrive at the conclusion that the sole fact of non-payment of the taxes rendered Turcotte ineligible, and that the admission of this fact by Turcotte in open meeting of the council gave the right to the council to declare the seat vacant and to fill the vacancy.

Another point is raised in this case. At the meeting of January 24, Turcotte went to the council and produced a declaration of qualification and an oath of office. He contends that this procedure constituted the taking of his office and that he had the right to do because the vacancy had not yet been filled.

Art. 119 M.C. says, in effect, that a member who refuses to accept the office of councillor can always, if the vacancy created by his refusal to accept has not been filled, re-enter upon his functions and exercise them. But the article adds: "without prejudice, in any case, to the costs of proceedings instituted against him, in the event of any such proceedings having been instituted." The council of St. Lazare interpreted this proviso of art. 119 as expressing that if proceedings have been taken against a councillor who has refused to accept the office, this councillor cannot go back on his decision; and consequently the council refused to accept the documents offered by Turcotte. Turcotte was proposed to fill the vacancy but another proposition was made in favour of Joseph Goupil, who had been defeated by Turcotte at the election of January 10. Three councillors voted for Goupil and two for Turcotte. Goupil was, in consequence, declared elected.

Here, again, it is unnecessary to decide if Turcotte had or not the right to accept the office after having refused it, because the vacancy was created on account of the incapacity of Turcotte to be elected. The question of his refusal to act is without importance. The defence of the appellant municipality to the action of the respondent says in plain words that Turcotte, at the time of his election, had not the qualifications required by art. 283 M.C. to be elected and to act as councillor for the municipality.

This part of the defence, I repeat, is, according to my opinion, well founded and is sufficient to have the request of the respondent

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rejected, even if the other points of the defence are not well founded.

PELLETIER, J.:—The first question which presents itself in this case is to know why it is that the municipality of Saint-Lazare is sued.

It is evident that the council acted the best it could and to the best of its knowledge; it is not fair to ask the setting aside of this resolution as well as the costs against the defendant corporation, whilst another procedure, as advantageous and efficacious, that of the *quo warranto*, could have been resorted to with less costs and expenses, because a decision on a brief of *quo warranto* in municipal matters is not subject to appeal.

Here it is the municipality which is sued, against which costs are asked, whilst on the *quo warranto* there would have been only the persons directly interested who would have been obliged to defend themselves if they had thought proper to do so. It is not surprising, also, that it is not Turcotte who has taken the present action. In effect, the first and principal cause of this difficulty is that Turcotte has permitted himself to be chosen as a candidate and to be elected, when he was clearly disqualified and his election could not be valid. In effect, the default in paying his taxes was a complete disqualification to be elector and to be municipal councillor. Turcotte seems to have understood this, not only in taking the present action, but from the attitude he took after his action and at the time of the two meetings of January 17 and 24.

As in all those parish suits, the evidence, with regard to everything that happened during those 2 days, is rather conflicting; but, if the evidence is conflicting, the one who must suffer is the one upon whom falls the burden of the evidence, that is to say, the plaintiff-respondent. However, notwithstanding the contradiction which is found in the evidence, I am satisfied that it is sufficiently proved,—that Turcotte, understanding that his election was void and exposed him to a contestation, has sufficiently given the council to understand that he refused to accept the office, and this justifies the council in proceeding as it did. The resolution passed on January 17, on account of Turcotte's attitude, who was present, and who was practically refusing to accept the office, was equivalent, in my opinion, to a declaration of the vacancy of the seat. He let that resolution be passed on that day without pro-

testing. This resolution declared that there would be a nomination made by the council on January 24 to replace him and everybody seems to have acquiesced in that.

On January 24, a motion was made to appoint the new councillor, and Turcotte, who then, as a matter of form, offered a declaration as to his qualification which was not sworn to, has nevertheless consented—according to the evidence there is no doubt about that—that the council proceed to appoint a new councillor. Goupil was then proposed on one side, and on the other Turcotte himself was proposed. Here, again, the evidence is conflicting, but the person who was one of the proposers of Turcotte admits that Turcotte had consented to this way of proceeding. Consequently the vote was taken and Goupil was declared elected by a majority of one vote. Now it is Honorius Bilodeau who sues and who pretends to have this declared void.

I do not think that the tribunals ought to try an action in contestation of this nature, especially when it is a question of a man who was not qualified to be elected as a councillor, and who evidently had understood his situation and would not have carried the matter further, if another interested party had not brought a suit against the municipality. Nevertheless, there is another reason for which I think the action should not be maintained.

The plaintiff sues only for the setting aside of the resolution passed on January 24. According to my view, if this action is maintained, it would have no useful effect and would only serve to reduce the council of the parish to an uncertain state. In effect, the setting aside of the resolution of January 24 does not give anything to Bilodeau or Turcotte, especially if we leave, as the action does, without setting it aside, the resolution of January 17.

If the present action is maintained, the election of Goupil would be void, but this would not give the seat to Turcotte, the resolution declaring the vacancy still in force and the majority of the council who is favourable to Goupil would again appoint the latter. The plaintiff would obtain nothing by his action which would be absolutely useless from the point of view he takes.

It could not be a question at this stage of the matter of an election by the people. It would have been necessary for doing so that Turcotte had taken the oath, taken his seat and his election had been contested. As it would certainly have been annulled,

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the matter was left in abeyance, and it is asked to-day to maintain indirectly in his seat a man who had not the required qualifications to be elected.

I have no hesitation in coming to the conclusion that Turcotte had excellent reasons not to take his seat, and that he was exposing himself to a contestation if he did; he preferred to stay quiet and let council act; it is too late now for another to come in his place and complain of all that happened by proceedings which would not reach the proposed aim.

I would reverse the judgment of first instance and set aside the action.

Carroll, J.

CARROLL, J. (dissenting).—On January 10, 1916, Napoleon Turcotte had been elected councillor by municipal electors with a majority of 5 votes. He had for opponent, Goupil, the *mis en cause*. On the same day, Lacasse, who became mayor at the meeting of January 17, had been elected councillor. At the meeting of January 17, Lacasse, when Turcotte was about to take the oath of office, asked the latter to furnish a declaration of his qualifications.

The evidence is conflicting as to what was said at this meeting. The supporters of Turcotte contend that he refused to take the oath that he had paid his taxes, and that it is on this point that he was examined. The supporters of Goupil say that Turcotte, seeing the objections made to his taking the oath, withdrew from the discussion, declaring to the council that he would not sit and refused to accept the office of councillor.

At this meeting of January 17, the following resolution was adopted:—

Proposed by Pierre Fradette, seconded by Joseph Lacasse: That the nomination to replace Napoleon Turcotte be postponed to Monday, the 24th January instant, at 10 o'clock in the forenoon, then to consider what relates to this case and appoint a councillor to fill the vacancy.

On January 24, Turcotte went to the council; he produced a declaration of qualification not sworn to. He said he was ready to take the oath of office. But it was proposed that Goupil be elected councillor to fill the vacancy, "Mr. Turcotte having produced his declaration after proceedings had been taken to fill the vacancy."

On January 24, Turcotte was still within the delay to take the oath of office. It seems to me evident that the election of Turcotte

was not favourable to the majority of the council. The perusal of the evidence has convinced me that the majority were against Turcotte, because he had not paid his taxes at the time of the election but in the afternoon only of the day of his election. He had been told that the council could be sued for his illegal election.

I do not attach much importance to the sayings of the witnesses of the one or the other side; but there are the facts which are admitted by both sides; for instance, Turcotte has, in the delay required, produced his declaration of qualification, and at the meeting of January 24, he declared himself ready to take the oath of office, which implies that at the meeting of January 17 he had not formally renounced the office.

The illegality charged against Turcotte of not having paid his taxes at the time of his election and the irregularity committed in his declaration of qualification did not justify the municipal council in declaring the seat vacant and appointing another councillor.

Art. 208 of the M.C. says that if the disqualification of a person appointed to a municipal office or holding the same is notorious or sufficiently established, the council may by resolution declare the office of such person vacant, saving any recourse on the part of the person appointed. The vacancy must then be filled in the ordinary manner and within the delay prescribed.

I think the opinion of de Lorimier, J., in *Leonard* v. *Corp. de la Paroisse de l'Ascension* (1907), 14 Rev. de Jur. 301, 305, is the true expression of the law.

> Art. 208 of the M.C., he says, is a special provision which can only apply in cases of absolutely notorious incapacity, that is to say, virtually indisputable. This article is the complement of article 203 of the same section, relative to persons incapable of filling municipal offices. The councillor elected can, in fact, be unable to fill the office, he can be exposed to legal proceedings being taken against him to have him discharged from his office, but it is for himself alone to decide about his conduct, as long as he does not recognize his incapacity or does not give notice to the council.

The absolute incapacities mentioned in art. 203 of the M.C. and which would render an election void, would be for example: the election of a minor, of a person in holy orders or of a minister of any religious creed, a member of the Privy Council, a Judge, etc. These disqualifications are notorious and sufficiently ascertained.

But the election of a councillor who may not have paid his

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taxes at the time of the voting, or who may not have produced a declaration to that effect, would be valid, after the delay had elapsed to contest that election.

In a case of this kind, it is for the Courts to pronounce on the validity or the invalidity of the election. Otherwise it would have to be said that the municipal councils are judges with regard to the legality of the election of their members.

It is easy to conceive the arbitrariness that would reign in these councils where divisions are so frequent and where abuse of the exceptional right conferred by arts. 337 and 339 M.C., which allow the appointment of a councillor to fill a vacancy, could be attempted.

Under the circumstances I would confirm the judgment.

Judgment.

Judgment: Considering that no person can be appointed member of a municipal council, nor act as such, if, at the time of his election, he is not a municipal elector (art. 283 M.C.);

Considering that in order to be a municipal elector it is necessary to have paid the municipal and school taxes (M.C., art. 291);

Considering that the admission made by Turcotte of the late payment of his taxes and the production by him made before the council of receipts showing this late payment, have had for effect to render notorious and proved his incapacity to be elected a member of the council and act as such;

Considering that when the incapacity of a person appointed to a municipal office is notorious or sufficiently established, the council may declare the office vacant and must thereafter fill the same (art. 208 M.C.);

Considering that the municipal council of the appellant has acted within the limits of its functions in declaring vacant the office of councillor which Turcotte was unable to occupy and exercise, and in filling this vacancy;

Considering that the judgment rendered by the Superior Court at Quebec on April 10, 1916, which maintained the action of the respondent and set aside the resolution of the municipal council of the appellant municipality, dated January 24, 1916, appointing Joseph Goupil councillor to replace Napoleon Turcotte, was erroneous; Sets aside the said judgment;

And proceeding to render the judgment which should have been rendered by the said Superior Court, dismisses the action of the respondent with costs in the two Courts against the said respondent. *Appeal allowed.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 3, 1917.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—"UNDERTAKERS"—"ENGINEERING WORK"—EJUSDEM GENERIS.
The Workmen's Compensation Act (R.S.B.C. 1911, ch. 244, sec. 9) gives rights of action against the principal contractor co-extensive with those against the employer himself, and both the sub-contractor and the principal contractor are "undertakers" within the meaning of the Act. The expression "any other work" in the definition of "engineering work" is not necessarily limited to work *ejusdem generis*.

2. STATUTES (§ II A—95) — CONSTRUCTION — "HEREINAFTER"—"HEREINBEFORE."
In order to give effect to the obvious intent of a statute (the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, sec. 9), the word "hereinafter" may be read as "hereinbefore."

Statement.

APPEAL by defendant from the judgment of Clement, J., in an action under the Workmen's Compensation Act (R.S.B.C. 1911, ch. 244). Affirmed.

E. P. Davis, K.C., and *C. B. Macneill*, K.C., for appellant.

A. J. D. Mellish, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I am of opinion that the injury complained of resulted from the employer's negligence. I do not adopt the Judge's theory of how the breakage of the goose neck occurred. I do not know how it occurred beyond this, that it cannot be accounted for, except on the theory that the pin at the foot of the mast got out of its socket in some way and caused the breakage of the goose neck. No other theory is tenable on the evidence. How it got out, no one knows, but we find that the socket had theretofore been broken in such a manner as to reduce its depth by one-half. The machine was defective, and the fair inference is that the defect was responsible for the accident.

The protection provided by the manufacturers of the crane against the pin springing out of its socket was reduced from 2½ inches to about 1 inch by the breakage aforesaid. That breakage was known to the employer and was not repaired.

But this does not dispose of the appeal. Several questions of law were raised by counsel for the appellant. The Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, sec. 9, makes a principal contractor liable to a workman of a sub-contractor, and this liability is not confined to mere compensation under the said Act, but appears to extend to liability at common law as well.

The same section is found in the English Act of 1897, and is discussed by the several text writers on that Act, who appear

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to accept it as not open to reasonable doubt that the section gives rights of action at common law against the principal contractor co-extensive with those against the employer himself: Beven on Employers' Liability, 4th ed., 484; Minton-Senhouse, 2nd ed., 149, 155; and Reugg, 4th ed., 231. That both the sub-contractor and the principal contractor are undertakers within the meaning of the Act was decided by the House of Lords in *Cooper & Crane* v. *Wright*, [1902] A.C. 302, but the question of the principal contractor's common law liability under the section, while referred to, was not before the House, and no opinion was expressed thereon. I think I ought to adopt the view held in England, and hold that the appellant, who is the principal contractor, and not the employer, is liable at common law to the same extent as the employer.

Another question of law was raised depending upon the construction of sec. 4 of our Act. That section provides that the Act shall apply only to employment by the undertakers as *hereinbefore defined* on, in or about a railway, etc. . . . or engineering work, and to employment by the undertakers as *hereinafter defined* about any building which exceeds a certain height.

The work upon which the deceased was engaged at the time of his injury fell without the class of buildings above referred to, that is to say, a building of a certain height, but a curious mistake seems to have been made in said section by the draftsman thereof. Undertakers are defined in sec. 2 of the Act and in no other place, yet sec. 4, in the first part of it above recited, refers to them correctly as "*hereinbefore defined*," while in the second part of the section it refers to them as "*hereinafter defined.*" The question, therefore, is whether I ought to read the word "hereinafter" as "hereinbefore."

It is quite clear, to my mind, how the mistake arose. Our Act is modelled on the English Act of 1897. The section of that Act corresponding to sec. 4 of ours is sec. 7, and "undertakers" are defined in a sub-section of said sec. 7. Sec. 7, in both the particulars mentioned above, correctly refers to undertakers as "hereinafter defined," and I have no doubt that the draftsman of our Act made a slip when copying this section.

There can be no pretence that two definitions of undertakers were intended to be contained in the Act. It is not a *casus*

omissus, but the using of the wrong word by mere accident, as I am firmly convinced.

I am, therefore, of opinion that I am not precluded from reading the word "hereinafter" as meaning "hereinbefore."

In *The King* v. *Mortlake* (1805), 6 East 397, at 401-2 (102 E.R. 1339), Lord Ellenborough, C.J., said:—

> The words of the Statute of Ann are relied on to show that it is not such a person with whom an apprentice bound to him could gain a settlement there; and it is said that they are in the disjunctive, "come into or reside in"; but upon referring to the Certificate Act, 8 & 9 Wm. 3, ch. 30, which speaks of persons who "shall come into any parish there to inhabit and reside," and the 9 & 10 Wm. 3, ch. 11, which speaks of doubts having arisen upon the former statute, by what acts "any person coming to inhabit or reside within any parish by virtue of any such certificate may procure a settlement", and which enacts that no person who shall come into any parish (without more) by any such certificate shall gain any settlement, except in certain ways mentioned; I say, upon comparing the words of the Statute of Ann with the former provisions, I think those words must be read copulatively and that they mean only to designate persons who may come into any parish for the purpose of residing, *and* actually reside there under a certificate.

In *Fowler* v. *Padget* (1798), 7 T.R. 509 (101 E.R. 1103), 4 R.R. 514, Grose, J., said: "In deciding this case, we ought to consider the spirit as well as the letter of the Act of Parliament on which this question arises."

And the whole Court, consisting of Lord Kenyon, and Grose and Lawrence, JJ., concurred in reading "or" as if it were "and."

Maxwell, 5th ed., at p. 30, referring to the literal construction of statutes and the impropriety of Courts adding or omitting words, says:—

> The foregoing elementary rule of construction does not carry the interpreter far; for it is confined to cases where the language is precise and capable of but one construction, or where neither the history nor the cause of the enactment nor the context nor the consequences to which the literal interpretation would lead, show that that interpretation does not express the real intention.

And in the same volume, p. 373, he points out that where the language of the statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some absurdity or hardship, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the stricture of the sentence; that this may be done under an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made

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are mere corrections of careless language; that where the main object and intention of the statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law except in cases of necessity of the absolute intractability of the language used.

In *Rex* v. *Wilcox* (1845), 7 Q.B. 317, the Court of Queen's Bench held that the legislature must have made a mistake in referring to an Act as 13 Geo. III., when it must have meant 17 Geo. III. Lord Denman, C.J., there said (p. 338):—

> A mistake has been committed by the legislature, but having regard to the subject-matter, and looking to the mere context of the Act itself, we cannot doubt that the intention was to repeal the 17 Geo. III, and that the incorrect words must be rejected.

As it appears to me to be beyond the possibility of a doubt that the use of the word "hereinafter" was a mere slip of the draftsman, I think I am bound to give effect to that opinion by reading "hereinafter" as "hereinbefore," thus giving the section some meaning and operation which otherwise it could not have. It was contended, in the alternative, that the work on which the deceased was engaged was an engineering work, and hence apart from said clause of sec. 4 was within the statute. I quite agree that if said clause were eliminated that would be so; whether the work fell within the definition of "engineering work" is a question of construction. The fact that the legislature dealt specially with work on buildings of a specified height raises in my mind a doubt as to whether, in these circumstances, the present definition was intended to include work so specially dealt with.

In *Cosgrove* v. *Partington*, 17 T.L.R. 39, 3 W.C.C. 167, the Court of Appeal held that the expression "any other work" in the definition of engineering work is not limited to work *ejusdem generis* with work of a railroad, harbour, dock, canal or sewer, and that a person working on the fifth storey of a mill was engaged on an engineering work, and this notwithstanding an effective special provision in respect of high buildings. The inference may be drawn from that case that the injured party can claim the benefit of the wide interpretation of the definition, and also said clause of sec. 7 of the English Act as well, and, if that be true, the plaintiff here is entitled to succeed independently of the latter part of sec. 4 of our Act, and if that clause must be read liberally, still she may succeed.

I prefer, however, to rest my decision upon the construction I have already mentioned, that the word "hereinafter" must be read "hereinbefore."

I would dismiss the appeal.

GALLIHER, J.A.:—The expression "any other work" in the definition of engineering work is not limited to work *ejusdem generis* as work on a railroad, harbour, dock, canal or sewer: *Cosgrove* v. *Partington*, 17 T.L.R. 39.

Beven on Employers' Liability, 4th ed., at p. 484, in dealing with the Imperial Act, 1897, 60 & 61 Vict. ch. 37, says, with regard to sec. 4, which is identical with our sec. 9 of ch. 244, R.S.B.C. 1911:—

> By sec. 4 of the Act of 1897, the undertaker as he is there called became liable to the workman of any sub-contractor employed in any portion of the entire work for any accident arising out of and in the course of the employment whereby the workman is injured. He also became liable to the sub-contractor's workman in respect of personal negligence or wilful act of the sub-contractor independently of the Act.
>
> Thus the head contractor's common law liabilities to a workman injured while working with a sub-contractor were increased inasmuch as independently of the act the sub-contractor was regarded either as a foreman or a fellow workman in neither of which capacities would the head contractor be liable for his acts causing injury to a fellow servant, while by the act he was made liable in either case as if the sub-contractor's negligence or default were the head contractor's own personal negligence or default.

Mr. Davis takes the point that what was being done here was not an "engineering work" strictly speaking, but under the definition in the Act would be included in that term, and draws our attention to sec. 4 of our Act, which reads as follows:—

> This Act shall apply only to employment by the undertakers as hereinbefore defined on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined or in or about any building, which exceeds 40 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair or demolition thereof.

And points out that, as to "engineering work," the Act shall apply to employment of undertakers as hereinbefore defined, while as to work of construction of a building, such as here, where mechanical power is used (although included in the definition of engineering work), it is treated separately, and as to this class of work the words are "undertakers as hereinafter defined," and that, as there are no hereinafter defined undertakers, the Act is defective.

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By reference to the Imperial Act, we see that sec. 7, which treats of the application of the Act, combines our secs. 4, 2 and 3, the first part being our sec. 4, except the words used are "hereinafter defined," and then proceeds in its second part to define the various terms as in our sec. 2, and as a third part (which is not material here) uses the language from which our sec. 3 is taken.

Had our Act been framed as the Imperial Act is, this question could not have arisen. The point is a very nice one and brings us to an interpretation of sec. 4.

In *Queen* v. *Judge of London Court*, [1892] 1 Q.B. 273, Lopes, L.J., says, at p. 301:—

> I have always understood that if the words of an Act are unambiguous and clear you must obey those words however absurd the result may appear.

And at p. 304, Kay, L.J., in referring to the decisions in *The Cargo ex Argos*, L.R. 5 P.C. 134, and *The Alina*, 5 Ex. D. 227, says:—

> Both these decisions proceed upon the canon of construction of Acts of Parliament adopted by the House of Lords in the *Sussex Peerage Case*, 11 Cl. & F. 85, at p. 143, that if the words of a statute are in themselves precise and unambiguous . . . the words themselves alone do in such case best declare the intention of the law-giver.

To what extent can we apply this canon of construction to sec. 4, and to the definition of engineering work in sec. 2?

Adopting the decision in *Cosgrove* v. *Partington*, *supra*, "engineering work" would include the work in question, and had not sec. 4 differentiated (as it seems to me it has) as between "engineering work" as defined until you come to the words "and includes," and the words "and any other works"—defining them —I should have had no difficulty.

The words of sec. 4 are: "This Act shall apply only to employment by the undertakers as hereinbefore defined on or in or about . . . an engineering work . . . and to employment by the undertakers as hereinafter defined on, in or about any building, etc., etc., etc." The precise class of work under consideration here.

The words used are clear and unambiguous in themselves, but to give effect to them would be to take away a remedy already provided for in a previous section of the Act in respect of a work within which class this building would fall, something that could hardly have been in the contemplation of the legislature.

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Having regard to the whole context, I think we should read the word "hereinafter" as "hereinbefore."

On the merits I do not adopt the theory relied on by the trial Judge, as I do not think, with the motive power off, and the boom being operated by hand, it was possible in the distance traversed for the male casting to have rotated so as to bring it out of the socket.

It is very difficult indeed to arrive at any conclusion as to how this accident occurred, but we have this fact that the socket in the female casting had a rim some three inches high around where the male casting fitted—that this was broken for a considerable area, reducing that height by about one-half; and, as it is admitted that the goose necks at the top were of first-class material, and in proper shape, it must, I think, be concluded that in some way or other the casting by breakage contributed to the accident.

Lord Atkinson, in *Lendrum* v. *Ayr Steam Shipping Co.*, [1915] A.C. 217, at 226, in discussing the case of *Wakelin* v. *London & S.W.R. Co.* (1886), 12 App. Cas. 41, says:—

> In this case as in that the claimant . . . was bound to produce evidence furnishing data from which an inference could reasonably be drawn as a matter of fact that the particular fact or circumstance from which liability arose existed.

Adopting those words, we have in the case at bar these facts established: 1. That the deceased met his death while working with the derrick. 2. That it was the falling of the boom of the derrick that struck him and caused death. 3. That the socket wherein the mast of the derrick fitted had been reduced in area by breakage.

From these facts I think it can be said that a reasonable inference may be drawn that the defective casting in some way was the cause of the accident.

McPHILLIPS, J.A.

McPHILLIPS, J.A.:—This appeal involves the determination as to whether, upon the construction of sec. 9 of the Workmen's Compensation Act (R.S.B.C. 1911, ch. 244), liability for negligence at common law is imposed upon the undertakers, where a sub-contract from the undertakers has been entered into and there has been personal negligence or wilful act, independently of the Act, upon the part of the sub-contractor, *i.e.*, whether the negligence of the sub-contractor falls upon the undertakers, with

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such right of indemnification to the undertakers as is set forth in the Act (secs. 9 and 11). The section reads as follows:—

9. Where in an employment to which this Act applies the undertakers as hereinbefore defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workmen employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies: Provided that the undertakers shall be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contracts or of any work which is merely ancillary or incidental to, and is no part of or process in, the trade or business carried on by such undertakers respectively.

The Imperial Act from which the British Columbia Act was taken was repealed and is replaced by the Act of 1906, in which the provision as contained in parenthesis in the section has disappeared.

Now our Workmen's Compensation Act stands repealed, and, in substitution therefor, we have the Workmen's Compensation Act (6 Geo. V., 1916, ch. 77), and all claims for compensation are no longer the subject-matter of adjudication in the Courts, but are to be determined by a Board constituted under the Act and paid out of an Accident Fund created under its provisions. The accident to be inquired into upon the appeal though is to be determined upon the law as it existed previous to the passage and the taking effect of the last-mentioned Act (*i.e.*, previous to January 1, 1917). That liability at common law upon the undertakers for negligence where there is a sub-contract and the negligence is that of the sub-contractor seems impossible of being gainsaid. Strange and novel as it may seem, and enacted in this most peculiar way, and the strange circumstance is this, that this case is the first one of record that brings up the question, although the legislation has existed in this province since the first enactment in the Workmen's Compensation Act of 1902 (2 Edw. VII. ch. 74)—that is to say, for 15 years—the section in the original Act being sec. 5.

The action is brought under the Families Compensation Act (R.S.B.C. 1911, ch. 82), otherwise known in Imperial legislation

as Lord Campbell's Act, the widow bringing the action on behalf of herself and infant children. The injury was immediately fatal, the workman being an employee of the sub-contractor of the appellant, one Bickerton. The work which was proceeding was the placing of structural steel work in connection with an elevator being built in the City of Vancouver, and the deceased was employed at his work pulling a rope attached to the jib of a derrick crane (the property of the sub-contractor Bickerton). The derrick crane fell, and the mast thereof struck the deceased and killed him. The evidence is clear that the derrick crane was not in the best of condition and not as originally manufactured—*i.e.*, parts replaced—and not working in a very satisfactory manner, a stay having to be used to preserve its perpendicular condition. The derrick crane being defective and broken, *i.e.*, the bottom of the mast rested in the socket of the sole plate. But the sole plate had a defective rim, a considerable portion thereof being broken off, the parts not really fitting properly or safely. The use of the stay, an improvised safety contrivance, in the endeavour to prevent accident, is not at all customary or found in use where proper derrick cranes are being worked.

Evidence was led at the trial which would seem to amply justify a holding that the derrick crane was in a very negligent and defective condition. The pleadings and the particulars contained therein gave clear notice to the appellant of what it was proposed to prove in the way of establishment of negligent and defective condition, so that no real or justifiable ground of complaint could arise of surprise at the trial, and the trial Judge, in his discretion, was well entitled to refuse the recalling of the witness Kent on the application of counsel for the appellant.

The trial Judge arrived at the conclusion that the *causa causans* was the defective condition of the derrick crane—*i.e.*, the sole plate; that is, that, owing to the faulty, defective and broken condition of the connections, the mast working in the socket having a broken rim went out of place, throwing an undue weight on the goose neck, breaking it, and there followed the general collapse, resulting in the fatal accident.

The evidence is voluminous but quite understandable. There runs throughout it all, the potent situation of the utilization of a derrick crane that could not be said to be suitable for the work—

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the handling of heavy structural steel. The work was dangerous work in its very nature, calling for the use of plant reasonably fit for the purpose, and upon a review of the evidence I cannot come to the conclusion that the trial Judge came to other than the right conclusion; and there would appear to be good and sufficient evidence upon the whole case to support the judgment upon the facts as arrived at by the Court below. To otherwise state the point, the trial Judge had material before him and the opportunity to examine the challenged machinery, which admitted of him as a reasonable man arriving at the conclusion at which he did.

The presumption ought always to be that the judgment is right, and the onus rests on the appellant to overturn this presumption. In other words, it must be established that the trial Judge arrived at the wrong conclusion. In my opinion, this h s not been accomplished (*Savage* v. *Adam*, [1895] W.N. 109 C.A.).

Colonial Securities Trust Co. v. *Massey*, [1896], 1 Q.B. 38, Lord Esher, M.R., at 39.

In a short review of the evidence it is plain that the goose neck was broken by an upward thrust and that if the mast mounted at the broken part of the rim, the break was one-third of the circumference. It would tear everything down which was the happening, and the improvised wire stay was to prevent this. It is a fair inference that the broken rim and general defective condition of the sole plate gave rise to the accident; and there was some evidence that an accident, which called attention to the defective condition, took place some 9 months before. When these facts are considered there would appear to be decisions which impose liability upon the appellant. Amongst others the following may be referred to: *The European* (1885), 10 P.D. 99.

Then upon the fact, the continuance of the use of the derrick crane in its defective condition constituted negligence on the part of the appellant.

It is plain upon the evidence, that the defective condition of the derrick crane was known, and it may well be imputed that it was known or ought to have been known that it was unsafe: *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, *per* Willes, J., at 288; *Mellors* v. *Shaw* (1861), 1 B. & S. 437 (121 E.R. 778), *per* Crompton, J., at 444; *Patterson* v. *Wallace & Co.* (1854), 1 Macq.

H.L. 748; *Hall* v. *Johnson* (1865), 3 H. & C. 589; *Brydon* v. *Stewart* (1865), 2 Macq. H.L. 30; *Roberts* v. *Smith* (1857), 2 H. & N. 213.

In *Smith* v. *Baker & Sons*, [1891] A.C. 325, Lord Herschell, at p. 362, in the clearest terms lays down the well-understood proposition, that at common law the employer must carry on the work in such a manner as not to subject his workmen to unreasonable risks. In the present case the employer Bickerton unquestionably so carried on the work that the accident which took place, fatal in its result, constituted negligence at common law, and *that negligence* is by statute as we have seen imposed upon the undertaker the appellant. *Clarke* v. *Holmes* (1862), 7 H. & N. 937, is a case in point as to the liability of the master to the workmen, and the decision is upon the law apart from any statutory duty (*i.e.*, under Factory Acts). Cockburn, C.J., at p. 942, said:—

> I consider the doctrine laid down in the case of the *Barton's Hill Coal Co.* v. *Reid* (1858), 3 Macq. H.L., 266 as the law of Scotland with reference to the duty of a master, as applicable to the law of England also; namely, that where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur

It cannot be contended upon the facts of the present case that there was any acceptance of the risk. There is no evidence upon which any such finding could be made, no evidence whatever that the deceased knew of the unsafe condition of the derrick crane, and the appellant cannot escape liability under: *Dynen* v. *Leach* (1857), 26 L.J. Ex. 221; *Membery* v. *G.W.R. Co.* (1889), 14 App. Cas. 179, *per* Lord Halsbury, at p. 185; *Webster* v. *Foley* (1892), 21 Can. S.C.R. 580 (also see *Osborne* v. *London & N.W.R. Co.* (1888), 21 Q.B.D. 220, *per* Wills, J., at 223, 224, following the view expressed in *Yarmouth* v. *France* (1887), 19 Q.B.D. 647 at 657).

I would dismiss the appeal.

MARTIN, J.A., dissented without giving written reasons. Martin, J.A.

Appeal dismissed.

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BROWN v. FIDELITY OIL AND GAS Co. and Macdonald et al., Garnishees.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck and Simmons, JJ. April 20, 1917.

GARNISHMENT (§ I B—9)—AGAINST CORPORATE DIRECTORS—ASSIGNMENT OF DEBT.

Funds in a bank transferred by a company to its directors for the purpose of disbursements, and paid out by them accordingly, cannot be garnisheed against the directors, as a "debt due from the garnishee to the judgment debtor," except in so far as the transfer or assignment may be fraudulent.

Statement. APPEAL from an order of McCarthy, J., dismissing a motion by the plaintiff (the judgment creditor) for leave to sign judgment against the garnishees. Affirmed.

W. P. Taylor, for appellant; *J.J. Macdonald*, for respondents.

The judgment of the Court was delivered by

Beck, J. BECK, J.:—There was an action by the Fidelity Company (the judgment debtor) against the Janse Drilling Company, Limited. It went to trial with the result that the action was dismissed and the defendant given judgment on a counterclaim for $12,000 odd. The case went to appeal (27 D.L.R. 651), with the result that the judgment on the counterclaim was set aside with costs and no costs below were given to either side. Under a contract between the Fidelity and the Janse Co., the former had deposited in the Bank of British North America the sum of $20,000, as security for the performance of the contract which formed the subject of the action between them, and as a fund from which payments on account of work to be done thereunder should be made from time to time.

At the time of the commencement of that action there remained in the hands of the bank some $9,000 odd. The Janse Company proposed to appeal to the Supreme Court of Canada, but they eventually abandoned their appeal upon the Fidelity Company abandoning their judgment for the costs of the appeal to this Court, amounting to $1,141.15 as taxed as between party and party; and the $9,000 then remained at the disposal of the Fidelity Company.

There are two garnishees, J.J. Macdonald and H. A. Simpson. They were directors of the Fidelity Company and Macdonald was the solicitor and counsel for the company in the litigation already referred to, and no doubt generally.

During the course of the litigation between the Fidelity Com-

pany and the Janse Company, the Fidelity Company had no funds with which to meet the costs and expenses of litigation—the costs of the appeal book alone requiring an outlay of $802, and a loan of $750 was accordingly obtained from the Bank of B.N.A. on a note bearing the name of the two garnishees and another director, Bate; and another director, Richardson, seems to have rendered Macdonald some assistance.

After the matters were settled between the Fidelity Company and the Janse Company, there was a meeting of the directors of the Fidelity Company at which were present only Macdonald, Simpson and Richardson. Bate is said to have been notified. These four seem to have been the only directors. At all events, no director or shareholder, so far as appears, takes any exception to what was done at this directors' meeting. They passed a resolution "that the Bank of British North America be instructed to place to the account of J. J. Macdonald and H. A. Simpson all moneys now held by the said bank under contract between the company and the Janse Drilling Co., dated May 29, 1914." This resolution was passed on February 2, 1916.

Both Macdonald and Simpson, by affidavit, say that the minutes of the meeting are not complete, inasmuch as they omit to state that the directors authorized them to disburse the moneys referred to according to the understanding then arrived at, namely, at their own discretion. Inferentially, it is to be gathered that the personal claims of both of them, especially Macdonald, were recognized, and Macdonald states that the claim of the plaintiff in this action was considered, and was considered to be not meritorious.

Pursuant to the resolution the $9,000 odd was transferred by the bank to the credit of Macdonald and Simpson.

The amounts paid out of this sum were as follows:—Macdonald, for costs, $6,700; note given to bank discounted to pay costs of appeal book, $779.50; H. L. O'Rourke, for legal services, $300; Simpson, on account of advances made by him for the company, $1,000; bank solicitor's charge, $25; paid into Court on a previous garnishee, $370.80—total $9,175.30.

Macdonald had obtained a charging order on the funds in the bank for his costs. O'Rourke seems to have been employed only to consider and fix the amount of Macdonald's costs and perhaps

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to consider Simpson's claim, which Simpson himself puts at $2,152.95 and on which $1,000 was paid "on account."

The amount at which O'Rourke fixed Macdonald's costs seems on the face of it very exorbitant. O'Rourke's charge seems outrageous. The other payments seem to be open to no comment. It appears too that Macdonald made some comparatively small payments to other persons—Richardson being one—out of the amount paid to himself.

What we have to decide is whether these moneys of the company having been transferred, as above related, by the directors to two of themselves, and having been disposed of in the way above stated by these latter, there is anything, and, if so, how much, to which the plaintiff's garnishee attached.

What is attachable under our rules relating to garnishee proceedings is "the debt, if any, due or accruing due from the garnishee to the judgment debtor" (r. 649). The words of the Eng. rule, O. 45, r. 1, are in effect the same.

The right of the attaching creditor is, however, under our rules much enlarged by reason of r. 650, which reads as follows:—

> A debt shall be deemed to be due to the defendant a judgment debtor within the meaning of the next preceding rule, though it has been assigned, charged or encumbered by the defendant or judgment debtor if the assignment charged or encumbrance is fraudulent as against the plaintiff or judgment creditor as the case may be.

In *Donohoe* v. *Hull Bros. & Co.*, 24 Can. S.C.R. 683, the judgment debtor was Edward Donohoe; he bought land on time and eventually had the transfer made to his wife. Ultimately she sold to one Milward, the transfer to whom was registered, and there remained, owing by Milward to Mrs. Donohoe, $1,800. Hull Bros. & Co., creditors of Edward Donohoe, issued a garnishee summons against Milward for the purpose of attaching the $1,800. On this aspect of the facts—for there were others—it was held that, assuming the transactions were open to be set aside by the creditors of Edward Donohoe, the moneys owing by Milward to Mrs. Donohoe could not be attached as moneys owing to Edward Donohoe. Ont. r. 591 (from which our r. 650 was copied) was evidently passed to meet this decision. *Vyse* v. *Brown*, 13 Q.B.D. 199, and *Webb* v. *Stenton*, 11 Q.B.D. 518, two of the three cases relied upon by the respondents (the garnishees), are cited on and made the basis of the decision in *Hull & Co.* v. *Donohoe*.

In the present case, there was a fund in the bank, owned by

the judgment debtor—the Fidelity Company; the company in effect assigned that fund to the garnishees—Macdonald and Simpson. Had the bank been the garnishees, it would no doubt under the quoted rule have been open to enquire into the question whether the arrangement between the company and Macdonald and Simpson was actually or constructively fraudulent, at all events they had distributed it, but the rule does not seem to have any application to the facts of the present case.

The position of Macdonald and Simpson, it seems, must be taken to have been in the first instance that of agents for the company; up to the time of their carrying into effect what they were authorized to do the company might have revoked their authority and thereafter, and probably even before revocation, the money while in their hands as agents might have been attached; but the disposal of it in accordance with the authority given them by the company must be taken as equivalent to the act of the company itself. Having in their capacity as special agents of the company—and they were joint agents—paid away the money, it seems clear that they are no longer indebted to the company, and that consequently a creditor of the company has no remedy against them or either of them by way of garnishment; though perhaps they may attack the payments to Macdonald and O'Rourke under sec. 45 of the Assignments Act 1907, ch. 6, which, though it protects "any payment of money to a creditor," adds the proviso "provided that the money paid . . . bears a fair and reasonable relative value to the consideration thereof."

It seems that nothing remains but to dismiss the appeal. I should be glad to be able to do so without costs but there seems to be no proper reason for departing from the *primâ facie* rule that the costs should follow the result. *Appeal dismissed.*

PROVINCIAL BANK OF CANADA v. BEAUCHESNE.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. November 13, 1916.

INSURANCE (§ VI D—380)—TRANSFER OF POLICY—MARRIAGE SETTLEMENT—COLLATERAL SECURITY.

An assignment of life insurance policies by way of a registered marriage settlement, unaccompanied by delivery and without any notice thereof to the insurance company, will not prevail over a subsequent valid transfer of the policies as collateral security to a bank.

Statement.

APPEAL from the judgment of Pouliot, J., 27 D.L.R. 188, 22 Rev. de Jur. 256, 22 Rev. Leg. (N.S.) 227. Reversed.

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Lavergne, J.

Wilfrid Laliberté, for appellant; *Walsh & Poisson*, for respondent.

LAVERGNE, J.:—During the month of April, 1914, Honore Roux, the husband of the respondent, transferred to the appellant, the Provincial Bank of Canada, two life insurance policies as security for considerable sums of money furnished by the bank. One of these policies for $1,500 was issued by the intervenant, the Federal Life Assur. Co., dated July 7, 1908, the other for $1,000 by the Canada Life Assur. Co., dated September 26, 1904. These two policies were payable to the testamentary executors, administrators or assigns of the assured.

At the time of the transfer, Roux appeared in the books of these companies as proprietor of said policies and they were also in his possession. He had just taken them out from the Molsons Bank which had them as security since April 23, and May 2, 1910, respectively. The appellant had therefore reason to consider Roux as proprietor of these policies and capable of granting a valid transfer of same. Roux died insolvent on February 11, 1915, and the bank, to which a considerable amount was due, collected the amount of the policies, viz: $2,500.

By her suit the respondent claims from the bank the reimbursement of the said sum, pleading that the two policies belong to her as having been transferred to her by Roux, by donation, in her marriage contract on October 5, 1913, prior to the transfer given to the appellant bank.

The supposed transfer in favour of the respondent by the marriage contract has never been served to the insurance companies, neither registered in their books nor accepted by them, in fact, they never had any knowledge of same. The respondent herself never had possession of the policies and has never seen them. The policies have never been endorsed by Roux in favour of the respondent. The transfer contained no other formality, simply the mention of the donation by marriage contract at a date when the policies were detained in security by the Molsons Bank.

The appellant on the contrary obtained a lawful transfer of these policies, which transfer was registered in the books of the companies, by means of which the appellant gained possession of the two policies, and kept them until they realized the amount after the death of Roux.

The main question to decide is which of the two transfers must prevail, the one given to the bank in security of funds furnished in April, 1914, or the one proceeding from the donation made in favour of the respondent by marriage contract in October, 1913. Can the transfer to the respondent effectuated by a mention in the marriage contract be validly opposed to a third assignee in good faith and for value? The appellant received the possession of the policies and duly made the companies register these transfers in their books when the assignor appeared to be really proprietor. There is also a question of fact to support the judgment of the first instance, which calls in question even the claim of the bank, in security of which the policies were given. This fact is not invoked in the litigation. The bank, however, made a complete and perfect proof of its claim. I will not return to that point.

The only suitable question for discussion is the significance of the two transfers. As I said the judgment maintained the suit of the respondent deciding that the appropriation by Honore Roux, in his marriage contract, of the two insurance policies constitutes a definite transfer. The judgment affirms that the liens of another's property, made without the assent of the proprietor, is null, and that Roux could not validly, on April 21 and May 1, 1914, transfer to the appellant policies already the property of the respondent. The judgment takes for granted that the policies were already transferred to the respondent when they have been transferred to the appellant.

The appellant pleads that these policies had never been effectively transferred to a third person, and particularly to the respondent.

The Court relied on the transfer made to the respondent of which the positive validity and existence are precisely the disputed question. The judgment mentioned certain authorities, but I do not believe they can be applied to this case. The statutes mentioned have all been repealed except one, which cannot be applied in this case.

It is admitted that the insurance companies concerned have never received any other notice of transfer of those policies by Roux to the respondent, than the notification admitted by the registration of the marriage contract, dated October 15, 1913, and registered on the 30th of the same month. The transfer of the

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policies by Roux to the appellant dated respectively March 16, 1912, and April 3, 1910, and the retrocession of the policies by the Molsons Bank to Honore Roux, dated respectively April 9, 1914, and April 22, 1914, are admitted and have been registered in the books of the two insurance companies concerned. At the time of the death of Roux, the Provincial Bank of Canada was appearing in the books of the insurance companies as assignee of those policies. The Provincial Bank of Canada received payment of the amount of the policies after the death of Roux, at the following dates: on or about March 9, 1915, for the policy in the Federal Life Assur. Co. and on or about March 8, 1915, for the policy in the Canada Life Assur. Co.

It appears from the proof and it results by the admissions that in April and May 1914, at the time of the transfers to the appellant, Roux, the assignor, appeared in the books of the insurance companies as proprietor of the policies. They had, at first, been transferred in security to the Molsons Bank and Roux took them out in April, 1914, in order to transfer them immediately to the appellant. Those transfers appear in the books of the companies and have been, in each case, accompanied by the delivery of the policies. As I already said, the transfer to the respondent in his marriage contract does not appear at all in the books of the companies and the companies never received signification of the transfer. It arises also from the testimony of the respondent herself that she never had possession of the policies in question.

Now, it appears from the testimony of J. E. Trottier, the manager of the appellant bank, interviewed by the plaintiff-respondent, that the appellant acted with all discretion and best faith possible; the marriage contract in question never came to their knowledge before the actual suit. The appellant had every reason to consider Roux as really proprietor: the policies had before been held by the Molsons Bank in security for the account of Roux and he took them out expressely to transfer them to the appellant.

These transfers to the Provincial Bank appear in the books of the companies and are accompanied by the delivery of the policies. The transfers of the respondent, on the contrary, have never been served on the companies, the policies have never been endorsed in favour of the respondent, nor have they ever been given to her.

The insolvency of Roux, at the time of his death, has been perfectly established, and the proof has not been contradicted and at his death the bank remained his creditor for a considerable balance.

When the respondent had received at the death of Roux everything possible, including even the insurances, Roux was still owing to the bank an amount of over $15,000. As I said above, at the time of the marriage contract between Roux and the respondent, in October, 1913, the policies were not in possession of Roux, but they were detained in security by the Molsons Bank.

The appellant specially alleges that when it accepted the transfer of the policies, considerable sums had been furnished precisely to discharge Roux of his debts towards the Molsons Bank and so permit the transfer of the policies to the appellant.

Roux began to do business with the appellant in July, 1913. From the beginning of the month of September, Roux owed to the bank, $2,489 and on May 1, 1914, he owed $21,680. It is in April, 1914, that the account of Roux has been acquitted.

It results from the proof that the sums advanced by the appellant to Roux served to pay Roux's debts to the Molsons Bank, and Roux then transferred his account and his securities from one bank to another: but instead of transferring the policies directly from the Molsons Bank to the Provincial Bank, he preferred to effectuate the transfer himself by a retrocession of the policies immediately to the appellant.

I arrive now at the main question: what formality must a transfer of an insurance policy contain to be valid against a third party, when it is not specially provided in the policy, and when the policy is made payable to testamentary executors, administrators, or assigns of the respondent? Art. 2482 Civ. Code determines the manner in which the assignment of an insurance can be effectuated in these terms:—

> The insurance policy can be transferred by endorsement and delivery, or by delivery only, under the conditions therein specified.

The benefit of an insurance is a title to a claim which can be transferred in virtue of the dispositions of the common law, by sale, exchange, donation or other deed of transfer recognized by the civil law, but it is necessary in all cases that this transfer be made according to the dispositions of said civil law, concerning the transfer of claims and other *incorporeal things:* Well, those

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claims, or this right, cannot be validly transferred to a third party, in virtue of the civil law, but by way of notice to the debtor or the acceptation of same. (Art. 1571 C.C.) The third parties are not only debtors of the debt, but also subsequent assignees. The transfer by marriage contract invoked by the respondent has not been effectuated by any of the ways of abandonment expressly recognized by the law, by endorsement and delivery, or delivery only. It does not contain the formalities required by the arts. 1570 and following, so that it could be validly invoked in virtue of the disposition of the common law against a third party assignee in good faith; and for this reason the suit of the respondent could not be maintained.

The question before us has been clearly set forth in England, in United States and specially in France, and the doctrine that I just mentioned above is based on a law similar to ours; it has been discussed by a great number of authorities. What we can find in our law concerning the formalities of insurance transfers, and particularly the signification of those transfers to the insurance companies, seems to result from the jurisprudence, rather from the Supreme Court than from the Courts of the Province of Quebec.

The appellant cited a number of authorities from French authors, from English law and also a large number of American authorities. Those citations are almost all cited at length in his statement which contributes to make the study of the same very easy. The appellant discusses also the authorities cited to support the judgment of the first instance. Those authorities are not in any case *ad rem* and cannot support the judgment rendered.

The appellant has represented also another point of law, that is to say, that the transfer of the policy to the respondent by the terms of the marriage contract constitutes a donation *mortis causa*. She maintains that the donor is free to rid himself, as onerous property, and for his own advantage of some assets so transferred. The appellant discusses this question at length. I do not believe I should follow it. It is not necessary to formulate opinions on questions which are not necessary for the decision of the case.

For the above reasons I am of the opinion that the judgment should not be maintained, and it should be set aside and the

action of the plaintiff-respondent should have been dismissed with costs.

CROSS, J.:—The judgment appealed against rests upon two grounds: first, that the life insurance assets in question belonged to the respondent (plaintiff), as having been acquired by her by assignment in her marriage contract, and consequently could not have been subsequently transferred to the appellant (defendant) by the husband; and, second, that, even if the husband could transfer the insurance assets to the appellant as he purported to do, the transfer was by way of security and the secured debt has been paid, thereby liberating the insurance money to the plaintiff.

The question whether the bank could lawfully take from a customer a policy of insurance on his life to secure the eventual debt of the customer upon a running account (or to secure any kind of debt), the policy being so worded as to be non-negotiable, has not been raised by either party and I express no opinion on it.

I consider, with all deference, that there is error in the judgment on both points above mentioned both in fact and in law.

The transferee of a debt becomes seized of it by notice of his transfer to the debtor, so that, of competing transferees, that one whose transfer has been first notified becomes seized of the debt. But, it is said for the plaintiff that this is not a case of a transfer of a debt, but of a stipulation in favour of a third party who has signified her intention to accept of it and who has consequently, by virtue of art. 1029 C.C., become seized of the benefit of the stipulation. I consider that the fallacy underlying this contention consists in disregarding the fact that, though in a sense the combined effect of the insurance policies and of the marriage contract is a covenant in favour of a third party accepted by the third party as between herself and one of the parties to the contract (but not the other), what the plaintiff in this action seeks to do is to avail herself, not of a covenant in her favour as a third party, but of a transfer of a debt (included no doubt in the policy and marriage contract), but none the less a transfer, which in order to seize the transferee had to be notified to the debtor.

While not inclined to hold a litigant to her own choice of language in an unduly critical way, it may be pointed out that the language employed in the marriage contract, and even in the plaintiff's declaration in the suit, is language asserting a transfer.

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The language, however, happens to be in accord with the substantial fact.

As to the other ground, I think that the appellant (defendant) has reason to complain that the pleadings do not raise it. In her action, the plaintiff founds her right to recover upon the assignment in the marriage contract solely. The assignments to the defendant were absolute in terms. In its defence, the defendant, however, mentioned that the policies were transferred to it to secure payment of whatever the husband might owe, and that he was still its debtor after it had received the insurance moneys. All that the plaintiff pleaded in answer is that it was ignorant of the matters so alleged. Had the plaintiff specifically denied the existence of a debt or alleged satisfaction of it, the defendant might have made clearer evidence.

As to the questions of fact, the defendant has transfers in its favour in absolute terms. It nevertheless admits that the policies were taken by it by way of security. The title being in defendant's favour, its admission must be taken as made or not at all. As made, it is that the security was to be for payment of whatever the ultimate balance due by Roux might be. The plaintiff has failed to prove that the assignment was to secure only the debt existing at the date of the assignment. The circumstances, as a whole, are also against that view. It is true that that is not exactly the position in which the parties are put by the judgment. The Judge disregards $21,960.71 of the bank's claims as not being secured by the insurance policies, and finds that, that being done, all the balance of defendants' claims has been paid by money from sources other than this insurance money. He disregarded the $21,960.71, because the defendants' claim for that sum is worded in its ex. D24 as being for "*chèques déshonorés et protestés,*" whereas he regarded the pledge as having been made to secure the bank in respect of a line of discount to Roux and limited it to the items charged for notes discounted.

With much respect, I consider that that is a mistake. Having regard to what was the manifest object and purpose of the security I would say that, if the bank took up the cheques of its customer Roux, its claim upon the cheques comes well within the meaning of a "discount" or "line of credit" for which the security was taken. I would reverse the judgment.

Considering that the transfers by Honore Roux of the two life insurance policies in the Federal Life Assur. Co. and the Canada Life Assur. Co., the intervenant, made in favour of the appellant in April, 1914, have been made according to the law amongst other ways, the immediate delivery of said policies to the appellant, besides the written transfers made for value, which were registered in the book of said insurance companies, intervenant;

Considering that the transfer made by said Roux to his wife, the respondent, in form of transfer by marriage contract dated October 5, 1913, is not valid against a third party, specially against the appellant, because the transfer has not been made by endorsement and delivery, nor by delivery only, and because this transfer has never been served to the insurance companies, intervenant;

Considering that at the time of the transfers made by Roux to the appellant, the said Roux was appearing in the books of the insurance companies as being the only proprietor of said policies and having right to dispose of same, and that the insurance companies have lawfully paid the insurance to the appellant after the death of Roux;

Considering the respondent has no right to claim from the said appellant the amount of said insurance policies.;

Considering that there is an error in the final judgment rendered by the Supreme Court maintaining the suit of the respondent against the appellant;

Maintain said appeal, annul and set aside the said judgment.

Appeal allowed.

BANK OF BRITISH NORTH AMERICA v. STANDARD BANK OF CANADA.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, and Hodgins, JJ.A., February 7, 1917.

BANKS (§ IVA—66)—LIABILITY FOR DISHONOURING CHEQUE—SUFFICIENCY OF FUNDS—APPLICATION.

A bank has no right to dishonour cheques on account of an insufficiency of funds, if at the time they were received through the clearing house it had sufficient funds to the credit of the drawer available for the payment thereof; in the absence of any directions by the drawer it cannot give priority to cheques subsequently presented, and in doing so it commits a breach of duty which renders it liable for the damages directly resulting therefrom.

Statement.

APPEAL by defendant bank from the judgment of Middleton, J., 26 D.L.R. 777, 34 O.L.R. 648. Affirmed.

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BANK OF BRITISH NORTH AMERICA v. STANDARD BANK OF CANADA.

Maclaren, J.A.

Wallace Nesbitt, K.C., for the appellant bank.

G. L. Smith, for the plaintiff bank, respondent.

The judgment of the Court was delivered by

MACLAREN, J.A.:—This is an appeal by the defendant from a judgment of Middleton, J., of the 24th November, 1915 (26 D.L.R. 777), condemning the defendant to pay to the plaintiff the sum of $2,918.23, being the balance remaining due upon five cheques drawn by a firm of Maybee & Wilson upon the defendant bank, and which were delivered to the defendant by the plaintiff at the Toronto Clearing House on the morning of the 1st October, 1913, and returned dishonoured to the plaintiff, a few minutes before 12 o'clock on the 4th October.

It was conceded at the trial and before us that, if the defendant bank was simply the drawee of these cheques, without more, it could not be held liable to the plaintiff. Our Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 127, did not adopt that part of sec. 53 of the Imperial Act, applicable to Scotland, which provided that a bill or cheque operates as an assignment of funds in the hands of the drawee; but adopted the part of the section applicable to England, namely, that "a bill, of itself, does not operate as an assignment of funds in the hands of a drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument."

The trial Judge has made a close analysis of the evidence given before him, and has made certain findings and drawn inferences which led him to the conclusion that the effect of what took place between the parties in the Clearing House transaction was to make the defendant bank the holder for value of the cheques in question, and that the settlement there made "was intended to be an absolute payment if there were funds to meet the cheques; but it was conditional upon this—that if there were not in fact funds to answer the cheques, the defendant bank was then entitled to return the cheques and to demand recoupment in cash. What was done was to return the cheques with the statement that there were no funds to answer them, and so to obtain from the plaintiff a refund, evidenced by a Clearing House cheque, which was the equivalent of so much money."

He bases his decision upon the ground that so long as the defendant bank had or ought to have had funds to answer the

cheques in question, it had no right to demand recoupment from the plaintiff of the money paid at the Clearing House, and that the recoupment was obtained by a misrepresentation of the real state of affairs.

Counsel for the defendant before us did not question any of the findings of fact or the inferences drawn from them by the trial Judge, but relied upon rule 2 of the rules and regulations respecting Clearing Houses, contained in by-law 16 of the Canadian Bankers' Association, which reads as follows: "2. The Clearing House is established for the purpose of facilitating daily exchanges and settlements between banks. It shall not either directly or indirectly be used as a means of obtaining payment of any item, charge, or claim disputed or objected to. It is expressly agreed that any bank receiving exchanges through the Clearing House shall have the same rights to return any item, and to refuse to credit any sum, which it would have had were the exchanges made directly between the banks concerned, instead of through the Clearing House; and nothing in these or any future rules, and nothing done or omitted to be done thereunder, and no failure to comply therewith, shall deprive a bank of any rights it might have possessed had such rules not been made, to return any item or refuse to credit any sum; and payment through the Clearing House of any item, charge, or claim shall not deprive a bank of any right to recover back the amounts so paid."

The association was incorporated by 63 & 64 Vict. ch. 93 (D.), and the above by-law was approved by the Treasury Board in May, 1901, and both these banks are members of the association, and are consequently bound by the by-law.

In my opinion, this rule does not bear the construction and does not have the effect claimed for it by the defence, and it is in no respect an answer to the position taken by the trial Judge, or to the conclusion arrived at by him. The rule is simply intended to place the parties on the same footing as though they had dealt with each other directly and not through a Clearing House. The plaintiff here is in no wise attempting to use the Clearing House as a means of obtaining payment of a disputed claim, and I can find nothing in the rule which militates in any way against the present claim of the plaintiff.

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By the express terms of the rule, the rights of the parties are to be the same as they would have been if the exchange of the cheques and other commercial paper had been made between them directly, and without the intervention of a Clearing House or any of its officers, and are to be determined by the law applicable to such a transaction, including the law merchant.

In that case, so far as the cheques now in question are concerned, it would be an undertaking or agreement by the defendant to collect for the plaintiff these cheques by duly presenting them to itself and paying them, if there were unappropriated funds to meet them while they remained in its possession. The agreement of the plaintiff to perform a like service for the defendant with regard to any bills or cheques held by the latter, and either drawn upon or payable at the plaintiff bank, would be a good consideration for such a contract. The defendant would then be the agent of the plaintiff for the due presentment of the cheques to itself, and like every other paid agent must use diligence and good faith.

The cheques in question reached the branch of the defendant's bank on which they were drawn early on the morning of the 3rd October. Between 11 and 12 that forenoon, the credit balance of Maybee & Wilson, the drawers of the cheques, was $6,860.44, and, so far as the evidence shews, none of it appropriated. It was clearly the duty of the defendant to have then presented these cheques and to have paid them. Instead of doing so, however, it first charged against the account $1,691.44, the amount of a claim of its own known as the Boucher item, which the trial Judge finds was not then due and for which they did not obtain authority until the next day. It also charged against it, in the afternoon of the 3rd October, four cheques aggregating $5,667.37, which had been previously returned dishonoured to the Dominion Bank and the Bank of Toronto, and which it sent for after it had received the plaintiff's cheques. These items with some other small charges left at the close of the day an overdraft of $1,044.

In my opinion, the defendant had no right to give to any of these items priority over the plaintiff's cheques. The case for the plaintiff seems to me even stronger than that of the plaintiff in *Kilsby* v. *Williams* (1822), 5 B. & Ald. 815, where the full

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Court held that bankers could not, in circumstances very like the present, except that it was not done through a Clearing House, apply moneys not appropriated by the customer to the payment either of their own general account against the drawer or of two cheques presented on the same day but subsequently to that of the plaintiff. See also Paget on Banking, 2nd ed., p. 291.

It is quite true that Maybee & Wilson might have countermanded the payment of the cheques held by the plaintiff, or might have directed that the deposits held on the 3rd October should be otherwise appropriated, but nothing of this kind was done. In the absence of this, the plaintiff was entitled to these moneys, and it was the duty of the defendant as the plaintiff's agent to have given the plaintiff the priority to which it was entitled. Not having done so, the defendant is liable to the plaintiff for the damages directly resulting from the breach of such duty. On this ground, therefore, as well as on that taken by the trial Judge, I am of the opinion that the judgment appealed from may be upheld.

This case is not complicated by any question as to what would be the duty of a bank if more cheques than would exhaust the drawer's account should come in simultaneously, either from the Clearing House or the post or elsewhere—that point does not now arise.

It is worthy of observation that the defendant did not profess to have refused payment of the plaintiff's cheques on the ground of its rights as a drawee to refuse payment; but on the ground that there were no funds in its hands properly available for their payment while the cheques were in its hands as the agent of the plaintiff—a reason quite untrue and unfounded.

In my opinion, the appeal fails and should be dismissed with costs. *Appeal dismissed.*

SMITH v. HALIFAX PILOT COMMISSIONERS.

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Nova Scotia Supreme Court, Graham, C.J., Longley, Harris and Chisholm, JJ. April 21, 1917.

1. MISTAKE (§ III—20)—OF LAW OR FACT—PILOTAGE LIMITS—RECOVERY OF PAYMENTS.
Money paid for a pilotage license which the pilotage authorities had no power to grant, for lack of territorial jurisdiction, is payment under a mistake of fact, and may be recovered back.

2. LIMITATION OF ACTIONS (§ I E—30)—FRAUD—BREACH OF TRUST—PILOTS' FUND.
The Statute of Limitations does not run against a claim founded on

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fraud or fraudulent breach of trust, as for funds wrongly obtained or withheld by pilotage authorities with respect to a fund for the benefit of pilots.

Statement.

APPEAL from the judgment of Russell, J., in favour of plaintiff, in an action against the defendant corporation to recover various sums of money paid to defendant for license fees and also the percentage paid defendant on moneys received by plaintiff on pilotage dues from ships piloted, and interest thereon. Affirmed.

J. B. Kenny, for appellant.

T. S. Rogers, K.C., and *J. McG. Stewart*, for respondent.

The judgment of the Court was delivered by

Harris, J.

HARRIS, J.:—The pilotage limits for the port of Halifax (as established by Order in Council) extend in a north-east line from Chebucto Head Light to Devil's Island Light; thence seawards in a radius of 15 miles. The Halifax Pilot Commissioners are the duly appointed pilotage authority for the port of Halifax and have the licensing of pilots as part of their duty.

Under the by-laws approved by the Governor-General in Council all pilotage dues, all fees for licenses of pilots and of pilot boats, and for bonds of pilots, are to form a general fund out of which is paid yearly: (*a*) Three per cent. of the pilotage dues received to a fund called The Halifax Pilots' Superannuation Fund. (*b*) Necessary expenses of conducting the pilotage business, including legal expenses, office rent, postage, telegrams, etc. (*c*) The secretary and treasurer's salary, $600. (*d*) Certain expenses of the commissioners, and (*e*) The balance is divided among the pilots monthly according to their earnings.

The Halifax Pilots' Superannuation Fund is vested in and administered by the defendants and now amounts to upwards of $40,000.

In case any licensed pilot becomes incapacitated by reason of age, infirmity or accident, and the commissioners, for any of these reasons, revoke, cancel or refuse the license of such pilot, the commissioners are to pay him out of the Superannuation Fund during the remainder of his natural life yearly a sum not less than $50 nor more than $300, in the discretion of the commissioners, and there is a provision for a pension in the discretion of the commissioners to his widow and children in case of his death.

St. Margaret's Bay is admittedly outside of the pilotage limits of the port of Halifax, and therefore outside the jurisdiction of the commissioners.

In 1879 the commissioners granted a license to the plaintiff as a pilot for the pilotage district of Halifax, District of St. Margaret's Bay, and the license was renewed yearly or every 2 years and the plaintiff continued to act for 35 years as a pilot for the St. Margaret's Bay District under license from the defendants. He paid $25 for his first license and $1 for the bond and $6 per year thereafter for renewals, and during the whole period he paid in 5% of his earnings as a pilot to the pilot commissioners, all the time understanding that he was a duly licensed pilot and that he was entitled to share in the superannuation fund when the time arrived for his retirement.

In 1914 he became incapacitated through old age and infirmity and applied for his pension. The commissioners refused to give him any pension, claiming that St. Margaret's Bay was outside of their jurisdiction, and they also refused to repay him the moneys which he had paid in to the Board. The plaintiff thereupon brought this action for a declaration that he was entitled to receive his pension, or, in the alternative, for repayment of the moneys paid the commissioners by him during the 35 years.

All the individual commissioners who were in office in 1879 are now dead and there is therefore no explanation as to why a license was granted to the plaintiff in the first instance. The fair inference is that both the commissioners and the plaintiff acted in good faith and mistakenly supposed St. Margaret's Bay to be within the jurisdiction of the Board.

In answer to the plaintiff's claim, the defendants set up their want of jurisdiction and repudiate the right of the plaintiff to participate in the fund. They also set up that the money was paid under a mistake of law, and they plead the Statute of Limitations.

The case was tried before Russell, J., who gave judgment for the plaintiff for $1,098.50 and the commissioners have appealed.

The Judge thought that the defendants had no jurisdiction to grant a license to the plaintiff as a pilot for St. Margaret's Bay, and that they could not grant a pension to the plaintiff out of the fund, and I think this is clearly so.

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If this is so the license they gave him was valueless and there was no consideration for the money paid by the plaintiff, and it seems to be a perfectly obvious proposition that defendants cannot keep his money. They cannot deny his rights and keep the consideration he paid for those rights.

There was a suggestion by counsel that the defendants could keep the money for expenses but that needs no answer: they have no such right.

The first contention is that the money having been paid under a mistake of law cannot be recovered. I do not agree that the money was paid under a mistake of law. Both parties supposed that St. Margaret's Bay was within the limits of the pilotage district of the Harbour of Halifax, and that was a mistake of fact. Of course the boundaries are defined by a statute, but that does not affect the question. As Jessel, M.R., put it in *Eaglesfield* v. *Lord Londonderry*, 4 Ch.D. 693, at 702:—

> A statement of fact which involves as most facts a conclusion of law is still a statement of fact and not a statement of law.

See also Kerr on Fraud and Mistake, 59.

In the case of the *City of Indianapolis* v. *McAvoy*, 86 Indiana 589, Woods, C.J., said: "It is a question of fact whether a particular locality is or is not within the limits of a city;" and this was said in a case in which the limits of the city were defined by ordinances under a statute.

I think this contention fails.

The next question which arises is as to whether the Statute of Limitations prevents the plaintiff recovering more than the payments made within the 6 years prior to the commencement of the action. I have reached the conclusion that the Statute of Limitations is no answer and that the plaintiff can recover the full amount sued for.

The defendants received the plaintiff's money as express trustee to hold it for the purpose of a superannuation fund. Both parties acted on that supposition, until the plaintiff applied for his annuity, and then the defendant for the first time repudiates the trust.

In *Cowper* v. *Godmond* (1833), 9 Bing. 748 (131 E.R. 795), the action was for money had and received to recover the consideration money paid for a void annuity. The annuity had been treated by the grantor as a subsisting annuity within six years

and it was held that the Statute of Limitations did not begin to run until the annuity had been avoided. Alderson, J., said, pp. 753-4:—

It may be conceded that the consideration money was money had and received by the grantor at the time of payment; but it was not had and received by the grantor, to the use of the grantee, until the grantor elected to treat the annuity as void.

Here the plaintiff had every reason to suppose that the defendants would carry out the arrangement and understanding upon which he paid his money and superannuate him when the time for his retirement arrived. They kept on receiving his money to the end and the statute, in my opinion, did not begin to run until the defendants repudiated the arrangement.

In Pothier on Contracts, by Evans, vol. 2, p. 126, it is said:—

Where a man deposits money in the hands of another to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner until an application and refusal or other denial of the right, for until then there is nothing adverse and I conceive that upon principle no action should be allowed in these cases without a previous demand, consequently that no limitation should be computed further back than such demand.

I think the defendants were express trustees of an express trust and the Statute of Limitations does not apply in such a case.

It was the rule of Courts of Equity, which was incorporated in the Judicature Act in England and in our Act (sec. 19 (1)), that no claim of a *cestui que trust* against his trustee for any property held on any express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations.

In *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, at 394, Lord Esher, M.R., said:—

The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, *i.e.*, to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his *cestui qui trusts* for all such money or property without regard to lapse of time.

And Bowen, L.J., at p. 397, said:

It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express and not merely as constructive trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first

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by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence—and this confidence or trust imposes on him the liability of an express or direct trustee.

See also *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 208.

In *Re Sharpe; Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154: In this last case Fry, L.J., said, p. 172:—

It appears to me clear, speaking, of course, without regard to recent legislation which extends certain benefits under the Statute of Limitations to trustees, that where money has found its way into the hands of a trustee or other person against whom this Court gives the same relief as against a trustee, there the trustee, or the person in a fiduciary position, cannot set up the Statute of Limitations or the analogy of the Statute of Limitations as an answer to the demand for money which was in his hands.

See also *Burdick* v. *Garrick* (1870), L.R. 5 Ch. 233.

The provisions of sec. 26 (1) of the Statute of Limitations do not apply where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was privy or a party, or is to recover the proceeds of trust property still retained by the trustee or previously received by the trustee and converted to his own use.

It is clear that the trust fund in the hands of the defendants was enriched by every dollar received by the defendants from the plaintiff. This being so the money paid by plaintiff is still retained by the defendants. The other alternative is that it was improperly converted to their own use and whichever way it is viewed the case does not come within sec. 26.

It may, I think, also very well be argued that the trustees were guilty of legal fraud or equitable fraud in misrepresenting their authority to grant the plaintiff a license and place him on the superannuation fund.

A misrepresentation is a fraud at law although made innocently and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true and was meant to be acted on and has been acted on by him accordingly to his prejudice. Kerr on Fraud, 2nd ed., pp. 29, 402.

There is no doubt the plaintiff was induced to part with his money upon the misrepresentation of the defendants as to their powers and jurisdiction.

If this be so, then it is an additional reason why the provisions of sec. 26 (1) do not apply.

The defendants raised a question as to the amount of the

judgment and contended that if plaintiff was entitled to recover at all, the amount was much smaller than that for which judgment had been entered. I have gone very carefully into the figures and I think, if I had been the trial Judge, I would have given the plaintiff a larger amount, but there is no appeal by the plaintiff and we cannot increase the amount.

I think the appeal should be dismissed with costs.

Appeal dismissed.

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MOORE v. B.C. ELECTRIC R. Co.

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C. A.

British Columbia Court of Appeal, Martin, Galliher and McPhillips, JJ.A. April 13, 1917.

STREET RAILWAYS (§ III C—43)—COLLISION—NEGLIGENCE OF JITNEY DRIVER.

Where in the agony of imminent collision caused by a jitney driver's recklessness, a motorman increases speed, in the hope of avoiding an accident, the railway company is not liable for injuries occasioned thereby to a passenger of the jitney.

[See annotation in 1 D.L.R. 783.]

APPEAL by plaintiff from judgment of Murphy, J., 22 B.C.R. 504, dismissing an action for personal injuries sustained by a passenger in a jitney automobile colliding with a street car. Affirmed. Statement.

J. A. Russell, for appellant; *L. G. McPhillips*, K.C., for respondent.

MARTIN, J.A.:—In my opinion the Judge below has reached the right conclusion and the appeal should therefore be dismissed. Martin, J.A.

GALLIHER, J.A.:—I think the jury were justified in finding that there was no contributory negligence on the part of the plaintiff. The only other question is as to the finding of negligence on the part of the B.C. Electric. Galliher, J.A.

I agree with the trial Judge in his application of the law to such findings based upon evidence, which I have fully read.

The appeal should be dismissed.

MCPHILLIPS, J.A. (dissenting):—This is an appeal which presents features of difficulty that are somewhat out of the usual course. The jury have answered certain questions against the defendant company (respondent) which need careful scrutiny. Upon the answers to these questions, which find negligence, the trial Judge has nevertheless entered judgment for the respondent. The specific acts of negligence found against the respondent are, "a lack of automatic alarm bell at crossing, and going too fast McPhillips, J.A.

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speed across roadway." The action was one for personal injury sustained by the appellant, a passenger in an automobile (jitney) at a level crossing, the automobile coming into collision with the electric car. Upon the evidence and there being no statutory requirements for any such device as an automatic alarm bell, the failure in this respect cannot constitute negligence. (See *Phelan* v. *G.T.R.*, 23 D.L.R. 90, 51 Can. S.C.R. 113, at 133; *G.T.R.* v. *McKay*, 34 Can. S.C.R. 81, at 97; *Mallory* v. *Winnipeg Joint Terminals*, 22 D.L.R. 448, 25 Man. L.R. 456.) Then with respect to the finding of "too fast speed across roadway." As to this there is the evidence that the motorman increased speed, in fact, accelerated speed instantly, when he saw that an accident seemed inevitable, with the hope that the accident might be avoided or minimized in effect, *i.e.*, it was the exercise of judgment at a moment when the motorman, in the language of the trial Judge, was "in the agony of imminent collision caused by the jitney driver's recklessness." The trial Judge absolved the respondent from liability upon both grounds of negligence as found by the jury. Upon the latter ground "too fast speed across the roadway," the trial Judge said as follows:—

> In my opinion the evidence clearly establishes that the reckless action of the jitney driver put the motorman in a position where he was suddenly and unexpectedly confronted with the imminent probability of killing the occupants of the jitney. If then in the agony of imminent collision caused by the jitney driver's recklessness the motorman made what at the highest can only be termed an error of judgment the law will not hold the company liable. Pollock on Torts, 9th ed., p. 490, and cases there cited. It is to be noted that the jury declined to find that the electric car approached the crossing at too high a rate of speed or that the motorman did not keep a proper lookout, both of which grounds were urged upon them. I hold the company on the findings not liable. The action is dismissed with costs.

It is with hesitancy that I take a different view from that of the trial Judge and my brothers of this Court, and it is with great respect that I so differ. The difficulty in which I find myself is this: the jury have found negligence within the ambit of authority vested in them—that is upon evidence which I can not say was insufficient; to say that I would have arrived at a different conclusion does not meet the situation. Error in law is not in this way established. To admit of the finding of the jury being disregarded, it becomes necessary to be of the opinion that there is the absence of sufficient evidence and that there can be but one conclusion, that being that the speed across the roadway could not be deemed

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actionable negligence in view of the emergency then existing, and that as reasonable men the jury were disentitled from so finding, and that, thereby, error in law is established. With deference to the contrary view of my brothers, I feel constrained upon the facts and upon the authorities to decide that the finding of the jury cannot be disregarded or displaced upon any ground of error in law (see *McPhee* v. *E. & N. Rly. Co.*, 15 D.L.R. 756, 49 Can. S.C.R. 43, at 53); *Skeate* v. *Slaters*, [1914] 2 K.B. 429, 30 T.L.R. 290; *Kleinwort Sons* v. *Dunlop Rubber Co.* (1907), 23 T.L.R. 696, at 697.

The jury were, after all, the triers of the facts, and it may well be said in their deliberations and in the conclusion arrived at they were convinced that the act of accelerating speed, as against having the car under sufficient control and at once applying the brakes and all the provided mechanism for stopping the car, was actionable negligence, and to sustain this finding it is not necessary for this Court to say that that conclusion was the right conclusion. It is only necessary to say, in the language of Sir Arthur Channell in *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734, "that they (the jury) have come to a conclusion which on the evidence is not unreasonable." I would therefore allow the appeal and in my opinion judgment should be entered for the appellant for $1,000, the damages awarded by the jury together with costs here and in the Court below. *Appeal dismissed.*

Re CANADIAN NORTHERN PACIFIC R. Co. AND BYNG-HALL.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 6, 1916.

EXPROPRIATION (§ III E—165)—RAILWAY—COMPENSATION FOR SEVERANCE.

A severance of sub-division property, by a railway expropriation, which does not injuriously affect the land as a whole is not an element of compensation.

[*Holditch* v. *Can. North. Ont. R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536, followed.]

Statement.

APPEAL from the order of Morrison, J., of April 4, 1915, dismissing an appeal from the award of the arbitrators appointed to determine the compensation and damages (if any) payable in respect of 2.21 acres of land expropriated by the railway company for railway purposes. The land so taken is part of and runs through a block of land described as the south-easterly portion of sec. 66, Victoria district, about 47 acres, and is owned by Percy Byng-Hall, Thomas Hasker, and Lawrence M. Earle, Joseph Nicholson being a mortgagee. It adjoins a lake known as Lost

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Lake, and is about 4½ miles from the City Hall, Victoria. The owners had subdivided the land in building lots, and filed plans in the early part of 1913. The property was then put in the hands of an agent, and was advertised for sale in lots. Notice of expropriation was given by the railway company in November, 1914. The arbitrators' award was $3,315 for the land, and $4,812 for all other compensation, and damages in respect of the taking of sale lands or otherwise injuriously affecting the other lands of the owners. The railway company appealed mainly on the ground that compensation should not have been allowed for injurious affection to the owners' other lands or for severance.

Bodwell & Lawson, for appellant; *Aikman*, for respondents, Byng-Hall, Harker and Earle; *C. D. Mason*, for respondent, Nicholson.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be allowed in part. In my opinion, as expressed earlier in the case, I do not think we can interfere with the finding of the arbitrators in respect of the value of the land taken. As regards the consequential damages, I am of opinion that, on the evidence, and when I speak of the evidence, I refer to the advertisement of the respondents themselves, which is set out in the case, commenting upon the advantages of having transportation furnished by this railway company; the situation of the property, its distance from the city, and the area involved, being some 47 acres, subdivided into lots, no consequential damage has been suffered by the respondents. It has been conceded by counsel for the respondents that if the land is to be treated as for market gardening there would be no consequential damage. So that, taking it either one way or the other, in my opinion the arbitrators were in error in coming to the conclusion that the damage which they awarded in this regard was suffered. The award, therefore, will be reduced to $1,500 an acre for the land actually taken.

Martin, J.A.

MARTIN, J.A.:—I agree. I think the *Holditch* case, 27 D.L.R, 14, [1916] 1 A.C. 536, applies. If it does not, the land has to be taken as a whole, and, considering the land as a whole, in my opinion it has been appreciated instead o depreciated. I have no doubt there was jurisdiction in the arbitrators to entertain this point of damages. I agree with what my brother McPhillips has said, that the time of acquisition, of acquiring title, means the notice to treat.

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McPhillips, J.A.

GALLIHER, J.A.:—I would dismiss the appeal as to the value of the land and allow the appeal as to damages.

McPHILLIPS, J.A.:—I am of like view, and consider that we should not interfere with the arbitrators' decision with regard to the value of the land. With regard to the damages to other land, I consider that they went wrong in law. The controlling decision is the case of *Holditch* v. *Can. North. Ont. R. Co.* 27 D.L.R. 14, [1916] 1 A.C. 536, where their Lordships of the Privy Council express themselves in the most precise terms, stating that the decision of the Supreme Court of Canada is in accordance with the true interpretation of the law, and the principle is clear enough, and it has been carried out in the past, that you must take some land, or sever some other pieces of land which stand there in a severed condition. Unfortunately, the respondents, if it is unfortunate—I would rather assume that they knew their own business, and that it was to their best advantage—provided the right-of-way upon the plan and subdivision, and having provided it, the railway came along and adopted it. If the right-of-way had encroached in the slightest way on any of the adjoining lots there would have been liability. But there is no encroachment, and therefore the *Holditch* case, it seems to me, is wholly in point.

Appeal allowed in part.

CANADIAN LAUNDRY CO. v. UNGAR'S LAUNDRY.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November 24, 1916.

COURTS (§ II A—164) — JURISDICTIONAL AMOUNT — COUNTERCLAIM — REMOVAL OF CAUSE.

A counterclaim for an amount exceeding the jurisdiction of the Court cannot be maintained by a County Court in New Brunswick.

[*Windsor* v. *Young*, 24 D.L.R. 652, 43 N.B.R. 313, followed; English cases distinguished.]

Statement.

APPEAL by plaintiff from an order of the Judge of the St. John County Court made in Chambers on May 8, 1916, on the return of a summons taken out by the plaintiff to set aside the defence and counterclaim, and a summons taken out by the defendant to transfer the action to the Supreme Court, King's Bench Division. Reversed.

W. A. Ross supported the appeal.

F. R. Taylor, K.C., contra.

Grimmer, J.

GRIMMER, J.:—The action was commenced in April last, the statement of claim being for work done, and goods sold and de-

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livered, the amount sued for being $337.40. The defence was that by contract the defendant had purchased certain laundry machinery from the plaintiff for $3,053, the whole purchase price of which had been paid and there was nothing due from defendant to plaintiff.

The defendant also counterclaimed against the plaintiff for damages in that the machinery purchased was not of the size, character or capacity to do the work represented for it, whereby the defendant was put to extra expense and was delayed in its work. The amount of the counterclaim was $3,866.37.

The plaintiff then obtained a summons from the St. John County Court requiring the defendant to show cause why the defence should not be struck out as being bad and no answer to the claim, and that the counterclaim be struck out as being beyond the jurisdiction of the Court.

The defendant also obtained a summons from the same Court, requiring the plaintiff to show cause why an order should not be made transferring the action to the Supreme Court.

After argument the Judge of the Court made an order dismissing the application of the plaintiff to strike out the defence and counterclaim. He also ordered that the defendant's application to transfer the cause stand until the trial; and that the defendant have leave to amend his pleadings; which was done, and a fresh defence and counterclaim was filed and served.

The plaintiff now appeals, seeking to set aside the said order.

I shall treat the subject from two aspects only, namely, the application to transfer the cause to the Supreme Court, and the effect of the counterclaim.

Ch. 116 of the Con. Statutes, 1903, in sec. 69, provides:—

> If on the trial of any cause it shall appear that the subject-matter of the suit is not within the jurisdiction of the County Court, the plaintiff shall not in consequence thereof be nonsuited; but the Judge shall have power to order that the same be transferred to the Supreme Court on such terms as to the payment of the costs of the proceedings in the County Court, or any part thereof, as the Judge shall think proper, such costs to be recovered by attachment in the same manner as costs of proceedings before a Judge at Chambers.

From this it is clear the right to make the application exists; but it can only be exercised or used during the progress of the trial, and the Judge cannot then make the order unless it appears that the "subject-matter of the suit" is without the jurisdiction of his Court. What then is meant by "subject-matter of this

suit?" In my opinion it means the plaintiff's claim as mentioned and set out in the statement of claim, without any reference to and exclusive of the defendant's counterclaim.

At the time the Con. Statutes, 1903, became law there was no provision by which a counterclaim could be pleaded in proceedings in the County Court; and therefore it cannot be contended the legislature, by sec. 69 of ch. 116, intended that a counterclaim should be considered as of "the subject-matter of the suit," and one will search in vain among the subsequent statutes of this province for any direct pronouncement in this respect. I think the words, "subject-matter of the suit," mean nothing more than cause or action. By the present Judicature Act "cause" includes any action, suit or other original proceeding between a plaintiff and a defendant; and "action" means a civil proceeding commenced by writ, etc. It follows, then, that as the action in this case was brought to recover the sum of $337.40 for work and labour, and for goods sold and delivered, it is well within the jurisdiction of the County Court, and it is the plaintiff's undoubted right by law to have its case tried in that Court, and the Judge of the County Court was in error in permitting the application to transfer the cause into the Supreme Court to stand until the trial. It should have been dismissed with costs.

Does the counterclaim in any way affect or alter their position? By sec. 7 of ch. 25, Acts of 1915, 5 Geo. V., a new section is substituted for sec. 78 of ch. 116, C.S. 1903 (the County Courts Act), and it is therein provided, among other things, that all laws of this province relating to set-off and counterclaim, *when applicable and not inconsistent with the provisions of this chapter*, shall apply to each County Court.

By sec. 10 of the chapter the Courts have jurisdiction only in civil matters when the amount claimed does not exceed $400 and in actions of tort when the damages claimed do not exceed $200. No sums beyond these can be considered by the Court unless, in the case of set-off, and in my opinion counterclaims, there is an abandonment of the excess over and above the $400 and $200.

Under the provisions of the statute above cited (5 Geo. V. ch. 25), counterclaim may be set up in the County Court, but, as clearly established by the cases, it must for all purposes for which justice requires it be treated as an independent action. Neither,

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as is shown in *Storey* v. *Waddle* (1879), 4 Q.B.D. 289, can the defendant by counterclaiming alter the mode of trial: *Amon* v. *Bobbett* (1889), 22 Q.B.D. 543, *Stumore* v. *Campbell*, [1892] 1 Q.B. 314.

When, as in this case, the counterclaim is for damages which exceed the sum of $200 the Court has no jurisdiction to consider and pass upon it, and to hold otherwise would, it seems to me, establish a principle which would not be applicable to or consistent with the provisions of ch. 116, Con. Stat. 1903, the County Courts Act. For the purposes of this judgment it is not necessary to minutely state the provisions of our statutes, including the Judicature Act, relating to the subject of counterclaim, its objects and effect, but as cases decided under the English statutes were cited by the respondent and referred to on the argument, I wish to say that having examined these statutes, I find them entirely different from our own, in that they confer much more extensive powers upon the lower Courts in respect to counterclaim than is contemplated or provided for in our Acts, and judgments rendered under those statutes would in no way affect the matter under consideration in this case. As I am therefore of the opinion the Court has no jurisdiction to entertain the counterclaim, and as under O. 21, r. 15, of the Judicature Act (which may be applied to this case) authority is given to a plaintiff where counterclaim is set up by which he contends the claim raised ought not to be disposed of, but should be treated as an independent action, to apply to the Court or a Judge for an order to exclude the counterclaim, which was done in this case by the plaintiff, the Judge should have made an order to strike out or exclude the counterclaim, and he was in error in making his order to dismiss the application.

Having had an opportunity of reading the judgment of White, J., herein, I agree with the order as proposed by him, to be made in this case.

White, J.

WHITE, J.:—The principal question we are called upon to determine is, whether a defendant sued in the County Court, can, by his answer, counterclaim for a sum beyond that over which the County Court would have had jurisdiction had the defendant sought to recover such claim by suing therefor as plaintiff in such Court.

By Act 5 Geo. V. ch. 25, sec. 7, the words, "and to counterclaims," were introduced into sec. 78 of the County Courts Act, ch. 116, C.S. 1903. The section as thus amended reads:—

All laws of this province relating to the examination or depositions of witnesses before trial, to proceedings in replevin, to actions by or against executors or administrators, to evidence, to the service of processes, to tenders, to judgments, to interest on judgments, to set-off, and *to counterclaims*, and for the amendment of the law in any way as to practice, proceedings or evidence, or any other matter or thing whatever connected with the administration of justice in the Supreme Court, *when applicable and not inconsistent with the provisions of this chapter*, shall apply to each County Court; and the mode of proceeding in all cases not herein provided for shall be according to the present practice of the Supreme Court. The decisions of the Supreme Court shall be binding on the County Courts.

I have italicized the words in the above section to which I particularly wish to draw attention.

By the County Courts Act civil jurisdiction is conferred by secs. 9 and 10 upon the Courts established thereunder as follows:—

9. The Courts shall not have cognizance of any civil action:—

(1) Where the title to land is brought in question; or (2) In which the validity of any devise, bequest, or limitation is disputed.

10. Subject to the exceptions in the last preceding section, the County Courts shall have jurisdiction and hold pleas in all personal actions of debt, covenant and assumpsit when the debt or damages do not exceed the sum of $400, and in all actions of tort when damages claimed do not exceed $200 and in actions on bonds given to the sheriffs or otherwise in any case in a County Court whatever may be the penalty sought to be recovered; provided always that the said Court for the city and county of Saint John shall not have or exercise any jurisdiction in any cause in which the City Court of Saint John has jurisdiction.

Additional civil jurisdiction is conferred upon these Courts in the case of actions upon certain bonds by secs. 11 and 12, but so far as concerns the question we are now asked to determine secs. 9 and 10 are the only sections to which we need look in considering the extent and limits of the jurisdiction conferred by the Act upon County Courts in civil actions.

Postponing for the moment inquiry as to how far, if at all, the jurisdiction in respect to counterclaim conferred upon County Courts by the Act under which these Courts are established is enlarged by the Judicature Act, let us first see what is the extent of the power which these Courts possess in respect to counterclaim by the provisions of the County Courts Act as amended in 1915 by ch. 25, construed without reference to the Judicature Act.

In *Stumore* v. *Campbell & Co.*, [1892] 1 Q.B. 314, Lord Esher, M.R., says, at p. 316:—

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No doubt matter is occasionally pleaded as counterclaim which is really set-off; but counterclaim is really in the nature of a cross-action. This Court has determined that, where there is a counterclaim, in settling the rights of parties, the claim and counterclaim are, for all purposes except execution, two independent actions. If the plaintiff sustains his claim, judgment goes for him on that; and if the defendant sustains his counterclaim, judgment goes for him on that. Either claim may be reduced by set-off. But if the plaintiff succeeds in the one case and the defendant in the other, there are two judgments which are independent for all purposes except execution.

And in the same case, Kay, L.J., says, at p. 318:—

All that those Acts (Judicature Acts) have done in respect of a counterclaim is to allow a cross-action to be brought and tried at the same time as the original action.

See also *Kinnaird* v. *Field*, [1905] 2 Ch. 361, where Vaughan Williams, L.J., says, at p. 366:—

I think that Kay, L.J., in *Stumore* v. *Campbell & Co.*, very happily describes the result of the legislation of the Judicature Acts when he said that all these Acts did with respect to the counterclaim was to allow a cross-action to be brought which should be tried at the same time as the original action.

At the same time, impelled by sec. 100 of the Judicature Act, he decided that for the purposes of O. 36, r. 2, the word "plaintiff" in that rule does not include the defendant in the suit in which counterclaim is set up.

In face of these authorities, it must be accepted as beyond question that a counterclaim is essentially a cross-action. When, therefore, sec. 78 of the County Courts Act confers upon a defendant the right to maintain such a cross-action by way of counterclaim it must be taken, I think, to give the Court power to try such cross-actions only as are within the jurisdiction of the Court as conferred and defined by secs. 9 to 12 of that Act.

That this is so has been already substantially decided by this Court in *Windsor* v. *Young*, 24 D.L.R. 652, 43 N.B.R. 313. It was there held that the County Court had no jurisdiction to entertain a set-off upon which the defendant claimed an amount beyond the jurisdiction of the Court as defined and limited by secs. 9 and 10 of the County Courts Act. If that be true in the case of a set-off, which is a statutory defence to the action, *a fortiori*, it must be true in the case of a counterclaim, which is really a cross-action triable, by virtue of the statute, along with the plaintiff's claim.

It follows, therefore, that if the County Court has power to entertain the counterclaim here in question it must be by virtue of some power conferred by the Judicature Act.

Prior to 1915, sec. 55, sub-sec. 3, of the Judicature Act, provided that "nothing in this Act contained shall affect the existing procedure and practice in the County Courts." That sub-section was repealed by sec. 1, sub-sec. 2, of the Act, 5 Geo. V. ch. 25.

The section of the Judicature Act upon which the respondent mainly relies as giving the jurisdiction he contends for is sec. 20, which reads as follows: "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts in New Brunswick, so far as the matters to which such rules relate shall be respectively cognizable by such Courts."

Had this section not contained the restrictive words "so far as the matters to which such rules relate shall respectively be cognizable by such Courts," there might have been ground for the respondent's contention. But these words, I think, limit the power to counterclaim to such cross-actions as would be cognizable by the County Court if brought before such Court by a plaintiff suing thereon.

Sub-secs. 7 and 8 of sec. 18 of the Judicature Act are cited and relied upon by the respondent. But that section itself provides that the rules laid down in its several sub-sections are applicable only to actions commenced in the Supreme Court. The section reads as follows: "In every civil cause or matter commenced in the Court, law and equity shall be administered therein according to the rules following." By sec. 2 "Court" is declared to mean the Supreme Court unless there is something in the subject or context repugnant thereto. It is only by sec. 20 that these rules are made in any wise applicable to County Courts, and then only to the extent and within the limits specified in that section.

Flitters v. *Allfrey* (1874), L.R. 10 C.P. 29, was cited by the respondent. That case merely decided that when the County Court has decided a matter within its jurisdiction such matter is to be treated as *res judicata* in all Courts.

Davis v. *Flagstaff Silver Mining Co.* (1878), L.R. 3 C.P.D. 228, and *Webster* v. *Armstrong* (1885), 54 L.J.Q.B. 236, were also cited by the respondent. In both of these cases the decision is founded upon the provisions of secs. 89 and 90 of the English Judicature Act. Our Act contains no corresponding, or similar, provisions. And, when we consider how closely our Judicature Act, as to nearly all of its provisions, follows the English Act, the omission

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from our statute of these two sections contained in the English Act is, I think, significant of the intention of the legislature that the law which exists in England by virtue of these two sections is not intended to apply here.

With regard to the defence, as distinguished from counterclaim, which was originally pleaded, that was clearly bad. It alleged in substance that the defendant had bought certain machinery from the plaintiff for which he had paid in full, but omitted, doubtless through an inadvertence, to state that the plaintiff's claim was for part of the purchase price of such machinery. The Judge, therefore, by his order, should either have amended the defence or disallowed it. He did neither, but dismissed the plaintiff's application to strike out such defence, and granted the defendant leave to amend his statement of defence as counsel may advise, thus leaving it at the defendant's option to retain the defence as originally pleaded if he should see fit so to do. It appears as a matter of fact that the defendant, availing himself of the authority thus given by the order of the Judge, delivered an amended statement of defence which, in addition to supplying the lacking averments, the want of which, as I have said, rendered the defence bad as originally pleaded, set up, by way of what the statement terms equitable defence, two additional grounds of defence numbered respectively 3 and 4, and also repeated his original counterclaim.

We are asked by the appellant to strike out these paragraphs 3 and 4 of the statement of defence upon the ground that the defence thereby set up is "founded on tort, and the damages claimed are in excess of the jurisdiction of the County Court and the defendant cannot, by abandoning part of his claim, bring it within the jurisdiction of the County Court."

I do not think this Court can on the present appeal entertain any question as to whether or not the defences set up in the amended statement of defence show upon their face a good answer to the action. This Court would only entertain such question after application had been first made to the Judge of the County Court to strike out the defence objected to as being bad for the reasons alleged, and had been refused, and an appeal taken from such refusal. But since, for the reasons stated, I think the order made by the Judge, under which alone the amended statement of

defence is authorized, must be set aside, it follows that the entire defence pleaded by virtue of that order should be struck out with leave to the defendant to answer *de novo*.

With reference to so much of the order of the Judge as deals with the defendant's application to transfer this cause to the Supreme Court, the order shows that the Judge has not directed this cause to be so transferred. He has merely ordered that the plaintiff's application to transfer stand over till the trial of the cause, and, in so doing, has not decided any question of law as to his power to ultimately grant such application. So far, therefore, as that portion of the order is concerned there is nothing to appeal from.

I think this Court should order that the amended statement of defence pleaded by the defendant under the order made by the Judge appealed from should be set aside, and that the Court should direct that all of said order, save so much thereof as directs that "the application of the defendant to transfer this cause to the Supreme Court, King's Bench Division, stand until the trial of this cause when the defendant may renew the same," be rescinded, and that, in lieu of such rescinded portion of the order, an order be made striking out the statement of defence, including counterclaim, as originally pleaded, and granting the defendant leave to answer *de novo;* and that the plaintiff be allowed the costs of this appeal, and the costs of his motion in the Court below to strike out the original defence and counterclaim; and that this cause should be remitted to the Court below with directions accordingly.

McLEOD, C.J., agreed. *Appeal allowed.*

McLeod, C.J.

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Quebec Court of Review, Archibald, A.C.J., Mercier and McDougall, JJ. October 28, 1916.

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CONTRACTS (§ IV B—330)—BUILDING—QUALITY OF MATERIAL—DECAY—INEVITABLE ACCIDENT.

Where a contractor puts up the woodwork of a building of a different quality of timber than that set forth in the specifications, resulting in "dry rot" setting in on account of the inferiority of quality, he is liable to the owner for the costs of reconstruction of the building to render it safe, and even for replacing the wood material with that of steel; it is not a case of *force majeure* or inevitable accident.

Statement.

APPEAL from the judgment of the Superior Court, Panneton, J. Affirmed.

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Statement.

This action concerns the responsibility of contractors and architect under art. 1688, C.C.

In 1907, the plaintiff had plans and specifications prepared by the defendants Brown & Vallance, architects, for a manufactory of spools for cotton mills. The contract was awarded to the other defendant Peter Lyall & Sons, and the supervision of the works was under the above named architects.

The building was delivered in the fall of 1908. The mill was equipped and the machinery was started in the fall of 1909. About that time a deflection in the floor was noticed and it was found that the wooden packing pieces put at the ends of the columns to make up their deficiency in length, the distance between the floors having been increased, were shrunk and decayed. Whilst changing those packing pieces for cast iron ones it was found that one of the beams was affected by dry rot. This beam was replaced by Lyall & Sons as were also two more which were discovered equally affected as the replacing of the first was being done. Further examinations were made, and it was found on lifting the floors that a very large quantity of the beams were infected. Batten strips which had been placed between the pairs of beams were removed; later in August the paint was removed from the beams so as to let a better access of the air to the wood.

In September the plaintiffs notified both defendants that they held them liable for this state of affairs. The defendants repudiated any liability. The parties met in November and the defendants, without acknowledging any responsibility, offered $5,000 towards the repairs, which was refused.

The building was shored upon account of its dangerous state. In January 1911, the plaintiffs protested the defendants by a notary requiring them to replace the bad materials employed in the mill; that in their default of doing so, the plaintiff would do the work at their expense, and the plaintiff notified the defendants that they were holding them jointly and severally liable for all damages. As the defendants made no move in the matter the plaintiff went to work and replaced the wooden columns and beams by steel columns and beams, at a cost of $71,174.92.

The plaintiff in this action further claims $4,100 for painting the brick of the building which they allege the defendants failed to do, though bound to do so by the contract. In addition they

claim $9,000 more for expenditure which they allege was rendered necessary to replace and repair the floors, besides 10% for supervision of the work, making the total amount claimed $91,802.42.

The defendants severed in their defence, and in substance pleaded denying any liability to the plaintiff.

The contract was for $218,000; the plaintiffs paid on it $217-500.

The Superior Court maintained the action.

Statement.

The judgment appealed from was as follows:—

PANNETON, J.:—The plaintiffs claim that the defendants are jointly and severally responsible for the loss under art. 1688 of our C.C.

The Code Napoléon, art. 1792, makes them liable only jointly not severally. This distinction must be kept in mind when reading the French commentators and jurisprudence on that subject.

The defects of construction undoubtedly include the defective materials. The authors are unanimous on that question. The woodwork complained of was commenced some time in the last part of the winter 1908 and completed in the fall following. The building is five storeys high. The columns of the first storey supporting the first floor are of cast iron, as stated above. The rest of interior, columns and beams, were all of wood. There were 252 columns on the four floors and 758 beams in all.

The whole extent of the decayed wood was ascertained only at the end of the year 1910, when the infection was found to be so extensive; more than one-half of the beams were infected or decayed, that after consultation with an engineer, the plaintiffs came to the conclusion that it was not safe to reconstruct the interior in wood, in fact the three new beams placed by Lyall & Sons in lieu of the infected ones were commencing to become infected, and they decided to replace the wooden columns and beams by steel ones which was, according to the opinion of the engineer, the only safe material to use under the circumstances.

The first question to solve is whether the timber used in the building complies with the requirements of the specifications which read as follows:—"All timber Georgia pine, long leaf, straight grain and free from knots".—That it did not do so, except a very small quantity, is admitted and proved. The reason given is that such timber could not be had otherwise than at prohibitive prices, as it would have to be picked at different mills. It presents itself to the ordinary man not experienced in construction that the thing to be done by the contractors was to report to the company that the timber required could not be obtained, but contractors have their own idea about the way to fulfil a contract. Some contractors and a few other practical men were examined, and stated that the timber used was of good quality and was such as is ordinarily used for such construction and that the defendants could fairly claim fulfilment of their contract by using such timber, though not of the kind or quality specified. There is a direct breach of the contract, the consequences of which the defendants Lyall & Sons did not anticipate, resting upon what in practice was considered as good timber at least for solidity and some other quality. But unfortunately for them it turned out not to be of the same ability to offer resistance to the dry rot contamination as that required by the specifications. The result proved it. This is fully established by the evidence of

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Miss Derrick whose deposition shows a complete mastery of the subject, and by the evidence of others. This breach of the contract was mainly, if not altogether, the cause of the disaster. The timber of the quality specified in the contract shows very little sap wood, whilst the timber used showed a much larger quantity of it, and the more sap wood there is the larger and more propitious is the field for the creation and development of the fungus which destroys the wood. The density of long-leaf pine offers a great deal more resistance to the attack of the disease, and is a much greater protection against it than the timber used in the building. In making that substitution the defendants Lyall & Sons have assumed all the risks of the change and all its consequences.

The timber remained on the ground all the winter, and part of it part of the spring, exposed to the inclemencies of the weather, to the effect of melting snow, and no proof was made that proper attention was given to it before it was employed to see if it was in good condition. Delvaux, No. 501, refers to a case reported in Dall G. 1898 p. 94, wherein it was held that, "Un entrepreneur est responsable même si les matériaux ont été examinés par le propriétaire et par l'architecte avant d'être employés." Unless the defendants could have established that dry rot set in by the fault of the plaintiffs, it seems to me that the defendants' task was a hopeless one. The attempt made in that direction failed to convince me that it was so, and there are no allegations in the plea of either defendants that the disaster was caused by the plaintiff's fault or negligence.

Whether the germs of the disease existed before the timber was brought on the ground or whether they began to exist when on the ground before being employed is immaterial. It was existing in a state of fruition at one place when employed, and the paint was applied over it, as was discovered when scraping it. The defendants' contention is that the timber was free from disease when employed. I am not prepared to say that it was so, and had the timber been of the quality required they would have been discharged from the liability fastened upon them by art. 1688, but the burden of proving that fact was on the defendants, and they made no such proof. The defendants used timber more liable to such disease than the one specified, and even if infection had set in after it was employed, they are responsible for having used that quality of timber. The idea of their responsibility was in their mind when they replaced the first three beams affected by dry rot, but they changed their mind when they discovered the extent of the infection.

The responsibility being fixed upon the defendants by the above article of our Code, no case has been made out to free them from the effects thereof.

The next question is whether plaintiffs were justified in rebuilding the interior of the mill in steel instead of wood.

The position in which the plaintiffs found themselves after discovering the rotten state of the building was not of their own making. It was the defendants who placed them in the necessity of making a choice. This choice was made upon the advice of a skilled man whose opinion was subsequently endorsed by many witnesses. But even adopting the opinion of the defendants' witnesses that it could safely be replaced by wood, if the plaintiffs made their choice in good faith, carried out the substitution of steel for wood in a workmanlike manner at reasonable costs, believing that it was a necessity owing to the defendants' fault, defendants must bear that expense. So long as the change is not so substantially more expensive as to constitute a case

of the plaintiffs enriching themselves at the expense of the defendants, I am not disposed to find fault with the plaintiffs' choice.

From the proof made, it seems that a greater number of such factories are built in wood than in steel and no inconvenience has resulted of the nature of the dry rot disease on account of the kind of work done in these mills.

The expense of building is about the same comparing the high price of the special quality of timber specified in the contract with steel. This contention is disputed by the figures given by Archibald for the defence. The proof thus made by the defendants on that point is not such as to leave in one's mind a sufficiently strong impression to overcome the evidence made by the plaintiffs. Unless a case of bad faith is made out against the plaintiffs, which I do not find, I am disposed to accept plaintiffs' evidence, placed as they were by the defendants in such a difficult position, when the defendants would do or suggest nothing.

In the "Gazette des Tribunaux," 1909, 1st sem., p. 87, there is a reported case of "*Mainguy Bowei, entrepreneur et Bassy, Architecte,*" 1909, 1st sem., p. 87, similar to this case in which the infected wooden post was replaced by a steel one. The report does not state why the change was made.

I am of opinion that the plaintiffs acted prudently in rebuilding in steel, and that they expended about the same amount of money in doing so that they would have paid to reconstruct in wood of the extra quality specified by the contract.

[The Court rendered two separate judgments, one against the builder, the other against the architects. The above remarks were made in the first judgment. In the second one, Panneton, J., made the following remarks:]

The French Code holds the architect only jointly responsible with the contractor. The commentators of the C.N. do not require the same amount of knowledge of the defective materials on the part of the architect as from the builder. He is not responsible for "*des vices cachés dont il n'a véritablement pu s'apercevoir.*" They hold him liable "*autant que le vice des bois eût été apparent ou reconnaissable.*" In the case of *La Ville de Paris* v. *Malpièce et autre,* 3 Ravon, 1 Collet, p. 533, a suit which arose from the defects in the timber used to build the church of St. Germain-en-Laye it is stated by the Court that the architect would be liable if "*il aurait manqué aux conditions essentielles imposées par le devis ou qu'autant que le vice des bois eût été apparent ou reconnaissable.*"

In the present case the architects drew the specifications and required the timber to be used to be "of best quality of Georgia pine, long leaf, straight grain and free from knots"—The pine used in the building, except a very small quantity, is not of that quality, does not answer that description, though it is proved by the defendants to be of a good merchantable quality and would answer the purpose for anything else except that it is more liable to suffer from dry rot than the quality required, and it is just here the weak point of the defence as they have "*manqué aux conditions essentielles imposées par le devis.*"

Our law is more exacting from the architect than the Code Napoléon. He must know the timber as well as the builder and is held liable in the same manner. He is responsible for the *vice de construction* resulting from the builder's fault and so is this last for the fault of the architect.

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The defendants Brown & Vallance in their plea merely deny the main facts of the plaintiffs' declaration and say that dry rot was due to causes over which they had no control and for which they are not responsible. But in their factum they further urge and offer for their defence that the plaintiffs allege that the building was never finally accepted by them, and that fact being alleged they say that under art. 1689 the plaintiffs have no right of action, as the building was the property of the defendants Lyall & Sons.

That allegation of the plaintiffs' declaration is denied by both defendants in their plea. But whether finally accepted or not does not alter the situation. Defendants Lyall & Sons have allowed the plaintiff to take possession of the building to start their operations therein and the dry rot was discovered only after the plaintiffs have been in full possession of the building for nearly one year and the defendants Lyall & Sons did not pretend to have anything more to do with the building, and so far as they were concerned, the delivery was complete. What the plaintiffs did in undertaking to replace wood by steel was an acceptance of the building which would preclude them from finding fault with it for anything for which defendants, Lyall & Sons would be responsible otherwise than under art. 1688. Ten years' liability exists even after the delivery and the acceptance has been had. When the plaintiffs' plant and machinery were all in the building and the works in operation, the plaintiffs had to go to work at once to do what was necessary to prevent further damages which would result from allowing the decayed wood to go to pieces and carry down the whole machinery involving perhaps the loss of life.

The plaintiffs also claim from the defendants $4,100, for painting the brick of the whole building. In the contract it is stipulated that "All joints must be carefully filled with mortar and well flushed up, joints on the inside and outside to be struck with a tool."

Instead of being made as required, defendant Lyall made raked off joints. It gives a better appearance to the building, but requires less mortar. It is stated by one witness that raked off joints cost more. It is hard to understand why it should cost more. But is it as good? It is a concave joint instead of a convexed joint flush with the wall. One naturally believes that this cast joint is better, and it is the one stipulated. To make such joints after the building is up is more expensive than if they had been made as the walls were being made.

The plaintiffs are entitled to have the building made according to the contract and they are entitled to recover from the defendants Lyall & Sons the cost of repainting which amounts to $4,098.73. Plaintiffs' claim for $9,000 for an expected expenditure to be made to place the infected flooring in a safe condition is proved only to the extent of $636.11, the cost of creosoting it.

The plaintiffs' claim for supervision at the rate of 10% on the costs I am not disposed to allow.

Brown & Vallance cannot be held responsible for Lyall & Sons' default to fulfil their contract with regard to the painting of the brick work.

The Court condemns the defendants Lyall & Sons, jointly and severally, to pay the plaintiffs $71,120.85 with interest from March 7, 1912, and part of that sum to wit: $67,022.12 and interest from March 7, 1912, jointly and severally with the other defendants, Brown & Vallance, the whole costs.

Brown, Montgomery and *McMichael*, for plaintiff.

Perron and *Taschereau*, for Lyall & Sons.

Elliott and *David*, for architects.

The judgment of the Court of Review was delivered by ARCHIBALD, A.C.J.:—This is a large record and concerns a large sum of money, but the facts are not numerous and most of them are determined beyond dispute. It is an action taken by a proprietor against the architect and contractors who have built him a building, and the judgment has gone, jointly and severally, against the contractors for the sum of $71,120.85, while the architects have only been condemned to pay $67,022.12.

The two judgments were separate one from the other, but there is no need to inquire closely into the matter of the difference of amounts between the two judgments as the principle upon which the inscription in revision is made would seek to destroy both judgments.

The building which was in question, for the plaintiff, was to have been constructed and was constructed by the contractors under the supervision of the architects, having beams and pillars which were specified to be long leaf Georgia Pine, and it was not specified to be built with beams and pillars of steel.

The contractors did not supply the quality of pine which was specified, but they supplied another kind of pine which was much cheaper and more easily obtainable in the market. This pine was supplied and put into the building without remark from the architect, and the building was completed and paid for and the plaintiff had moved into it and installed their machinery and were there nearly a year when it was found that the wood was very badly affected with a dry rot and in places was becoming dangerous.

The contractors were notified and some repairs were attempted to be made. I think some three beams were replaced, but shortly afterwards these also began to be affected with the same disease.

The proof establishes that dry rot is a disease which attacks wood, resulting from a germ; that it is not an inevitable accident or *force majeure* or some dispensation of Providence that nobody is responsible for. It also establishes the fact that, when this disease has become—if I may say so—epidemic in a building, as it had so become in this building, it is impossible, without great expense, to eradicate it.

When the contractors had refused to acknowledge any further responsibility for the condition of the building, the owner investigated what it was possible to do and it found that it could be just

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CANADA SPOOL COTTON CO. v. PETER LYALL & SONS.

Archibald, A.C.J.

as cheaply reconstructed in steel as in wood of the quality which was specified, having in view the precautions necessary to get rid of the infection of dry rot, and they finally decided to reconstruct in steel, which they did, and the judgment has allowed them the cost which they were obliged to be at in performance of this work.

Experts were examined and after making long tests, gave evidence that they had established that the quality of pine specified was much less subject to dry rot than was that actually furnished. The long leaf Georgia Pine is a very slow-growing wood. The evidence shows the average number of annual growth rings in a certain diameter in the wood specified is very much greater than exists in the wood actually furnished. But this is really a matter of no consequence. Plaintiff was entitled to have the particular wood which was specified and the defendants could not offer him any other wood. The obligation of the defendants was to guarantee the solidity of the structure for a period of 10 years, and they could only avoid that guarantee by showing that the attack upon the solidity arose from inevitable accident or *force majeure*. As I have said, in this instance, it arose from nothing of the kind; but it arose from the fact that the wood defendants had furnished was affected by the germ of dry rot when they furnished it, which they were to discover and to know. Under these circumstances, the defendants having refused, themselves, to take the necessary means for restoring the building into the state in which it should have been as a solid building, plaintiff had the right, after having put them in default, to do the work itself, and it did do it, and did it by the least expensive method in which the work could be securely done. The building which they have obtained by doing the work in the manner in which they did do it, is not a building of greater value than it would have been, had the defendants completed their work in accordance with their contract. The judgment, therefore, which has condemned the defendants jointly and severally is right and must be confirmed.

Judgment affirmed.

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S. C.

BEURY v. CANADA NATIONAL FIRE INS. Co.

Ontario Supreme Court, Britton, J., February 21, 1917.

INSURANCE (§ V B—180)—*Proofs of loss—Waiver—Denial of liability—"Insurance contract"—Interim receipt—Insurance Act, R.S.O. 1914, ch. 183, sec. 2 (14), sec. 194, Condition 8—Estoppel*

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—*Notice of cancellation.*]—Action to recover the amount of the plaintiffs' loss by fire upon property alleged to be covered by an insurance contract made with the defendants. The defendants counterclaimed the amount of the unpaid premium. The plaintiff applied for the insurance on or before the 30th April, 1915; the interim receipt issued was dated the 30th April, 1915; by the terms of the interim receipt the property was insured for 30 days; that period came to an end at noon on the 30th May, 1915; there was no other policy or contract; and the fire took place on the 31st May, 1915.

Gideon Grant, for plaintiffs; *A. C. Heighington*, for defendants.

BRITTON, J.:—The plaintiffs A. R. Williams and T. A. Hollinrake were the owners of a certain building or buildings, in the township of Swansea, in the Province of Ontario, and in this building or buildings was certain personal property, alleged to be owned by the plaintiff James P. Beury. Beury had purchased this personal property from an estate of which the plaintiff G. T. Clarkson was the receiver. This property was destroyed by fire on the 31st May, 1915. The plaintiffs allege that this property was covered by insurance effected with the defendant company, and this action is brought to recover the amount of the plaintiffs' loss, covered by such insurance.

This building was used and occupied as a place for the manufacture of films to be used in the business of exhibiting moving pictures.

There seems to be no substantial dispute about the ownership by the plaintiffs of the property intended to be covered by insurance, and that that property was destroyed by fire.

I find that the plaintiffs were the owners of the property upon which the plaintiffs intended to obtain a policy of insurance from the defendants. This is the property that was destroyed by fire on the 31st May, 1915. In fact there was upon the trial no question raised as to the ownership of the building by Williams and Hollinrake. There cannot be any real question as to the chattels—because, if the title to the chattels had not passed to Beury, it was in the receiver, and the receiver is a party to this action.

The plaintiffs put in formal proofs of their loss; these proofs were, I think, in substantial compliance with the statutory condition in regard to proofs. Even without formal proofs, before

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trial, of loss, it is not open to the defendants to put forward the non-delivery of proofs as a defence, because they dispute their liability, and deny that they have any insurance on the property, and deny their liability in any respect for the loss by fire.

I have given this matter very considerable consideration, and my conclusion is, that, if the plaintiffs have any right to recover, it is solely on the interpretation to be put upon statutory condition 8, sec. 194, of the Insurance Act, R.S.O. 1914, ch. 183, which is as follows: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application."

In this case there was an application for insurance; that application was accepted; and it only remained for the defendants to deliver the policy in accordance with the application. Instead of that, they deliver what is called an interim receipt, by which the term of the risk was only thirty days from the date of the interim receipt, instead of twelve months from the date of the application. With the interim receipt the defendants did not point out in writing the particulars wherein the interim receipt differed from the policy applied for. The policy applied for was for 12 months, and not for 30 days. By sec. 2, clause 14, of the Insurance Act, an interim receipt is a "contract of insurance" within the meaning of the Insurance Act. Whatever may have been the intention of the Legislature, I can gather their meaning only by interpreting the Act above cited.

I do not think that the receipt itself is at all a compliance with the Act; what the Act requires is something outside of, and additional to, the policy (interim receipt in this case); nor do I think that the letter subsequently sent was in compliance with the section above cited. It cannot be said that the interim receipt was a new contract entered into between the parties; there was no negotiation, or discussion, or consideration of a new agreement differing from the one first applied for.

The section does not say that the policy must contain certain things as mentioned in the statute; but the complaint of the plaintiffs is, that the policy sent differed from the policy the defendants ought to have sent, and the defendants did not state in writing wherein there was a difference, and what the difference

was; therefore, whatever is sued upon as coming from the defendants as a policy, shall be deemed to be a policy in accordance with the application.

I do not think the interim receipt was applied for in lieu of, or in substitution for, the policy asked for by the plaintiffs. The plaintiffs never, so far as I gather from the evidence, applied for a term of only 30 days.

The plaintiffs contend that the rate of insurance was fixed on the 16th May, while the defendants say it was not fixed till the 25th or 26th May. It is only material, as it seems to me, as shewing that the rate *was* fixed, and that it was fixed for 12 months, and not for 30 days only. There having been no objection at this stage to the application, and as it was held over only for the purpose of fixing a rate, and as the rate was afterwards fixed, I think the plaintiffs are entitled to succeed.

No particular stress, as I understood the argument at the trial, was placed upon the premium not being paid before the fire. It clearly was a case in which credit was given for the payment of the premium. The plaintiffs were always ready and willing to pay the premium as soon as the rate should be fixed, and they now bring the money into Court.

In view of all the circumstances, the defendants should be estopped from contending that the policy (interim receipt) was not in force at the time of the fire—they having, before then, and while the receipt, according to the defendants' own contention, was in force, notified the plaintiffs that the policy would be cancelled at a date named, which date had not arrived at the time of the fire.

There will be judgment for the plaintiffs against the defendant company declaring that the receipt issued by the defendant company shall be deemed a policy issued by the defendant company as applied for by the plaintiffs. And there will be judgment for the plaintiffs for the sum of $1,897.44 with interest from the 6th October, 1915, at 5 per cent. per annum till judgment, with costs.

And there will be judgment for the defendants on their counterclaim for $105.20, with costs down to the time of the payment of the money into Court by the plaintiffs, and the costs of obtaining the money out of Court.

[The above decision was affirmed by the Second Divisional Court of the Appellate Division on the 13th April, 1917.]

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CALGARY GRAIN CO. v. NORDNESS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 20, 1917.

SALE (§ I B—5)—*Grain—Place of delivery—"Basis in store at"—Sufficiency of memorandum—Sales of Goods Ordinance (Alta.), secs.* 6, 28—*Canada Grain Act*, 1912, *ch.* 27.]—Appeal from the judgment of Greene, J., dismissing the plaintiff's action for damages for breach of contract in failing to deliver grain. Affirmed.

C. F. Adams, for appellant; *G. L. Fraser*, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—The contract which bears more likeness to a cipher telegraph message than an ordinary agreement is in the following terms:—

To C. A. Nordness, Jenner. The Calgary Grain Co. Calgary, Alta., Oct. 7th, 1916.

We confirm the following purchase from you to-day: 1,000 bush. of 1 Nor. at 91¾ per bush.

Basis in store Ft. William or Pt. Arthur for shipment to . . . for . . . delivery to be made on or before Nov. 30. Other grades to apply at spread, date of inspection.

In the event of the seller failing to fill above contract as specified we reserve the right to buy in a like amount to fill and in case of a loss same will be charged to the seller and if a gain the amount will at once be paid the seller.

Accepted. The Calgary Grain Co.,

To C. A. Nordness. Per D. A. McCrimmon.

Some time after the agreement was made a car was ordered for the purpose of shipping the wheat and when it was ready plaintiff's agent sent word to defendant with instructions to bring in the wheat. With the aid of several neighbours he brought in the greater portion and was prepared to bring in the remainder on the following day, but he was then informed that the car was defective and could not be used, and when he asked plaintiff's agent what he was to do he got no assistance. He could find no place to store the grain so he sold it at a loss to himself of 1c. per bushel. The exact date of this does not appear, but it was apparently some time in November.

The plaintiff bases its claim to damages in the difference between the market price and the contract price on November 30, there being no evidence that there was any difference on the day when the grain was actually sold, which, if there was a breach, would probably be its date.

If it were necessary to determine the meaning of the cryptic document which is put forward as the evidence of the contract,

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I would consider the task a hopeless one, but I am of opinion that the case can be disposed of with less difficulty. The plaintiff contends that by the terms of the contract the defendant was bound to provide the car and deliver the grain at Fort William or Port Arthur and the agent of the plaintiff who negotiated the purchase stated in evidence that he told defendant he had to deliver it at Fort William. In view of the fact, however, that this statement was made on the invitation of plaintiff's counsel in response to a question that only required "yes" for an answer, it need not be expected that the highest value will be attached to it. If counsel wish the evidence of their witnesses to be accepted withour question they would be well advised to see that their answers are spontaneous and not suggested.

The defendant denies that anything was said as to the place of delivery.

A grain merchant was called to prove that the use of the words 'basis in store Ft. William" casts on the seller the burden of procuring the cars and delivering at Fort William. This same witness in cross-examination admitted that these words were sometimes employed in contracts for grain to be delivered in Calgary, but still maintained that they referred not merely to price, but to delivery.

In the Canada Grain Act (ch. 27 of 1912) there is contained a form of track buyers' purchase note of a car of grain. Sec. 219 provides that this memorandum of agreement shall specify *inter alia*, the kind of grain purchased and "the purchase price per bushel in store at Fort William, Port Arthur or other destination." It also provides that it shall specify the amount of money paid on account and "that the full value of the purchase money shall be paid to the vendor, immediately the purchaser shall have received the grade and weight certificates and the railway expense bill."

The form given in the schedule "G" commences as follows:—

I have this day bought from.....car No. containing bushels (more or less) at cents per bushel basis . . . in store Fort William or Port Arthur, weight and grade guaranteed by seller.

Receipt of bill of lading for same property endorsed by the consignee is hereby acknowledged.

It is stated in Benjamin on Sales (5th ed.), p. 741, that the transfer to the buyer of bills of lading forms a good delivery in performance of the contract.

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It is apparent, therefore, that the words "basis—in store at Fort William" in the track buyers' contract have no reference whatever to delivery. The words, however, are used in such a way in the context as to give some sensible meaning. The blank after "basis" is no doubt intended to be filled in with a specification of the grade, and the terms of the section shew that the grain is bought and the price fixed upon the basis that it is of that grade (there being another term of the contract to shew how the price is to be fixed if the grade varies), the full amount of the purchase price to be determined when its grain is in store at Fort William at which time the expenses and actual quantity of the grain and the grade, which has to be determined by the inspection which, under the Act, is to be made at Winnipeg in the ordinary course, will be ascertained.

In the contract before us the words used do not permit of any such sensible interpretation. There is no blank for specifying the grade. The words commence a new paragraph, which contains blanks and makes no sensible meaning in English. It is not necessary to try further to make some sense of it for it is clear to me that by no means could it be interpreted as intending to provide for delivery at Fort William or Port Arthur and therefore in order to give it that interpretation it would be necessary to shew that both parties understood it to be so intended.

The trial Judge has not expressly found that the defendant did not so understand it, but he does say that the defendant did not understand that it was his duty to order a car at the time the contract was made which impliedly finds that he did not understand it was his duty to deliver the grain at Fort William. On the evidence I think this is the only fair conclusion to reach.

Such being the case the contract is silent as to the place of delivery and if there was no place of delivery agreed upon, as the trial Judge points out, under sec. 28 of the Sales of Goods Ordinance the proper place of delivery was the defendant's farm and the plaintiff was never ready to take, and never had any thought of taking, delivery there, and in the absence of such readiness is not in a position to maintain an action for breach of contract for non-delivery. If a place of delivery was agreed upon, which seems rather more likely, since the defendant upon request, at his own expense, brought the grain to Jenner, then the memorandum is incomplete in not specifying it and is insufficient within the terms

of sec. 6 of the Sales of Goods Ordinance which is set up as a defence, and it is not necessary to decide whether if he were bound to deliver at Jenner he did all that the contract required of him.

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

CALGARY GRAIN Co. v. LIDDLE.

Alberta Supreme Court, Harvey, C.J., Stuart and Beck, JJ. April 20, 1917.

SALE (§ IB—5)—*Grain—Place of delivery—"Basis in store at" —Sufficiency of memorandum—Sales of Goods Ordinance (Alta.)*]—Appeal from the judgment of Greene, J., dismissing an action for breach of contract. Affirmed.

C. F. Adams, for appellant; *G. L. Fraser*, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—Like the case of the same plaintiff v. Nordness, this is an action for damages for breach of contract by non-delivery of grain, and, as in the other case, Greene, J., dismissed the action. The contract is not quite so abbreviated as in the other case. The part material is as follows:—

> We confirm the following purchase from you to-day: 1,400 bushels of 1 Northern at 99¾ cents per bushel, basis in store Fort William or Port Arthur for shipment to . . . for . . . delivery to be made on or before November 30. If cannot make November will take December spread.
>
> Other grades to apply at spread date of inspection.

It is to be observed that the words "basis in store Fort William or Port Arthur," do not commence a paragraph as in the Nordness case, but for the reasons I gave in that case I can see no ground whatever for interpreting them as having any regard to the place of delivery, and the contract therefore is silent as to the place of delivery, and there is no suggestion that anything was agreed as to this except as to getting cars.

It is clear, however, that the defendant thought that he was to deliver at Jenner. There was difficulty, however, in getting cars, and then differences arose between the parties as to the meaning and effect of the words, "If cannot make November will take December spread," and in the result, no grain was delivered or offered for delivery.

The same defence is raised in this case as in the Nordness one, that the memorandum in writing is insufficient under the Sales of Goods Ordinance, and I am of opinion that the reasons for dismissing the appeal in that case are fully applicable to this, and I would therefore dismiss this appeal also with costs.

Appeal dismissed.

B. C.

C. A.

HANNA v. CITY OF VICTORIA.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 3, 1917.

DAMAGES (§ III L—280)—*Expropriation—Municipal Act—Compensation for land injuriously affected—Offsets—Advantages—Local improvements.*]—Appeal by City from the judgment of Morrison, J. Reversed.

Hannington, for City; *McDiarmid*, for respondent Hanna.

MACDONALD, C.J.A.:—I agree with the Judge's answers to the first and second questions. The third question is to be answered only if the first is answered in the affirmative, and as it was answered in the negative the Judge's answer to it was gratuitous, but does not prejudice either party.

The fourth question is the substantial one. The lane in question is being opened up as a local improvement by the city at the instance of the owners of the lots through which it passes. They are to pay the whole cost. The contention of the respondent is that not only is the compensation for land taken or injuriously affected to be set-off against any advantage he might derive from the contemplated work, but that in determining such advantage the charge which must be assessed against the portion of the lot not taken must also be set-off against such advantage. Sec. 394 being the one in question is open to that construction, but it is I think, also open to the construction contended for by counsel for the City, namely, that only the cost of the land taken and damages suffered shall be set-off against such advantage.

Were it not for the impracticability of carrying it out, I should prefer the former construction—a construction which was favoured by the Ontario Court of Appeal in *Re Pryce & City of Toronto*, 20 A.R. (Ont.) 16. It is true that in that case very little attention, particularly in the argument, appears to have been directed to the question which is now before us, and it may be that the practical difficulty of applying the construction adopted by that Court in actual practice was not sufficiently dwelt upon.

Now, consider the task of arbitrators if the construction contended for by the respondents is adopted. There are several owners in the position of the respondents. Whether they have agreed as to their damages, or have not yet taken proceedings, is not stated. What we know, however, is that this is a single submission of the respondent's claim alone. How then are the

arbitrators to arrive at the damages suffered by the respondents when one of the factors, namely, the amount which may eventually be found to be the claimant's share of the costs is an unascertained factor? I cannot see how it can be made certain even if the same board were dealing with all claimants interested. Not one claim could be finally determined until all had been tentatively determined, and even then re-adjustment after re-adjustment would have to be made before even approximate effect could be given to the section construed as the respondents contend for. Were each claimant to do as the respondent has done, take his own separate proceedings, the uncertain factor could never be supplied.

The other construction presents no such difficulty. A reasonable meaning can be given to the section when applied to this case by holding that the advantage referred to was a physical advantage to the enjoyment of the balance of the lot and had no reference to the burden which might be placed upon it to secure the owner's share of the cost. Then, again, I think the respondent's contention is inconsistent with sec. 55 of the Act, which provides that where a first assessment proves insufficient, a second and successive assessments may be made, or if too much, the excess shall be refunded ratably.

In the circumstances contemplated by said sec. 55, the intention of sec. 394 as contended for by the respondents would be violated; whereas on the other construction no such violence would be done.

For these reasons I would allow the appeal and answer the fourth question, which is not very clearly expressed, in the negative.

MARTIN, J.A.:—In my opinion, local assessments should not be considered in the ascertainment of "damages" under sec. 394. There are two quite distinct things which must not be confused or mixed up together—one is the "cost of constructing" the improvement under secs. 54(2)-8, which necessitates expenditure, and which is a charge on all the land affected and assessed in equitable proportions, and must be paid as a statutory obligation; and the other is the damage "necessarily resulting from" the doing of that work, apart from its cost. To illustrate this, it might happen that the damages resulting from the doing of a work costing $10,000, would be $1,000 to each of ten owners, but the "advantage" they would each derive would be $1,000, and therefore the "damages"

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and "advantage" would be balanced and nothing could be recovered by the owners. But the cost of the work, $10,000, would still remain, and have to be paid by said owners according to the assessment, which shows that there is this element of cost which is not included in, and is quite distinct from, damages. This is the clear principle upon which the question in dispute should be answered. There is nothing in the Ontario cases which, in principle, conflicts with it (*Re Richardson*, 17 O.R. 491, was on a special section) and it is in accord with our judgment in *Okell's* case (*Okell* v. *Victoria*, 16 D.L.R. 353).

I am of the opinion, therefore, that the appeal should be allowed.

GALLIHER, J.A.:—I agree with the reasons for judgment of the Chief Justice.

McPHILLIPS, J.A., agreed. *Appeal allowed.*

CAN.
S. C.

CAMPBELL v. NOVA SCOTIA STEEL & COAL Co., Ltd.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 18, 1915.

RAILWAYS (§ III—51)—*Operation—Signals and flagmen—"Train moving reversely in city, town or village"—Yard train—Contributory negligence of servant—Nova Scotia Railway Act (R.S.N.S. 1900, ch. 99), sec. 251.*]—Appeal by defendant company from the judgment of the Supreme Court of Nova Scotia, 22 D.L.R. 885, 48 N.S.R. 540, affirming the judgment of Ritchie, J., in favour of plaintiff in an action under the Employers' Liability Act and Lord Campbell's Act (R.S.N.S. 1900, ch. 178), to recover damages for the death of an employee caused by defendant's negligence.

W. A. Henry, K.C., for appellant company.
W. R. Tobin, for plaintiff, respondent.

The appeal was dismissed and judgment below affirmed.

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WORDS AND PHRASES—*continued.*